

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

[Docket No. FRA–2011–0060, Notice No. 3]

RIN 2130–AC31

**System Safety Program**

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

**ACTION:** Final rule.

**SUMMARY:** FRA is issuing this final rule to mandate that commuter and intercity passenger railroads develop and implement a system safety program (SSP) to improve the safety of their operations. A SSP is a structured program with proactive processes and procedures, developed and implemented by commuter and intercity passenger railroads to identify and mitigate or eliminate hazards and the resulting risks on each railroad's system. A railroad has the flexibility to tailor a SSP to its specific operations. A SSP will be implemented after receiving approval by FRA of a submitted SSP plan. FRA will audit a railroad's compliance with its SSP.

**DATES:** This final rule is effective October 11, 2016. Petitions for reconsideration must be received on or before October 3, 2016. Comments in response to petitions for reconsideration must be received on or before November 15, 2016.

**ADDRESSES:** *Petitions for reconsideration and comments on petitions for reconsideration:* Any petitions for reconsideration or comments on petitions for reconsideration related to this Docket No. FRA–2011–0060, Notice No. 3, may be submitted by any of the following methods:

- *Web site:* The Federal eRulemaking Portal, [www.regulations.gov](http://www.regulations.gov). Follow the Web site's online instructions for submitting comments.

- *Fax:* 202–493–2251.

- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12–140, Washington, DC 20590.

- *Hand Delivery:* Docket Management Facility, Room W12–140 on the ground level of the West Building, U.S. Department of Transportation, 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

(2130–AC31). Note that all petitions and comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted petitions, comments or materials.

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

**FOR FURTHER INFORMATION CONTACT:**

Daniel Knot, Staff Director, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Passenger Rail Division; telephone: 631–965–1827; email: [Daniel.Knote@dot.gov](mailto:Daniel.Knote@dot.gov); Robert Adduci, Senior System Safety Engineer, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Passenger Rail Division; telephone: 781–447–0017; email: [Robert.Adduci@dot.gov](mailto:Robert.Adduci@dot.gov); Larry Day, Passenger Rail Safety Specialist, U.S. Department of Transportation, Federal Railroad Administration, Office of Railroad Safety, Passenger Rail Division; telephone: 909–782–0613; email: [Larry.Day@dot.gov](mailto:Larry.Day@dot.gov); or Matthew Navarrete, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel; telephone: 202–493–0138; email: [Matthew.Navarrete@dot.gov](mailto:Matthew.Navarrete@dot.gov).

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**I. Executive Summary****A. Purpose of Rulemaking**

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

On September 7, 2012, FRA published a notice of proposed rulemaking (NPRM) to address the following mandates for commuter and intercity passenger railroads. 77 FR 55372, Sept. 7, 2012. Section 103 (49 U.S.C. 20156) of RSIA enacted a statutory provision directing the Secretary of Transportation (Secretary) to issue a regulation requiring certain railroads, including passenger railroads, to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. FRA is establishing separate safety risk reduction program rules for passenger

railroads (SSP) and certain freight railroads (Risk Reduction Program) to account for the significant differences between passenger and freight operations. Section 109 (codified at 49 U.S.C. 20118 and 20119) of RSIA enacted a statutory provision authorizing the Secretary to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a safety risk reduction program. This final rule implements these statutory mandates with respect to the system safety program covered by part 270. The Secretary has delegated such statutory responsibilities to the Administrator of FRA. *See* 49 CFR 1.89.

#### B. Summary of Major Provisions

A SSP is implemented by a written SSP plan. The SSP regulation sets forth various elements that a railroad's SSP plan is required to contain to properly implement a SSP. The main components of a SSP are the risk-based hazard management program and risk-based hazard analysis. A properly implemented risk-based hazard management program and risk-based hazard analysis will identify the hazards and resulting risks on the railroad's system, require railroads to develop methods to mitigate or eliminate, if practicable, these hazards and risks, and set forth a plan to implement these methods. As part of its risk-based hazard analysis, a railroad will consider various technologies that may mitigate or eliminate the identified hazards and risks.

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

A SSP can be successful only if a railroad engages in a robust assessment of the hazards and resulting risks on its system. However, a railroad may be reluctant to reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. Congress directed FRA to conduct a study to determine if it was in the public interest

to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. *See* 49 U.S.C. 20119. Furthermore, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. *See* 49 U.S.C. 20119(b). FRA contracted to have the study performed and the SSP NPRM addressed the study's results and set forth proposed protections for certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages. 77 FR 55406, Sept. 7, 2012.

To minimize the information protected, information that is generated *solely for the purpose of developing, implementing, or evaluating a SSP* is protected from (1) discovery, or admissibility into evidence, or use for other purposes in a proceeding for damages involving personal injury, wrongful death, or property damage, and (2) State discovery rules and sunshine laws which could be used to require the disclosure of such information. Information that is compiled or collected for a purpose unrelated to the railroad's SSP is not protected. Under section 109 of RSIA, the information protection provision is not effective until one year after its publication.

In addition to protection from discovery, 49 U.S.C. 20118 specifies that certain risk reduction records obtained by the Secretary also are exempt from the public disclosure requirements of the Freedom of Information Act (FOIA). Records protected under this exemption may only be disclosed if disclosure is necessary to enforce or carry out any Federal law, or disclosure is necessary when a record is comprised of facts otherwise available to the public and FRA has determined that disclosure would be consistent with the confidentiality needed for SSPs. FRA therefore believes that railroad risk reduction records in FRA's possession would generally be exempted from mandatory disclosure under FOIA. Unless one of the two exceptions provided by section 20118 would apply, FRA would withhold disclosing any such records in response to a FOIA request. *See* 5 U.S.C. 552(b)(3) and 49 CFR 7.13(c)(3).

A SSP will affect almost all facets of a railroad's operations. To ensure all employees directly affected by a SSP have an opportunity to provide input on the development, implementation, and

evaluation of a railroad's SSP, a railroad must consult in good faith and use best efforts to reach agreement with all directly affected employees on the contents of the SSP plan and amendments to the plan. In an appendix, the rule provides guidance regarding what constitutes "good faith" and "best efforts."

This rule will become effective 60 days after the publication of the final rule except the protection of certain information discussed above will not become effective until one year after the final rule is published. A railroad is required to submit its SSP plan to FRA for review not more than 180 days after the applicability date of the discovery protections, *i.e.*, 485 days after the effective date of the final rule, or not less than 90 days before commencing operations, whichever is later. Within 90 days of receipt of the SSP plan, FRA will review the plan and determine if it meets all the requirements in the regulation. If, during the review, FRA determines that the railroad's SSP plan does not comply with the requirements, FRA will notify the railroad of the specific points in which the plan is deficient. The railroad will then have 90 days to correct these deficient points and resubmit the plan to FRA. Whenever a railroad amends its SSP, it is required to submit an amended SSP plan to FRA for approval and provide a cover letter describing the amendments. A similar approval process and timeline would apply whenever a railroad amends its SSP.

FRA will work with the railroad and other necessary stakeholders throughout the development of its SSP to help the railroad properly tailor the program to its specific operation.

#### C. Summary of the Costs and Benefits

Most of the passenger railroads affected by this rulemaking already participate in the American Public Transportation Association (APTA) system safety program and are currently participating in the APTA audit program. Railroads that are still negotiating contracts or not participating directly with APTA, have developed, or are in the process of developing an APTA system safety program. Since the majority of intercity passenger or commuter railroads already have APTA system safety programs, there will not be a significant cost for these railroads to implement the regulatory requirements in this final rule. Thus, the economic impact of the final rule is generally incremental in nature for documentation of existing information and inclusion of certain

elements not already addressed by railroads in their existing programs.

FRA estimated costs in the following areas: Documenting the SSP plan and the safety certification process; SSP training; preparing for and providing information in response to external audits; providing mitigation method information to FRA; preparing technology analysis results and providing them to FRA; providing an annual assessment of SSP performance and improvement plans; consulting with directly affected employees and preparing consultation statements, amending SSP plans; retaining records; and conducting internal SSP assessments.

FRA also addressed the use and costs of data protection, which is an important element of this rule. While the rule may protect from discovery some information that in the absence of the rule would not be protected, FRA concludes that the benefits of the protections justify the costs. Without the protections, railroads' risk-based hazard analysis and mitigations may be less robust, which may lead to a less safe environment than with the protections in place. No specific or net incremental costs are incurred by the protections (record keeping and reporting paperwork costs are accounted for in the rule). The information protections are important to ensure the effectiveness of a SSP at almost no additional regulatory cost to the railroad. This means that the information protections provide an incentive to the railroad to be forthright about identified risks, without concern the information may be used in litigation against them.

Total estimated twenty-year costs associated with implementation of the final rule, for existing passenger railroads, range from \$2.0 million (discounted at 7%) to \$2.9 million (discounted at 3%).

FRA believes that there will be new, startup passenger railroads that will be formed during the twenty-year analysis period. FRA is aware of two passenger railroads that intend to begin operations in the near future. FRA assumed that one of these railroads would begin developing its SSP in Year 2, and that the other would begin developing its SSP in Year 3. FRA further assumed that one additional passenger railroad would be formed and begin developing its SSP every other year after that, in Years 5, 7, 9, 11, 13, 15, 17 and 19. Total estimated twenty-year costs associated with implementation of the final rule, for startup passenger railroads, range from \$297 thousand (discounted at 7%) to \$485 thousand (discounted at 3%).

Total estimated twenty-year costs associated with implementation of the final rule, for existing passenger railroads and startup passenger railroads, range from \$2.3 million (discounted at 7%) to \$3.4 million (discounted at 3%).

The estimated costs for existing and startup passenger railroads to implement this rule do not include costs of mitigations that railroads may implement to address hazards, as the cost of hazard mitigation will vary greatly depending on what hazard is being eliminated or mitigated. FRA expects that railroads will implement the most cost-effective mitigations to eliminate or mitigate hazards.

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

During the course of daily operations, hazards are routinely discovered. Railroads must decide which hazards to address and how, with the limited resources available for this purpose. Without a SSP plan in place, the decision process might become arbitrary. In the absence of the information protections provided by the final rule, railroads might also be reluctant to keep detailed records of known hazards. With a SSP plan in place, railroads may be better able to identify and implement the most cost-effective measures to reduce accidents and incidents and resulting casualties.

The SSP NPRM Regulatory Impact Analysis (RIA) was performed on a breakeven basis. The approach has been modified for the final rule due to the lack of empirical evidence currently available to estimate all relevant regulatory costs, namely those from risk

analysis and risk mitigation. These costs are not reasonably predictable until the data protections are in place and each railroad produces and implements their SSP plans assessing their hazards and risk levels. The pool of potential safety benefits is large as evidenced by the totality of accidents and incidents experienced on passenger railroads that this final rule could impact. FRA expects that railroads can achieve sufficient safety benefits to justify quantified and unquantified costs.

SSPs under the APTA program are currently voluntary. This rule focuses on a robust risk-based hazard analysis and mitigation, and the oversight required to achieve full compliance. Passenger railroads must demonstrate a robust SSP and the means to implement the SSP and assure compliance. Railroad management and employees will be accountable to achieve the safety goals in their SSPs, but there will also be FRA oversight to monitor and demand corrective actions if and when necessary.

As documented in the RIA, FRA expects that regulatory costs under the SSP final rule will be modest and only incremental in relation to the railroads' non-regulatory costs because the rule provides information to the industry on what FRA's expectations are for a robust SSP. Railroads should be able to assemble a SSP plan to satisfy the rule by packaging what they currently have under the APTA program that complies with the SSP rule's provisions, along with (1) greater emphasis on eliminating or reducing hazards and the resulting risks, (2) rigorous analysis process, and (3) commitment to achieve the railroad's safety goal through setting priorities of its risk reduction efforts of mitigation. The SSP final rule would also address any gaps in those plans that do not meet the requirements of this rule. The few railroads that are not under the APTA program have their own SSPs or are developing such with FRA's assistance. For instance, when a hazard analysis is performed, this rule requires the railroad to demonstrate the processes and procedures it used to carry-out the analysis and mitigation. This means that, for the most part, FRA would only require actions to address gaps in the SSP plans, such as providing a clear or more robust description of the methods and processes they will use. These actions are expected to maintain and improve the economic benefit that can be achieved through the use of a robust SSP. However, it is difficult to provide a precise cap on the regulatory costs and benefits because the type and level of hazards and corresponding risk are not

known, which is why FRA could not estimate benefits quantitatively.

A benefit (not quantified) of this rule is that it may promote more cost-effective investment of railroad resources. However, FRA does not know to what extent. Therefore, FRA focused on the passenger railroad accidents and incidents this rule will impact. FRA analyzed passenger operation-related accident costs—the costs of accidents

this final rule could affect. Between 2001 and 2010, on average, passenger railroads had 3,724 accidents, resulting in 208 fatalities, 3,340 other casualties, and \$20.6 million in damage to railroad track and equipment each year. Total quantified twenty-year accident costs total between \$33 billion (discounted at 7%) and \$51 billion (discounted at 3%). Of course, these accidents also resulted in damage to other property, delays to

both railroads and highway users, emergency response and clean-up costs, and other costs not quantified in this analysis. In conclusion, FRA is confident that the accident reduction benefits should justify the \$2.3 million (discounted at 7%) to \$3.4 million (discounted at 3%) implementation cost over the first twenty years of the final rule.

TABLE 1—TOTAL COSTS (OVER 20-YEAR PERIOD) AND ANNUALIZED

	Current dollar value	Discounted value 7 percent	Discounted value 3 percent
Total .....	\$4,743,039	\$2,327,224	\$3,412,651
Annualized .....	237,152	219,674	229,384

This rule will certainly have benefits incremental to the APTA program. However, FRA could not estimate the benefits of the final rule as SSPs are mostly an organizational structure and program to manage safety through hazard analysis and mitigation. FRA cannot accurately estimate the rule's incremental safety benefits because FRA cannot reliably predict the specific risks each railroad will identify or the specific actions they will take to mitigate such risks relative to the APTA program.

**II. Background and History**

*A. System Safety Program—Generally*

On September 7, 2012, FRA published an NPRM proposing to require commuter and intercity passenger railroads to develop and implement a SSP to improve the safety of their operations. 77 FR 55372, Sept. 7, 2012. The NPRM was proposed as part of FRA's efforts to continuously improve rail safety and to satisfy the statutory mandates in 49 U.S.C. 20156, 20118, and 20119.

Railroads operate in a dynamic, fast-paced environment that at one time posed extreme safety risks. Through concerted efforts by railroads, labor organizations, the U.S. DOT, and many other entities, railroad safety has vastly improved. Even though FRA has issued safety regulations and guidance that address many aspects of railroad operations, gaps in safety exist, and hazards and risks may arise from these gaps. FRA believes that railroads are in an excellent position to identify many of these gaps and take the necessary action to mitigate or eliminate the arising hazards and resulting risks. Rather than prescribing the specific actions the railroads need to take, FRA believes it will be more effective to allow the

railroads to use their knowledge of their unique operating environment to identify the gaps and determine the best methods to mitigate or eliminate the hazards and resulting risks. A SSP provides a railroad with the tools to systematically and continuously evaluate its system to identify hazards and the resulting risks gaps in safety and to mitigate or eliminate these hazards and risks.

There are many programs that are similar to a SSP. Most notably, the Federal Aviation Administration (FAA) has published a final rule requiring each certificate holder operating under 14 CFR part 121 to develop and implement a safety management system (SMS). 80 FR 1308, Jan. 8, 2015. An SMS is a comprehensive, process-oriented approach to managing safety throughout the organization. An SMS includes an organization-wide safety policy; formal methods for identifying hazards, controlling, and continually assessing risk; and promotion of safety culture. Under FAA's final rule an SMS has four components: Safety Policy, Safety Risk Management, Safety Assurance, and Safety Promotion. *Id.* Similar components can also be found in this SSP rule.

The U.S. Department of Defense (DoD) has also set forth guidelines for a System Safety Program. In July 1969, DoD published "System Safety Program Plan Requirements" (MIL-STD-882). MIL-STD-882 is DoD's standard practice for system safety, with the most recent version, MIL-STD-882E, published on May 11, 2012. DoD, *MIL-STD-882E, Department of Defense Standard Practice System Safety*. MIL-STD-882 is used by many industries in the U.S. and internationally and certainly could be of use to a railroad when trying to determine which

methods to use to comply with the SSP rule. In fact, MIL-STD-882 is cited in FRA's safety regulations for railroad passenger equipment, 49 CFR part 238, as an example of a formal safety methodology to use in complying with certain analysis requirements in that rule. *See* 49 CFR 238.103 and 238.603.

*B. System Safety Program Overview and Related Actions*

*i. System Safety at FRA*

As discussed in the NPRM, system safety is not a new concept to FRA. *See* 77 FR 55374. This final rule responds to the statutory mandates set forth in RSIA and is based on lessons learned from past experience with various elements of system safety, as well as recommendations from the Railroad Safety Advisory Committee (RSAC).

*ii. Federal Transit Administration's Part 659 and MAP-21 Program*

As discussed in the NPRM, the Federal Transit Administration has set forth a regulation that covers State-conducted oversight of the safety and security of rail fixed guideway systems that were not regulated by FRA. *See* 77 FR 55375, Sept. 7, 2012; 49 CFR part 659. On March 16, 2016, FTA published the State Safety Oversight (SSO) final rule. 81 FR 14230, Mar. 16, 2016. The SSO rule replaces part 659 and implements certain provisions of the Moving Ahead for Progress in the 21st Century Act, Public Law 112-141 (2012). Many of the same concepts from part 659 are incorporated in the SSP final rule.

MAP-21 made a number of fundamental changes to the statutes that authorize FTA programs at 49 U.S.C. ch. 53. On October 3, 2013, FTA published an advance notice of proposed rulemaking (ANPRM) seeking comment

on the implementation of these changes. See 78 FR 61251, Oct. 3, 2013. The ANPRM sought comment on several provisions within the Public Transportation Safety Program (National Safety Program) authorized at 49 U.S.C. 5329, and the transit asset management (National TAM System) requirements authorized at 49 U.S.C. 5326. *Id.* Specifically, FTA sought comment on its initial interpretations, proposals, and questions regarding: (1) The requirements of the National Safety Program relating to the National Public Transportation Safety Plan, the Public Transportation Agency Safety Plan, and the Public Transportation Safety Certification Training Program; (2) the requirements of the National TAM System, including four proposed options under consideration for defining and measuring state of good repair; and (3) the relationship between safety, transit asset management, and state of good repair. *Id.* at 61252. FTA also sought comment on its intent to propose adoption of the SMS<sup>1</sup> approach as the method to develop and implement the National Safety Program. *Id.* While many of the requirements of the National Safety Program and the National TAM System apply equally to all modes of public transportation, FTA intends to focus, initially, on rail transit systems' implementation of and compliance with these requirements. *Id.* at 61251.

In the ANPRM, FTA made it clear that if another Federal agency (e.g., FRA) regulates the safety of a particular mode of transportation, FTA, as part of the rulemaking pursuant to MAP-21, does not intend to set forth duplicative, inconsistent, or conflicting regulations. 78 FR 61251, Oct. 3, 2013. FTA specifically highlighted that it does not intend to promulgate safety regulations that will apply to either commuter rail systems that are regulated by FRA. *Id.* Further, FTA's regulatory jurisdiction is explicitly limited by two statutory provisions. *Id.* at 61253. First, FTA is prohibited from promulgating safety performance standards for rolling stock that is already regulated by another Federal agency, e.g., FRA. See 49 U.S.C. 5329(b)(2)(C)(i). Second, the requirements of the State Safety Oversight Program will not apply to rail transit systems that are subject to regulation by FRA. See 49 U.S.C. 5329(e)(1) and (e)(2).

On February 5, 2016, FTA published an NPRM proposing requirements for

the Public Transportation Agency Safety Plan. 81 FR 6344. The NPRM proposed "requirements for the adoption of Safety Management Systems (SMS) principles and methods; the development, certification, and update of Public Transportation Agency Safety Plans; and the coordination of Public Transportation Agency Safety Plan elements with other FTA programs and proposed rules, as specified in 49 U.S.C. 5329." *Id.* at 6344-45. The NPRM reaffirms FTA's intent not to promulgate safety regulations that would apply to commuter rail systems that are regulated by the FRA. *Id.* at 6345, 6346, 6351, 6353, 6361, and 6369. FTA clarifies that, primarily, due to the information protections set forth in this FRA SSP rule, a public transportation provider cannot use its SSP for other modes of transportation aside from a commuter rail operation that falls under this SSP rule. *Id.* at 6351.

Since FRA is publishing the SSP final rule after FTA published the NPRM for Public Transportation Agency Safety Plans (the FTA Agency Safety Plan NPRM), but before the FTA Agency Safety Plan final rule, railroads and other interested stakeholders will have the opportunity to compare the SSP final rule with the FTA Agency Safety Plan NPRM.

#### iii. Risk Reduction Program Rulemaking

FRA is currently developing, with the assistance of the RSAC, a separate risk reduction rule, referred to as the risk reduction program (RRP), that would implement the requirements of sections 20156, 20118, and 20119 for Class I freight railroads and railroads with inadequate safety performance. The RRP NPRM was published in the **Federal Register** on February 27, 2015. 80 FR 10949. The RRP rulemaking is discussed *infra* in the "Statutory Background" section.

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

FRA also has established two voluntary, independent programs that exemplify the philosophy of risk reduction: The Confidential Close Call Reporting System (C3RS) and the Clear Signal for Action (CSA) program.<sup>2</sup> FRA has developed these programs in the belief that, in addition to process and technology innovations, human factors-based solutions can make a significant

contribution to improving safety in the railroad industry.

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

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

The SSP rule was developed with the assistance of the RSAC.<sup>3</sup> This rule incorporates the majority of RSAC's recommendations. FRA decided not to incorporate certain recommendations because they were unnecessary or duplicative and their exclusion would not have a substantive effect on the rule. The rule also contains elements that were not part of RSAC's recommendations. The majority of these elements are added to provide clarity and to conform to **Federal Register** formatting requirements. However, FRA notes the areas in which the exclusion of the RSAC recommendations or the inclusion of elements not part of the RSAC recommendations do have a substantive effect on the rule and will provide an explanation for doing so.

### III. Statutory Background

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

In section 103 of the RSIA, Congress enacted a statutory provision directing the Secretary to issue a regulation requiring certain railroads to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program. This statutory mandate is codified at 49 U.S.C. 20156 (section 20156). The Secretary has delegated this statutory responsibility to the FRA Administrator. See 49 CFR 1.89, 77 FR 49965, 49984, Aug. 17, 2012; see also 49 U.S.C. 103(g). The railroads required to be subject to such a regulation include the following:

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

<sup>1</sup> As discussed previously, FAA has published a final rule requiring each certificate holder operating under 14 CFR part 121 to develop and implement an SMS. See 80 FR 1308.

<sup>2</sup> The history and structure of C3RS and CSA program were discussed extensively in the SSP NPRM. 77 FR 55375-76.

<sup>3</sup> The history, structure, and SSP-related proceedings were discussed extensively in the SSP NPRM. 77 FR 55376-78.

The SSP rule implements sections 20156, 20118, and 20119 as they apply to railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads). The SSP rule is a risk reduction program in that it requires a passenger railroad to assess and manage risk and to develop proactive hazard management methods to promote safety improvement. The rule contains provisions that, while not explicitly required by the statutory safety risk reduction program mandate, are necessary to properly implement the mandate and are consistent with the intent behind the mandate. Further, as mentioned previously, many of the elements in the rule are modeled after the APTA System Safety Manual; therefore, the majority of railroads will have already implemented those elements. The rule also implements section 20119, which addresses the protection of information in railroad safety risk analyses and will be discussed further in the rule.

#### B. Related Risk Reduction Rulemaking

As discussed, *supra*, the RRP NPRM proposes implementing the requirements of sections 20156, 20118, and 20119 for Class I freight railroads and railroads with inadequate safety performance. To avoid duplicative requirements, as proposed, the RRP rule would not apply to any passenger railroad already required to comply with the SSP rule. Establishing separate safety risk reduction rules for passenger railroads and Class I freight railroads will allow those rules to account for the significant differences between passenger and freight operations. For example, passenger operations generate risks uniquely associated with the passengers that utilize their services. The SSP rule can be tailored specifically to these types of risks, which are not independently generated by freight railroads. Further, freight railroads may generate risks uniquely associated with the transportation of hazardous materials and the proposed RRP rule can be specifically tailored to these types of risks, which are not independently generated by passenger railroads.

Some overlap may exist between certain components of the SSP and RRP rules. Most significantly, the SSP and RRP final rules most likely will contain similar provisions implementing the consultation requirements of section 20156(g) and responding to the information protection study section 20119(a) mandated. There was significant discussion during the SSP and RRP RSAC processes on how to

implement these statutory mandates. FRA worked with the General Passenger Safety Task Force's System Safety Task Group and the RRP Working Group to receive input regarding how information protection and the consultation process should be addressed, with the understanding that the same language would be included in both the SSP and RRP NPRMs for review and comment. Based on the comments received in response to the SSP NPRM, FRA has revised the consultation process requirement and the information protections. These revisions are discussed further in the discussion of comments section.

#### C. System Safety Information Protection

Section 20119(b) authorizes FRA to issue a rule protecting risk analysis information generated by railroads. These provisions would apply to information generated by passenger railroads pursuant to a SSP.

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

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

Section 20118(a) specifically provides that a record obtained by FRA pursuant to a provision, regulation, or order related to a risk reduction program or pilot program is exempt from disclosure under FOIA. The term "record" includes, but is not limited to, "a railroad carrier's analysis of its safety risks and its statement of the mitigation measures it has identified with which to address those risks." *Id.* This FOIA exemption also applies to records made available to FRA for inspection or copying pursuant to a risk reduction program or pilot program. Section

20118(c) also gives FRA the discretion to prohibit the public disclosure of risk analyses or risk mitigation analyses obtained under other FRA regulations if FRA determines that the prohibition of public disclosure is necessary to promote public safety.

FRA believes that section 20118 qualifies as an Exemption 3 statute under FOIA.<sup>4</sup> FRA therefore believes that SSP records in its possession are exempted from mandatory disclosure under FOIA, unless one of two exceptions provided by the statute would apply. *See* 49 U.S.C. 20118(a)–(b). The first exception permits disclosure when it is necessary to enforce or carry out any Federal law. The second exception permits disclosure when a record is comprised of facts otherwise available to the public and when FRA, in its discretion, has determined that disclosure would be consistent with the confidentiality needed for a risk reduction program or pilot program.

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

###### 1. The Statutory Mandate

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

<sup>4</sup> In 2009, Congress amended 5 U.S.C. 552(b)(3) to require Exemption 3 statutes to specifically cite to section 552(b)(3). *See* OPEN FOIA Act of 2009, Public Law 111–83, 123 Stat. 2142, 2184 (Oct. 28, 2009). Because this requirement applies only to statutes enacted after October 29, 2009, however, it does not apply to section 20118, which was enacted in October of 2008.

prohibits any such rule from becoming effective until one year after its adoption.

## 2. The Study and Its Conclusions

FRA contracted with a law firm, Baker Botts L.L.P., to conduct the study on FRA's behalf. Various documents related to the study are available for review in public docket number FRA–2011–0025, which can be accessed online at [www.regulations.gov](http://www.regulations.gov). As a first step, the contracted law firm prepared a comprehensive report identifying and evaluating other Federal safety programs that protect risk reduction information from use in litigation. See *Report on Federal Safety Programs and Legal Protections for Safety-Related Information*, FRA, docket no. FRA–2011–0025–0002, April 14, 2011. Next, as required by section 20119(a), FRA published a **Federal Register** notice seeking public comment on the issue of whether it would be in the public interest to protect certain railroad risk reduction information from use in litigation. See 76 FR 26682, May 9, 2011. Comments received in response to this notice may be viewed in the public docket.

On October 21, 2011, the contracted law firm produced a final report on the study. See *Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations For and Against Protecting Railroad Safety Risk Reduction Program Information* (final report), FRA, docket no. FRA–2011–0025–0031, Oct. 21, 2011. The final report contained analyses of other Federal programs that protect similar risk reduction data, the public comments submitted to the docket, and whether it would be in the public interest, including the interests of public safety and the legal rights of persons injured in railroad accidents, to protect railroad risk reduction information from disclosure during litigation.

The final report determined that substantial support exists for the conclusion that a rule that protects “railroad safety risk information from use in civil litigation involving claims for personal injuries or wrongful death would serve the broader public interest.” *Study of Existing Legal Protections* at 63. The final report highlighted the fact that, in the past with similar programs, Congress has deemed that it is in the public's interest to place statutory limitations on the disclosure or use of certain information for use by the Federal government. *Id.* The safety risk reduction programs RSIA mandated, according to the final report,

involve public interest considerations similar to the ones Congress has protected through statutory limitations and these limitations have been upheld by courts. Many of the comments to the final report agree that limiting the use on information collected pursuant to a safety risk reduction program mandated by RSIA in discovery or litigation would serve the broad public interest by encouraging and facilitating the timely and complete disclosure of safety-related information to FRA. Further, the final report underscored FRA's statutory duty to protect the broader public interest in ensuring rail safety and that this public interest outweighs the individual interests of future litigants who may bring damage claims against railroads. Therefore, the final report concluded “after balancing all of the considerations that bear upon the public interest . . . the balance weighs in favor of adopting rules prohibiting the admissibility or discovery of information compiled or collected for FRA railroad safety risk reduction programs in a civil action where a plaintiff seeks damages for personal injury or wrongful death.” *Id.* at 64.

In response to the final report, the SSP NPRM proposed in § 270.105 to protect any information compiled or collected solely for the purpose of developing, implementing or evaluating a RRP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. The information protected includes a railroad's identification of its safety hazards, analysis of its safety risks, and its statement of the mitigation measures with which it would address those risks and could be in the following forms or other forms: plans, reports, documents, surveys, schedules, lists, or data. FRA received multiple comments in response to the proposed information protections and made revisions based on these comments. These revisions are discussed further in the discussion of comments section and the corresponding section-by-section analysis.

### D. Consultation Requirements

Section 20156(g)(1), states that a railroad required to establish a safety risk reduction program must “consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the

safety risk reduction program.” Section 20156(g)(2) further provides that if a “railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.” FRA must consider these views during review and approval of a railroad's SSP plan.

In the NPRM, FRA proposed to implement this mandate by requiring each railroad required to establish a SSP to consult with its directly affected employees (using good faith and best efforts) on the contents of its SSP plan. A railroad is required to include a consultation statement in its submitted plan describing how it consulted with its employees. If a railroad and its employees were not able to reach consensus, directly affected employees could file a statement with FRA describing their views on the plan.

As with the information protection provisions, FRA anticipates the RRP rule will have essentially identical provisions regarding the consultation requirements since there was significant discussion during the SSP and RRP RSAC processes on how to implement section 20156(g). FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that the same language would be included in both the SSP and RRP NPRMs for review and comment.

### E. Related Fatigue Management Plans Rulemaking

Section 20156(d)(2) states that a SSP must include a fatigue management plan that meets the requirements of section 20156(f). This SSP final rule does not address this mandate because it is currently being considered by a separate rulemaking process.

On December 8, 2011, the RSAC voted to establish a Fatigue Management Plans Working Group (FMP Working Group). The purpose of the FMP Working Group is to provide “advice regarding the development of implementing regulations for Fatigue Management Plans and their deployment under the Rail Safety Improvement Act of 2008.” *Railroad Safety Advisory Committee Task Statement: Fatigue Management Plans*, Task No.: 11–03, Dec. 8, 2011. Specifically, the FMP Working Group is tasked to: “review the mandates and objectives of the [RSIA] related to the

development of Fatigue Management Plans, determine how medical conditions that affect alertness and fatigue will be incorporated into Fatigue Management Plans, review available data on existing alertness strategies, consider the role of innovative scheduling practices in the reduction of employee fatigue, and review the existing data on fatigue countermeasures." *Id.*

The working group completed its work in September 2013 and submitted its recommendations to FRA for further consideration. Ultimately, any fatigue management plans required by FRA pursuant to section 20156(d)(2) and 20156(f) would be considered part of a railroad's overall SSP.

FRA notes that the SSP NPRM had a placeholder in proposed § 270.103(t) that would require a railroad, as part of its SSP, to develop a fatigue management plan no later than three years after the effective date of the final rule, or three years after commencing operations, whichever is later. This placeholder did not contain any additional substantive requirements and was intended merely to be an acknowledgement of the statutory fatigue management plan mandate. FRA has elected to not include this placeholder in the final rule because it may create confusion regarding the separate FMP Working Group process and the ongoing fatigue management plans rulemaking.

#### IV. Guidance Manual

The preamble of the SSP NPRM outlined FRA's plan to publish a guidance manual that would assist in the development, implementation, and evaluation of a railroad's SSP. FRA believes sufficient guidance is currently available to railroads that would assist in implementing a SSP. As discussed previously, a majority of passenger railroads affected by this rule participate in the APTA system safety program and are currently participating in the APTA audit program. APTA has published significant guidance regarding its program, primarily, APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads. APTA, *Manual for the Development of System Safety Program Plans for Commuter Railroads*, (May 15, 2006), available on APTA's Web site at <http://www.apta.com/resources/reportsandpublications/Pages/Rail.aspx>. FRA has also developed guidance regarding implementing system safety principals in its Collision Hazard Analysis Guide. The Collision Hazard Analysis Guide supports APTA's Manual by providing a "step-

by-step procedure on how to perform hazard analysis and how to develop effective mitigation strategies that will improve passenger rail safety." FRA, *Collision Hazard Analysis Guide: Commuter and Intercity Passenger Rail Service*, 5 (October 2007), available at [www.fra.dot.gov](http://www.fra.dot.gov). FRA believes APTA's guidance on its system safety program and FRA's Collision Hazard Analysis Guide would provide the necessary assistance to railroads implementing a SSP. As noted previously, FRA will work with each railroad to provide the necessary assistance and guidance for implementing a SSP.

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

FRA received 19 written comments in response to the NPRM, including comments from members of the railroad industry, trade organizations, labor organizations, as well as members of the general public. Specifically, comments were received from the following organizations: Alaska Railroad Corporation, American Association for Justice, Amtrak, Association of American Railroads (AAR), APTA, Maelstrom Society, National Safety Council, New York State Metropolitan Transportation Authority (MTA), Northeast Illinois Regional Commuter Railroad Corporation (Metra), Parsons Brinkerhoff, Inc., and Trinity Railway Express. Interested labor organizations (Labor Organizations) jointly filed a comment. The Labor Organizations included: American Train Dispatchers Association, Brotherhood of Locomotive Engineers and Trainmen, Brotherhood of Maintenance of Way Employees Division, Brotherhood Railway Carmen Division TCU/IAM, Sheet Metal, Air, Rail and Transportation Workers, and Transportation Workers Union of America (TWU). The following discussion provides an overview of the written comments FRA received in response to the NPRM. More detailed discussions of specific comments and how FRA has chosen to address these comments in the final rule can be found in the relevant section-by-section analysis portion of this preamble.

Generally, all of the comments submitted were in favor of SSP. While the comments varied on the structure and breadth of a SSP, there was agreement that a properly implemented SSP would increase safety of the railroad's operations. As discussed previously, there are two concurrent rulemakings that will implement sections 20156, 20118, and 20119, the SSP rule and the RRP rule. FRA established separate safety risk reduction rules for passenger railroads

and the Class I freight railroads to account for significant differences between passenger and freight operations. Many commenters requested that FRA make it clear that the SSP requirements are separate from the forthcoming RRP rule and a railroad will not be required to submit both a SSP plan and RRP plan to FRA. It is not the intent that one railroad will be required to satisfy both regulations, *i.e.*, be required to implement both a SSP and RRP and submit the corresponding plans to FRA for review and approval.

Certain commenters provided specific scenarios involving multiple rail operations and inquired which railroad would be required to comply with which regulation. One example involved a commuter railroad subject to the SSP rule that contracts certain portions of its passenger operations to a freight railroad that may be subject to the proposed RRP rule. In this scenario, the entity that is ultimately responsible for providing the passenger service would be responsible for complying with the SSP rule, which would be the commuter railroad. The fact that the commuter railroad contracts its operations to the freight railroad does not result in the delegation of the duty to comply with the SSP rule to that freight railroad. Contracting out these operations may pose certain hazards and risks. Therefore, the commuter railroad's SSP needs to take into account that the passenger operations are contracted out to another railroad. If the freight railroad also conducts freight operations over the same track in which it conducts the passenger operations for the commuter railroad and the freight railroad is required to implement a RRP, that segment will be included in the freight railroad's RRP and must take into consideration the risks and hazards posed by the passenger operation. Further, if the freight railroad conducts freight operations over the same track in which it conducts the passenger operations for the commuter railroad, the commuter railroad's SSP must take into consideration the risks and hazards posed by the freight operations.

Another commenter presented the scenario in which a passenger railroad subject to the SSP rule owns and maintains, but does not dispatch, a segment of track in which there are freight operations. From the example, it is not clear if the passenger railroad is also operating on that segment. If the passenger railroad is operating on that segment, pursuant to § 270.3(a), it will need to include that segment in its SSP. If the passenger railroad is not operating on that segment of track, but there are freight operations on that segment of

track by another railroad, the passenger railroad will include that segment in its SSP because, as discussed in the section-by-section analysis for § 270.103(d)(2), the passenger railroad will be required to identify the persons that utilize significant safety-related services and by operating on track that the passenger railroad owns and maintains, the freight operators are utilizing significant safety-related services of the passenger railroad. Further, FRA would expect the passenger railroad to include that segment in the description of its rail system pursuant to § 270.103(d)(1). The railroad conducting freight operations on that segment of track may be required to implement a RRP and that segment may need to be included in its RRP.

Another example was a situation in which a passenger railroad has two terminals on its system where there are freight operations adjacent (within 25') to the passenger operations. In this scenario, FRA would expect the passenger railroad's SSP to assess what hazards and resulting risks arise due to the proximity of the freight operations to the passenger operations; however, the actual freight operations would not be included in the passenger railroad's SSP. FRA does not intend these three examples to cover every scenario a railroad may encounter; rather, these examples provide guidance concerning what facts FRA will find determinative regarding which railroad will be required to comply with which regulation. Since FRA cannot contemplate every scenario, railroads and other interested parties are welcomed and encouraged to reach out to FRA for guidance regarding application of the SSP rule to a railroad's specific operations.

In many instances in the NPRM, FRA stated that it plans on working with the railroads on certain aspects of the rule. The Labor Organizations expressed concern that FRA plans on exclusively working with the railroads and not allowing any other interested party to be involved, effectively substituting FRA for the Labor Organizations in the statutory-mandated consultation role. This was not FRA's intent behind those statements. Rather, the intent was to make it clear that FRA would be available to provide guidance to the railroads on the various aspects of the rule, not that there would be an exclusive partnership between FRA and the railroads to develop the railroads' SSPs. FRA will work with the railroads and will not replace the Labor Organizations and any other directly affected employee in their consultation

role. FRA has amended the language to make this intention clear. It is also important to note that through the consultation process in § 270.107, railroad employees will always have an opportunity to provide input on the railroads' SSPs.

The Labor Organizations also believe that the NPRM supports a continuation of self-analysis by the railroads, which, they claim, is inconsistent with the intent behind RSIA. As evidence, the Labor Organizations point to multiple instances in the NPRM where FRA states that railroads have flexibility and/or discretion to make certain determinations on certain requirements of the rule, such as the waiver section proposed in § 270.7, the lack of a penalty schedule in the NPRM, and that, in limited instances, a railroad is allowed to make safety-critical changes to its SSP without prior FRA approval.

The SSP rule is directly dependent on a railroad's ability to thoroughly and candidly assess its hazards and resulting risks. The SSP requires a railroad to engage in self-analysis that will be conducted in conjunction with the railroad's directly affected employees and FRA oversight. Since no two railroads operations are exactly the same, no SSP will be exactly the same, which means that a railroad will need a certain degree of flexibility to tailor a SSP to its specific operations. Regardless of the amount of flexibility afforded to the railroads, the directly affected employees, including the Labor Organizations, will have an opportunity to provide input and work with the railroads on the development of the SSP. Regarding the lack of a penalty schedule, FRA typically does not include penalty schedules in an NPRM; however, this final rule does include a penalty schedule.

APTA expressed concern that the proposed rule was more prescriptive in significant respects than current FRA practices. APTA believes that the level of specificity in the proposed rule diminishes the flexibility needed so that the railroads can adapt their SSP plans to local conditions. Further, APTA states such specificity could divert a railroad's attention from assessing its operation risk to assessing regulatory compliance risk and would only expand the amount of paper and bureaucracy needed to comply with the rule with little to no increase in safety. APTA believes that FRA has expanded the elements of the APTA program which threatens to divert attention from the railroad's core safety practices and the highest risk of railroad operations. As examples, APTA points to the requirements associated with

scheduling, reporting, and conducting consultation with the directly affected employees pursuant to § 270.102; defining, outlining, measuring, and promoting a positive safety culture pursuant to § 270.103(c) and (v); the concept of fully implemented; and the requirement that the railroad establish milestones to track the progress of implementation. Each one of these examples, according to APTA, is an instance in which railroads may have a different understanding of the requirement and therefore, subjectivity is introduced into the process and does not support a consistent regulatory framework.

FRA disagrees with APTA's assertions. As discussed above, the SSP rule is structured so that a railroad can tailor the program to its operations. The SSP rule sets forth general parameters and the railroad will design its program so that it fits these parameters, addresses the railroad's operations, and eliminates or reduces hazards on the railroad's operations. As with most new FRA regulations, significant interaction between FRA, the railroads, and other stakeholders will be necessary to ensure all parties understand the proper implementation for the rule. The majority of railroads that are required to comply with this rule already participate in APTA's system safety program. FRA believes that this rule does not add a significant paperwork and bureaucracy burden compared to what is already required by APTA's program. FRA does not believe the rule is more directive than the APTA program; rather, since most of the railroads that will implement a SSP already participate in the APTA program, the railroads are familiar with the concept and application of system safety and will be ready to adapt their existing APTA program to the requirements set forth in this rule. Further, implementation of the SSP rule will more than likely be the railroad conducting a gap analysis between its current APTA program and the SSP rule and modifying that program where necessary to bring it into compliance with the SSP rule.

The majority of the comments supported and understood that the discovery protections are necessary for a railroad to engage in a thorough and candid analysis of the hazards and resulting risks on its system; however, the American Association for Justice (AAJ) objected to the inclusion of any information protections. AAJ claims that: (1) The proposed information protections are unprecedented; (2) FRA can promulgate a SSP regulation without the information protections; (3)

the information protections will reduce the rights of persons injured in railroad accidents; (4) the information protections will allow railroads to hide safety hazards; and (5) FRA should specifically preserve State tort law based claims.

First, AAJ claims that proposed information protections are unprecedented. AAJ recognizes that there are existing programs that have information protections; however, AAJ argues that these programs have two key features: (1) Congress directed that disclosure of documents be limited, and (2) limited disclosure applies predominately to documents actually submitted to a federal agency. AAJ believes that the SSP information protections do not have either of these key features.

While Congress did not set forth specific information protections in section 20119, Congress gave FRA authority to set forth such specific protections. As discussed previously, in section 20119(a), Congress directed FRA to conduct a study to determine if certain information protections would be in the public interest. Congress set forth the specific parameters of the information protections that the study must consider. Congress then authorized FRA to promulgate a rule, subject to notice and comment, which addressed the results of the study. *Id.* FRA has complied with Congress' mandate and has set forth information protections that are consistent with the specific parameters set forth by Congress. FRA does not believe that the information protections are invalid simply because Congress didn't promulgate specific protections.

Nothing in section 20119 limits the information protections to documents that are submitted to FRA. The language used by Congress in section 20119 indicates the information protections, depending on the results of the study, could apply to information that may not even be submitted to FRA. Pursuant to section 20119(a), the study must consider information protections that would apply to documents that are compiled and collected for "the purpose of planning, implementing, or evaluating a safety risk reduction program." Since Congress did not limit the information protections only to documents that are submitted to FRA, it is within FRA's authority to set forth information protections that apply to documents within a railroad's possession.

Nothing in 23 U.S.C. 409 (section 409), the statute that SSP information protections are modeled after, or the Supreme Court's decision in *Guillen*

(which reviewed the validity and constitutionality of section 409), limits the information protections to documents submitted to the Federal Highway Administration (FHWA).<sup>5</sup> The Court's interpretation of section 409 was not based on whether the documents were submitted to FHWA. Rather, the Court held that the information protections were extended to the information because the Hazard Elimination Program required compiling or collection of that information. *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003). In the case of the SSP, the railroads are required by statute to compile and collect information for a SSP, so, like section 409 and the holding in *Guillen*, the protections are extended to that information.

AAJ claims that in the limited circumstances in which data has been protected, the provisions have been narrowly tailored and construed. AAJ believes that SSP information protections are overly broad and inconsistent with any other government program that limits some disclosure of evidence.

FRA agrees with AAJ's assertion that the SSP information protections must be narrowly tailored and construed. In *Guillen*, the Court recognized that "statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for truth." *Guillen* at 144–45. Since section 409 established a privilege, the Court construed it narrowly to the extent the text of the statute permitted. *Id.* at 145. FRA believes the SSP information protections are consistent with the Court's narrow interpretation of section 409.

Furthermore, the SSP protections are more narrowly tailored than the protections in section 409. Section 270.105(a)(2) limits the protections to information that was originally compiled and collected "solely" for the purpose of planning, implementing or evaluating a SSP. This means that information compiled or collected for any other purpose is not protected, even if the railroad also uses that information for its SSP. For example, if a railroad is required by another provision of law or regulation to compile or collect information, the information protections do not apply to that information. "Solely" also means that a railroad must continue to use that information only for its SSP. If a railroad subsequently uses for any other purpose information that was initially compiled or collected

for a SSP, that information is not protected to the extent that it is used for the non-SSP purpose. These additional limits result in protections that are more narrow and specific than those in section 409, which does not include any language similar to "solely" that would limit protected information to information generated only for the exclusive purpose of the Hazard Elimination Program.

Second, AAJ contends that FRA can issue a SSP rule without the discovery protections, just like FAA did in its SMS rulemaking. A significant difference between the FRA and FAA programs is the scope of statutory authority Congress gave each agency for protection of information collected or maintained as part of an SMS. The FAA's authority, set forth in 49 U.S.C. 44735, limits the protection of SMS data that is voluntarily submitted, such as reports, data, or other information produced or collected for purposes of developing and implementing an SMS, from FOIA disclosure by the FAA. FRA's authority to implement SMS information protections is based on 49 U.S.C. 20119, and recommendations resulting from the required study under section 20119.

As discussed previously, the Study concluded that it would be within FRA's authority and in the public interest for FRA to promulgate a regulation protecting certain risk analysis information held by the railroads from discovery and use in litigation and makes recommendations for the drafting and structuring of such a regulation. *See Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations For and Against Protecting Railroad Safety Risk Reduction Program Information* at 63–64. Therefore, FRA believes the information protections are consistent with the authority provided by Congress as set forth in 49 U.S.C. 20119 and the conclusion of the Study.

Third, AAJ believes the SSP information protections will reduce the rights of persons injured in railroad accidents. AAJ points to the fact that in many cases, evidence a railroad knew or should have known of a hazard is the key to proving the railroad's liability, particularly for Federal Employers Liability Act cases. AAJ believes that the study concluded without analysis that injured people could continue to be able to pursue legal remedies because access to documents that are currently discoverable would remain discoverable. AAJ does not believe this conclusion is accurate because the information protections may shield the

<sup>5</sup> Section 409 and *Guillen* are discussed extensively in the section-by-section analysis of § 270.105.

documents/data necessary to show that the railroad knew or should have known of the hazard.

The SSP information protections have been drafted with the goal that a plaintiff is no worse off than they would have been had the SSP rule never existed. This is consistent with section 409 and the Court's interpretation of that section. *See Guillen* at 146. To ensure a plaintiff is no worse off, § 270.105(b) sets forth certain exceptions to the information protections. Pursuant to § 270.105(b), the information protections are not extended to information compiled or collected for a purpose other than that specifically identified in § 270.105(a). Further, if certain information was discoverable and admissible before the enactment of the SSP rule protections, § 270.105(b) ensures that the information remains discoverable and admissible. These exceptions are discussed extensively in the section-by-section analysis for § 270.105(b). FRA believes that these exceptions strike an appropriate balance between ensuring that plaintiffs are no worse than they would have been if the SSP rule had not existed and encouraging the railroads to make a robust and candid assessment of the hazards and resulting risks on their system.

According to AAJ, the information protections will allow railroads to hide safety hazards. AAJ believes that the threat of disclosure of these hazards creates an incentive for railroads to correct them immediately. AAJ points to multiple cases that they believe provide proof that railroads routinely hide evidence of hazards.

FRA disagrees with this assertion. The purpose of the SSP is for railroads to identify hazards and resulting risks on their system and take the appropriate measures to mitigate or eliminate these hazards. Without the information protections, a SSP could result in an effort-free tool for plaintiffs in litigation against railroads, which would discourage railroads from identifying hazards and resulting risks, thus frustrating the intent behind section 20156. FRA believes that the SSP and information protections will encourage railroads to identify and address, rather than hide, hazards. Furthermore, if a railroad is already required by another law or regulation to collect information to show compliance with existing laws or regulations, that information will not be protected. Therefore, railroads will not be able to use the SSP information protections to hide issues of non-compliance.

Finally, AAJ requests that FRA specifically preserve state tort law based

claims. AAJ believes that since railroads are required to submit their SSP plans to FRA for approval, railroads may claim that they are immune from any safety hazard claim or either that the state law claim is preempted by FRA's approval of the SSP.

This concern was also raised by the Labor Organizations. To address this issue, FRA included § 270.201(b)(4) in the final rule, which provides that approval of a railroad's SSP plan under this part does not constitute approval of the specific actions the railroad will implement under its SSP plan pursuant to § 270.103(q)(2) and shall not be construed as establishing a Federal standard regarding those specific actions.

FRA will not review or approve the specific mitigation and elimination measures that a railroad may adopt to address the hazards and risks that it identifies. *See* § 270.201(a)(2). The SSP rule is not intended to preempt State standards of care regarding the specific risk mitigation actions a railroad will implement under its SSP. Accordingly, § 270.201(b)(4) clarifies that FRA approval of a railroad's SSP plan under this final rule does not constitute approval of the specific mitigation and elimination measures that the railroad will implement pursuant to § 270.103(q)(2) and should not be construed as establishing a Federal standard of care regarding those specific actions.

## VI. Section-by-Section Analysis

FRA is adding a new part 270 to title 49 of the CFR. Part 270 satisfies the statutory requirements regarding safety risk reduction programs for railroads providing intercity rail passenger or commuter rail passenger service. *See* 49 U.S.C. 20156. Part 270 also protects certain information compiled or collected pursuant to a safety risk reduction program from admission into evidence or discovery during certain court proceedings for damages. *See* 49 U.S.C. 20119.

### Subpart A—General

#### Section 270.1 Purpose and Scope

This section contains a formal statement of the final rule's purpose and scope and remains unchanged from the NPRM. Paragraph (a) states that the purpose of the rule is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. The rule requires a railroad to establish a program that systematically evaluates railroad safety hazards and the resulting risks on its system and

manages those risks in order to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities.

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

Paragraph (c) explains that the rule provides for the protection of information generated solely for the purpose of developing, implementing, or evaluating a system safety program under this part. In addition to the SSP, § 270.1(c) of the NPRM proposed implementing protection of information for a railroad safety risk reduction rule required by FRA for Class I freight railroads and railroads with inadequate safety performance, *i.e.*, the RRP rule. 77 FR 55379. Upon further consideration, FRA has determined that the RRP protections should be implemented in the RRP final rule, not in this rule. Accordingly, this section has been revised to only apply to this SSP final rule.

NY MTA recommended that the term "solely" be deleted from paragraph (c) and § 270.105(a) to protect studies or risk analyses that are not developed expressly to comply with this part. NY MTA believes that it is in the public interest to ensure that railroads conduct on-going and thorough self-critical examinations and expressed concern that if these types of studies or analyses are not protected, they may be used against the railroad in a court proceeding. As discussed further in the section-by-section analysis for § 270.105, FRA only has the authority under section 20119(b) to protect documents that are created pursuant to a SSP; therefore, deleting the term "solely" would improperly expand the protections beyond the limits of FRA's authority.

#### Section 270.3 Application

This section sets forth the applicability of the rule and remains unchanged from the NPRM. Section 20156(a)(1) mandates that FRA require each Class I railroad, a railroad carrier that has inadequate safety performance, or a railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. This rule sets forth the requirements of a railroad safety risk reduction program for a railroad that provides intercity rail passenger or commuter rail passenger

transportation. Safety risk reduction programs for Class I railroads and railroads with inadequate safety performance will be addressed in the separate RRP rulemaking proceeding. See 80 FR 10950 (RRP NPRM).

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

In commenting on the NPRM, the Alaska Railroad proposed that when FRA next submits technical corrections of Federal statutes to Congress, FRA no longer use the terms "intercity passenger" and "commuter passenger" and instead use the term "passenger" to refer to these type of railroads. The Alaska Railroad believes that the terms, "intercity passenger" and "commuter passenger," are based on an old, outdated statutory context. While FRA does not agree or disagree with the Alaska Railroad's position regarding the use of these terms, FRA agrees with the Alaska Railroad that this issue is a matter to be handled legislatively by Congress—not a matter to be handled by FRA in a rulemaking.

AAR expressed concern that paragraph (a) could lead to confusion that certain freight railroads may be required to have a SSP in addition to a RRP because some freight railroads operate commuter trains on behalf of commuter agencies and some freight railroads provide tracks over which passenger trains operate. To avoid confusion, AAR proposed that "railroads that primarily provide freight service and are potentially subject to risk reduction program regulations" should be excepted from the rule. The discussion of comments section addressed multiple scenarios raised by commenters that involve freight

operations and passenger operations and which railroad would be responsible for which program. Simply because a passenger railroad contracts out passenger service to a freight railroad does not mean the duty to comply with this rule has been automatically delegated to the freight railroad and the passenger railroad no longer is required to comply with this rule. The passenger railroad ultimately is responsible for complying with this rule and the freight railroad providing the passenger service is required to comply with the passenger railroad's SSP. See § 270.7(b). FRA believes that AAR's suggested language would only lead to further confusion rather than clarification. It is not clear which railroads would be classified as "primarily provid[ing] freight service" and, therefore, it would not be clear which railroad would be excepted from complying with this rule. Due to this ambiguity, AAR's suggested language is not adopted.

Metra requested that an RSAC recommendation regarding delegation of duties under this rule be inserted into the final rule. The RSAC recommended that if a passenger railroad contracts all activities that relate to the passenger service to another entity, the sponsoring passenger railroad may seek approval from the FRA Associate Administrator of Safety to delegate responsibility for the SSP to the other entity. FRA chose not to adopt this recommendation. It would not be consistent with FRA's statutory jurisdiction over passenger railroads to allow delegation of responsibility under this part, so that a passenger railroad could effectively divest itself of legal responsibility under the rule. In certain instances, including this part, FRA allows a railroad to contract with another entity to perform the duties required by a rule; however, FRA's approach has always been never to allow a railroad to delegate completely responsibility for compliance with a rule to another entity. Since the SSP rule is the first of its kind for FRA and the railroad industry, FRA believes it is important for the passenger railroad to be responsible for compliance with the rule to ensure that the railroad is involved in system safety planning and implementation under the rule.

In paragraph (b), certain railroads are excepted from the final rule's applicability. The exceptions proposed in the NPRM are adopted in the final rule. The first exception, in paragraph (b)(1), covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. This paragraph clarifies

the circumstances under which rapid transit operations are not subject to FRA jurisdiction under this part. It should be noted, however, that some operations having rapid transit characteristics are within FRA's jurisdiction given their connections to the general system, *e.g.*, shared use of the general system right-of-way. FRA specifically intends for part 270 to apply to such operations.

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

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

Finally, paragraph (b)(4) sets forth an exception from the requirements of this part for railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 270.5). Plant railroads are

typified by operations such as those in steel mills that do not go beyond the plant's boundaries and that do not involve the switching of rail cars for entities other than themselves.

Section 20156(a)(4) allows a railroad carrier that is not required to submit a railroad safety risk reduction program to voluntarily submit such a program. If the railroad voluntarily submits a program, it shall comply with the requirements set forth in section 20156 and is subject to approval by the Secretary. In the NPRM, FRA sought comment on whether a provision that allows a railroad to establish voluntarily a SSP should be added to the final rule. FRA did not receive a significant number of comments in response to this request and the comments FRA did receive, supported voluntary compliance with the rule.

As discussed in the NPRM, FRA anticipates that the majority of railroads which voluntarily submit a railroad safety risk reduction program under section 20156(a)(4) would do so pursuant to the RRP regulation that is the subject of a separate proceeding. Paragraph (a) is broad and intended to cover the majority of the railroads that provide commuter and intercity passenger service. Absent the exceptions in paragraph (b), if a railroad is not required by this part to establish a SSP, that railroad more than likely does not provide commuter and intercity passenger service and, therefore, may be required to establish a RRP. If these railroads are not required to establish a RRP but decide to voluntarily establish a railroad safety risk reduction program pursuant to section 20156(a)(4), the RRP regulation would more than likely be better suited for their operations because, due to the breadth of paragraph (a), they are most likely not a railroad that provides commuter or intercity passenger service. Therefore, FRA believes voluntary compliance with a statutory-mandated risk reduction program, including a SSP, is better addressed in the forthcoming RRP rule. See 80 FR 10969 and 10992 for the proposed RRP voluntary compliance section and discussion.

#### Section 270.5 Definitions

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

input regarding the proposed terms defined in this section and specifically whether other terms should be defined. FRA received multiple comments in response to this request. Generally, commenters did not have significant issues with the proposed definitions; however, some commenters recommended adding definitions for certain terms.

The Labor Organizations suggested that FRA add the definitions that the RSAC recommended but FRA chose not to include in the NPRM. The definitions were for the following terms: Contractor, FTA, hazard analysis, improvement plan, individual investigation, passenger operations, passenger railroad, railroad property, risk-based hazard management, safety, safety certification, safety culture, safety-related services, safety-related employee, sponsoring railroad, system safety program, and system safety program plan. Trinity Railways also requested that FRA add definitions for passenger railroad, safety-related services, and sponsoring railroad. Regarding the terms FTA, individual investigation, passenger operations, railroad property, safety-related employee, and sponsoring railroad, FRA declines to add definitions for these terms because these terms are not used in the rule text. Regarding the terms contractor and safety, these terms have a common understanding throughout the railroad industry and do not have a particular meaning within the rule, so definitions for these terms are not necessary. Regarding the terms hazard analysis, improvement plan, passenger railroad, safety certification, and safety-related services, there are sections within the rule that address the meaning of each term and FRA believes that it is unnecessary to include definitions for these terms as well. See §§ 270.3(a), 270.103(d)(2) and (3), (q), and (s)(3), 270.303(b)(4), and 305(b)(1). However, FRA has decided to add definitions for the terms risk-based hazard management, safety culture, system safety program, and system safety program plan. A discussion of all the definitions used in this part follows.

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

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

"FRA" means the Federal Railroad Administration.

"Fully implemented" means that all the elements of the railroad's SSP plan required by this part are established and

applied to the safety management of the railroad. APTA commented that the proposed definition for "fully implemented" included two sentences and that each sentence provided the same information but in a different context and that this could lead to confusion as to how it should be applied. However, FRA notes that the proposed definition contained only one sentence and believes that it was sufficiently clear to avoid confusion. APTA may have been referring to the section-by-section analysis discussion for this definition. In this regard, FRA has not included that additional discussion here to maintain clarity.

"Hazard" means any real or potential condition, as identified in the railroad's risk-based hazard analysis under § 270.103(q), that can cause injury, illness, or death; damage to or loss of a system; or damage to equipment, property, or the environment. This definition is based on the existing definition of the term in FTA's part 659. 49 CFR 659.5. FRA does not intend this definition to include hazards that are completely unrelated to railroad safety, such as environmental hazards that would fall under the exclusive jurisdiction of the United States Environmental Protection Agency (EPA) or workplace safety hazards that would fall under the exclusive jurisdiction of the United States Department of Labor's Occupational Safety and Health Administration (OSHA). Railroad safety hazards that fall under FRA jurisdiction that could cause damage to the environment, however, would be included in this definition. For example, the potential of a derailment of a tank car at a location due to track geometry would fall under this definition. If that derailment would not likely result in a release of hazardous materials, it would fall under FRA's jurisdiction. However, if the derailment has a high potential for the release of hazardous material, that would be a hazard that would fall under this definition that is related to railroad safety and may fall under both FRA's and EPA's jurisdiction. An example of a railroad hazard that would fall exclusively under EPA's jurisdiction is air pollution caused by locomotive emissions. This hazard is not within FRA's jurisdiction and would not be included in this definition. See *e.g.*, 40 CFR part 92 (Control of Air Pollution from Locomotives and Locomotive Engines).

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

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

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

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

The definition clarifies that when an entity operates a locomotive to move rail cars in service for other entities,

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

The definition of the term “plant railroad” is consistent with FRA’s longstanding policy that it will exercise its safety jurisdiction over a rail operation that moves rail cars for entities other than itself because those movements bring the track over which the entity is operating into the general system. See 49 CFR part 209, Appendix A. Indeed, FRA’s Policy Statement provides that “operations by the plant railroad indicating it [i]s moving cars on . . . trackage for other than its own purposes (e.g., moving cars to neighboring industries for hire)” brings plant track into the general system and thereby subjects it to FRA’s safety jurisdiction. 49 CFR part 209, Appendix A. Additionally, this interpretation of the term “plant railroad” has been upheld in litigation before the U.S. Court of Appeals for the Fifth Circuit. See *Port of Shreveport-Bossier v. Federal Railroad Administration*, No. 10–60324 (5th Cir. 2011) (unpublished per curiam opinion). APTA believes that since the term “plant railroad” is provided in support of 49 CFR part 209 it does not need to be defined within the context of the SSP rule. FRA disagrees. Plant railroads will be exempt from the rule; therefore, FRA believes it is necessary to clearly define what type of operations will be considered a “plant railroad.”

“Positive train control system” means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of 49 CFR part 236. APTA believes that since the term “positive train control” is provided in support of 49 CFR part 236 it does not need to be defined within the context of the SSP rule. FRA disagrees. Since “positive train control system” has a specific meaning within FRA’s regulations, it is important that the meaning of the term used within the SSP rule is consistent with part 236.

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

“Railroad” means: (1) Any form of non-highway ground transportation that

runs on rails or electromagnetic guideways, including—

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

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

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

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

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

“Risk-based hazard management” means the processes (including documentation) used to identify and analyze hazards, assess and rank corresponding risks, and eliminate or mitigate the resulting risks. This is a high-level definition of “risk-based hazard management” and will provide a general understanding of the concept of what is “risk-based hazard management.” Risk-based hazard management is a key component of a railroad’s SSP and § 270.103(p) sets forth the requirements for a risk-based hazard management program.

“Safety culture” means the shared values, actions and behaviors that demonstrate commitment to safety over competing goals and demands. This definition was proposed in the NPRM section-by-section analysis of § 270.101(b). This definition is from the DOT Safety Council’s May 2011 research paper, *SAFETY CULTURE: A Significant Driver Affecting Safety in Transportation*. The DOT Safety Council developed this definition after extensive review of definitions for safety culture used in a wide range of industries and organizations over the

past two decades. FRA recognizes that railroads may have a slightly different understanding of what exactly makes up safety culture; however, for the purposes of this rule, FRA believes it is important to establish a shared definition of safety culture.

Organizations with a strong safety culture will consistently choose safety over performance when faced with the choice of cutting corners to increase performance. Safety culture is discussed further in section-by-section analysis for § 270.101(b), which requires a railroad to design its SSP so that it promotes a positive safety culture.

“System safety” means the application of management, economic, and engineering principles and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of the system life cycle. By specifying that system safety operates within certain constraints, this definition clarifies that there may be hazards on the railroad’s system that a railroad may not be capable of fully mitigating or eliminating, or where the costs to address the hazard are not commensurate with the risks. Rather, the railroad would monitor the hazard and at some point, if feasible, employ methods to mitigate or eliminate that hazard and resulting risk.

“System safety program” means a comprehensive process for the application management and engineering principles and techniques to optimize all aspects of safety. A railroad’s SSP sets out how the railroad will implement system safety in its operations. Because this part describes specific requirements of a system safety program, this definition is intended to be high-level.

“System safety program plan” means a document developed by the railroad that implements and supports the railroad’s SSP. Section 270.103 sets forth the specific requirements of a SSP plan.

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

The NPRM proposed a waiver process in § 270.7 in which a railroad could request a waiver from a provision of the SSP rule. FRA determined that such a

provision is unnecessary because the rules governing the FRA waiver process are already set forth in 49 CFR part 211. Therefore, a waiver provision has not been included in the SSP final rule.

#### Section 270.7 Penalties and Responsibility for Compliance

This section, originally proposed as § 270.9, contains provisions regarding the penalties for failure to comply with the rule and the responsibility for compliance. It is adopted and remains unchanged from the NPRM.

As explained in the NPRM, paragraph (a) identifies the civil penalties that FRA may impose upon any person that violates or causes a violation of any requirement of this part. These penalties are authorized by 49 U.S.C. 20156(h), 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. In general, any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$839 and not more than \$27,455 per violation. Civil penalties may be assessed against individuals only for willful violations. Where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed \$109,819 per violation may be assessed. In addition, each day a violation continues constitutes a separate offense. Maximum penalties of \$27,455 and \$109,819 are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101–410, 28 U.S.C. 2461, note, as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, Sec. 701. Furthermore, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these regulations. FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important in ensuring that compliance is achieved. This final rule includes a schedule of civil penalties as Appendix A to this part. Because a penalty schedule is a statement of agency policy, notice and comment was not required before its issuance. See 5 U.S.C. 553(b)(3)(A).

Paragraph (b) clarifies that the requirements in the rule are applicable to any person (as defined in the rule) that performs any function or task required by the rule. Although various sections of the rule address the duties of passenger railroads, FRA intends that

any person who performs any action on behalf of a passenger railroad or any person who performs any action covered by the rule is required to perform that action in the same manner as required of the passenger railroad, or be subject to FRA enforcement action. For example, if a passenger railroad contracts with another entity to perform duties covered by this rule, that entity is required to perform those duties in the same manner as the passenger railroad. While the passenger railroad remains responsible for complying with the rule, FRA can take enforcement action any person who performs any action on behalf of a passenger railroad or any person who performs any action covered by the rule.

#### Subpart B—System Safety Program Requirements

##### Section 270.101 System Safety Program: General

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

To properly implement a SSP, a railroad is required to set forth a SSP plan pursuant to § 270.103. The SSP plan will be a document or a series/ collection of documents that contain all of the elements required by this part and shall be designed to support the railroad’s SSP.

Paragraph (b) requires that a railroad’s SSP be designed so that it promotes a positive safety culture. Safety culture, as defined in § 270.5, is the shared values, actions and behaviors that demonstrate commitment to safety over competing goals and demands. U.S. DOT, Safety Council Research Paper, *SAFETY CULTURE: A Significant Driver Affecting Safety in Transportation* (May 2011). Research has shown that when an organization has a strong safety culture, accidents and incidents are less frequent and less severe. *Id.* at 4. Conversely, if an organization’s safety culture is weak,

significant and catastrophic accidents are more likely to occur. *Id.* For a railroad to achieve its SSP goals, the mitigation or elimination of safety hazards and risks on the rail system, the railroad must have a positive and strong safety culture, so it is vital that the railroad's SSP be designed so that it promotes a positive safety culture. Consistent with the Safety Council Research Paper, FRA believes that there are 10 elements that support a strong safety culture on a railroad. *Id.* at 7. These elements are: (1) Having leadership that is clearly committed to safety; (2) practicing continuous learning; (3) making decisions that demonstrate that safety is prioritized over competing demands; (4) having clearly defined reporting systems and accountability; (5) promoting a safety-conscious work environment; (6) making employees feel personally responsible for safety; (7) fostering open and effective communication across the railroad; (8) fostering mutual trust between employees and the railroad; (9) responding to safety concerns in a fair and consistent manner; and (10) having training and other resources available to support safety. *Id.* at 7–8. While these 10 elements are not requirements of this rule, FRA believes that if a railroad incorporates each element, the railroad will have a strong safety culture. Further, implementing these elements will provide the railroad the necessary framework to effectively describe its safety culture as required by § 270.103(b)(2) and describe how it measures the success of its safety culture as required § 270.103(t).

#### Section 270.103 System Safety Program Plan

This section implements a railroad's SSP through a SSP plan. This section received numerous comments and these comments are addressed in the appropriate subsection to which they refer. As mentioned previously, a railroad is required to create a written SSP plan to fully implement and support its SSP. This section sets forth all of the required elements of the railroad's SSP plan.

Paragraph (a) establishes that a railroad's SSP plan must contain the minimum elements set forth in this section. FRA did not receive any comments regarding paragraph (a) and therefore it remains unchanged from the NPRM. As provided in § 270.201, a railroad's SSP plan must be submitted to and approved by the FRA Associate Administrator for Railroad Safety and Chief Safety Officer. FRA Associate Administrator for Railroad Safety and Chief Safety Officer approval of the SSP

plan will be considered approval of the railroad's SSP as required by section 20156(a)(3).

In certain scenarios, a railroad providing passenger service is not the railroad that owns the track on which passenger service is being operated. Rather, the railroad that owns the track hosts the railroad providing the passenger train service. For a railroad providing passenger train service to effectively identify, evaluate, and manage the hazards and resulting risks on the system over which it operates, as required by this part, the railroad needs to evaluate all aspects of the operation. As such, paragraph (a)(2) of this section addresses the coordination that must occur between a railroad providing passenger service and a railroad hosting that passenger service. If certain aspects of the operation are not under the control of the railroad providing passenger service but are controlled by the railroad hosting the operation, the two railroads need to communicate so those aspects can be adequately addressed by the railroad's SSP. A passenger railroad may have multiple railroads hosting its passenger train service on its system and therefore needs to coordinate with each railroad. If a railroad hosting the passenger train service does not cooperate with the railroad providing the passenger train service to coordinate the applicable parts of the SSP, under § 270.7, the railroad hosting the passenger train service may be subject to civil penalties because it may cause the railroad providing the passenger service to violate the requirements of this part. For example, if a passenger railroad service is hosted by a freight railroad and that freight railroad is responsible for track maintenance, the freight railroad will need to provide the passenger railroad the necessary information regarding track maintenance for the passenger railroad to prepare its SSP plan. Since track maintenance has significant impact on the safety of rail operations, it is a vital element of a railroad's SSP plan. Therefore, if the freight railroad refuses to provide the passenger railroad the necessary information regarding track maintenance, the passenger railroad will not be able to fully comply with this part and, consequently, the freight railroad may be subject to civil penalties for causing the passenger railroad to fail to comply with this part.

APTA requested that FRA address coordination issues whereby one railroad can adopt and operate under another railroad's SSP plan. There is nothing in this rule prohibiting a railroad's SSP plan from adopting certain portions of another railroad's

SSP plan if those portions cover the same operations on both railroads. However, no two railroad operations are exactly the same; therefore, no two SSP plans will be exactly the same. If a railroad adopts portions of another railroad's plan, the operations covered by those portions of the plan must involve the same directly affected employees and both railroads must independently comply with the consultation requirements under this rule.

APTA also requested that FRA allow railroads to develop SSP plans for a jointly served facility and allow properties with multiple host railroads to have SSP plans specific to each of the territories that a host railroad supports. There is nothing in the rule prohibiting railroads from jointly developing portions of their SSP plans; however, the railroads must ensure that the jointly developed portions address all the necessary requirements of this rule. Each railroad can include the jointly developed portions in their plans, but each portion must involve the same directly affected employees and both railroads must independently comply with the consultation requirements under this rule.

Paragraph (b) requires each SSP plan to have a policy statement that endorses the railroad's SSP. It should be noted that proposed paragraph (c)(1) has been moved to paragraph (b). The policy statement required by this paragraph should define, as clearly as possible, the railroad's authority for the establishment and implementation of the SSP. This includes the legal name of the entity responsible for developing the railroad, any authorizing or implementing legislation, and federal, state & local statutes enacted to establish the railroad.

The policy statement is required to be signed by the chief official of the railroad. This signature would indicate that the top level of management at the railroad endorses the railroad's SSP. AAR requested that the chief official for safety should be required to sign the system safety program, not the chief official at the railroad. AAR believes that the title of "chief official at the railroad" is ambiguous because railroads have different organizational structures and there may not be one person with the title of "chief official." AAR claims that FRA has departed from the language in the statutory mandate which requires the chief official for safety to sign the SSP plan. AAR also believes that the chief official for safety is the more appropriate person to sign the SSP plan because he/she will be more familiar with the details of the SSP

than the other senior railroad officials and the chief official for safety will be directly responsible for the preparation of the SSP plan. FRA does not disagree that the chief official for safety should be required to sign the SSP plan. Indeed, the chief official for safety is not only required by this rule to sign the SSP plan but is required to certify that the contents of the SSP plan are accurate and that the railroad will implement the contents of the plan. See 49 CFR 270.201(a)(3)(i). FRA is not deviating from the requirements in the statutory mandate. Section 270.201(a)(3)(i) virtually mirrors the language in section 20156(b). AAR has mistaken § 270.103(b) as requiring the chief official at the railroad to sign the SSP plan. This paragraph requires the chief official at the railroad only to sign the SSP policy statement, not the entire SSP plan. Prior experience with effective risk management programs has demonstrated to FRA the importance of the active involvement of the highest officials in improving safety and safety culture. For this reason, FRA has determined that the chief official at the railroad must sign the SSP policy statement.

FRA notes that this policy statement is also required to describe the safety philosophy and culture of the railroad. Section 270.101(b) requires a railroad to design its SSP so that it promotes and supports a positive safety culture as defined by § 270.5. In order for a railroad to properly design its SSP so that it promotes and supports a positive safety culture, it first needs to describe its safety culture and philosophy. As discussed previously, FRA believes that there are 10 elements that are critical to a strong safety culture and these 10 elements provide the necessary framework for a railroad to comprehensively describe its safety culture. Once its safety culture is described, the railroad must also describe how it measures the success of its safety culture pursuant to paragraph (t) of this section. The requirement for this description was proposed in § 270.103(c)(1) of the NPRM; however, as discussed in the next paragraph, FRA has determined to delete proposed § 270.103(c).

As proposed in the NPRM, paragraph (c) would have required a railroad to set forth a statement in its SSP plan that describes the purpose and scope of the railroad's SSP. The statement would have been required to have, at a minimum, three elements. However, upon further consideration, FRA has determined that these three elements are better placed elsewhere in the rule. Therefore, proposed § 270.103(c),

Purpose and scope of system safety program, has been removed. As noted above, proposed § 270.103(c)(1) has been moved to § 270.103(b), System safety program policy statement, and proposed § 270.103(c)(2) and (3) have been moved to § 270.103(e), Railroad management and organizational structure, which was proposed as § 270.103(f) in the NPRM. FRA believes by moving these sections, the requirements are clearer and more consistent.

Paragraph (c) of the final rule, proposed as paragraph (d) in the NPRM, addresses the importance of goals in a SSP. The central goal of a SSP is to manage or eliminate hazards and the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. FRA believes one way to achieve this central goal is for a railroad to set forth goals that are designed in such a way that when the railroad achieves these goals, the central goal is achieved as well. The APTA System Safety Manual served as the model for the guidelines set forth in paragraph (c).

Paragraph (c) requires a railroad to include as part of its SSP plan a statement that defines the goals for its SSP. The statement must describe the clear strategies on how the railroad will achieve these goals. These strategies will be the railroad's opportunity to provide its vision on how these particular goals will ultimately reduce the number and rates of railroad accidents, incidents, injuries and fatalities. The statement must also describe what the railroad's management's responsibilities are to achieve the system safety goals. This statement will make it clear to the railroad, railroad employees, and FRA who, and at what level within management, is responsible for ensuring that the stated goals are achieved.

Rather than setting forth specific requirements that these goals must satisfy, paragraph (c) contains general requirements. This allows railroads the flexibility to establish goals specific to their operations. The general parameters of these goals are that they should be—

- long-term, so that they are relevant to the railroad's SSP. This does not mean that goals cannot have relevance in the short-term. Rather, goals must have significance beyond the short-term and continue to contribute to the SSP. The NPRM proposed that the goals should be relevant to the railroad "throughout the foreseeable life of the railroad." FRA determined to delete the quoted language to reduce any confusion;

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

- measurable, so that they are designed in such a way that it is easily determined whether each goal is achieved or at least progress is being made to achieve the goal; and
- consistent with the overall goal(s) of the SSP, in that they must be focused on the identification of hazards and the elimination or mitigation of the resulting risks.

FRA notes that the NY MTA, in commenting on the NPRM, believes it is critical that FRA and OSHA align their positions related to numerical goals. NY MTA states that OSHA has indicated that simply setting numerical safety goals discourages accident reporting and that the goal of a SSP as described in the NPRM appears to be focused on setting such numerical goals. NY MTA is concerned that any conflict between OSHA's perspective and the main goal of a SSP program could have the unattended effect of hampering safety programs.

FRA agrees with NY MTA that the goals of a SSP cannot be focused exclusively on numerical values, *e.g.*, accident rates, employee injury rates, etc.; however, FRA believes that paragraph (c), like the SSP rule as a whole, does not focus solely on numerical goals. While the central goal of a SSP is to manage risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities, this is not the sole goal of a SSP. A SSP must be designed and implemented so that it systematically reduces hazards and the resulting risks on a railroad's system. This rule provides each railroad with the flexibility to adapt a SSP to its system—the rule is not focused on a rigid numerical goal. A properly implemented SSP should naturally result in reduced rates of railroad accidents, incidents, injuries, and fatalities.

Paragraph (d), proposed as paragraph (e) in the NPRM, requires a railroad to set forth a statement in its SSP plan describing the characteristics of the railroad's system. FRA received comments from AAR, Labor Organizations, and the NY MTA regarding this paragraph. The railroad's system description is an important part of the overall SSP. This is the section where the railroad will provide sufficient information to allow a basic understanding of the railroad and its operations. A good system description is important to understand the operating

environment and interfaces that occur during operation of passenger trains, especially those elements that may positively or negatively affect safety. If the system is not described accurately, then the risk-based hazard analysis and resulting mitigations may be flawed.

Understanding the breadth of the railroad system is also fundamentally necessary for FRA to be able to review and audit a railroad's SSP. This description will allow FRA to determine whether the railroad's program sufficiently covers the railroad's operations and the extent of the risks/hazards on its system. The description will also focus the railroad on its staff and contractors that have an effect on the safety of its operations and, therefore, have an effect on the success of its SSP.

This information is required for FRA to understand the extent of infrastructure and operations so that they can relate the safety aspects of the plan to the railroad specifically. When carrying out enforcement action such as reviewing annual assessments or performing audits, FRA will have a basis of understanding for what, where and who is responsible. This is a key input in order to establish a "baseline" of a railroad's safety environment and culture.

FRA notes that passenger railroads often answer to officials representing governmental jurisdictions served by those railroads. FRA believes a SSP plan will be ineffective if those officials cannot easily be made aware of the nature of the railroads' operations and how those operations are made safer through the SSPs. FRA believes that for the SSPs required by RSIA to be effective, this information must be readily available to relevant governmental officials. Further, this information will make it easier for those governmental officials to inform railroads of, or place emphasis upon, relevant hazards, improving the quality of the SSPs. For example, States have safety rail inspectors who work in collaboration with FRA, to which that information will be useful. Railroads for the most part have this information currently; it's simply a matter of inserting into the plan document.

Generally, the description of the characteristics of the railroad's system should be sufficient to allow persons who are not familiar with the railroad's operations and railroad operations in general to understand the railroad's system and its basic operations. Specifically, this statement describes the following:

- The railroad's operations (including any host operations), including the role,

responsibilities, and organization of the railroad's operating departments.

- The physical characteristics of the railroad, including the number miles of track over which the railroad operates, the number of stations the railroad services, the number and types of grade crossings over which the railroad operates, on which segments the railroad shares track with other railroads, the maximum authorized speed, and toxic inhalation hazard routing.

- The scope of the service the railroad provides, including the number of passengers, the number of routes, and the days and hours when service is provided. The railroad may also provide a system map.

- The maintenance activities performed by the railroad, including the role, responsibilities, and organization of the railroad's various maintenance departments and the type of maintenance required by the railroad's operations and facilities.

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

The NPRM proposed requiring a description of the history of the railroad's operations and physical plant. FRA determined that these descriptions were not necessary because any pertinent information they would provide is already addressed by the other descriptions required by paragraph (d)(1).

Paragraph (d)(2) requires a railroad to identify in its SSP plan certain persons that provide or utilize significant safety-related services. The railroad will identify persons that have entered into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad for purposes related to railroad operations. The term "significant safety-related services" is intended to be understood broadly to give a railroad the flexibility to evaluate the services other entities provide to the railroad and the degree that these services are safety-related. FRA has edited this section from the NPRM to clarify who needs to be identified by the railroad. First, the NPRM proposed that a railroad identify "entities or persons that provide significant safety-related services." However, FRA determined that the term "entities" was redundant because the definition for "person" in § 270.5 covers all of the entities that would need to be identified, therefore, the term "entities" has been removed. Second, the proposed rule text in the NPRM did not include the requirement that the person must be providing the services on the

railroad's behalf. This was added to clarify the relationship between the railroad and the person providing the service. The contractual basis of this relationship is discussed further in this section.

Third, the proposed rule text in the NPRM did not include the requirement that the railroad describe the persons that utilize significant safety-related services of the railroad; however, the NPRM did request comment on whether FRA should add this requirement. FRA received comments from AAR, APTA, Labor Organizations, and NY MTA in response to this request. AAR was unsure of which persons FRA meant when referring to persons that utilize significant safety-related services and suggested that the railroad itself could be a person that utilizes significant safety-related services. APTA commented that general considerations can be given for customers, motorists using highway rail-grade crossings and communities served by safe alternative transportation. However, APTA believes that there is no useful purpose for including this requirement in the rule. FRA has added the requirement that the railroad identify persons that utilize significant safety-related services, but included language to clarify which persons would fall under this category. The railroad will identify persons that utilize significant safety-related services provided by the railroad for the purpose related to railroad operations. For example, if a railroad contracts with a company to perform bridge maintenance, that company provides a significant safety-related service to the railroad on behalf of the railroad and would be identified as so under this paragraph. If during the bridge maintenance, the company uses the railroad's roadway worker protection, that company is then utilizing a significant safety-related service (roadway worker protection) provided by the railroad and would be identified as so under this paragraph. A railroad does not have to identify persons providing or utilizing significant safety-related services for purposes unrelated to railroad operations, such as railroad passengers or motor vehicle drivers who benefit from a highway-rail grade crossing warning system.

Fourth, FRA has added a contractual element to the relationship between the railroad and persons that provide or utilize significant safety-related services. This was added to ensure that there is a formalized agreement between the railroad and the person regarding the service that is provided or utilized. With the formalized agreement, the duties of the contractor would be clear

and, therefore, the extent they are performing or utilizing significant safety-related services of the railroad would be clear as well. FRA would give a railroad significant discretion to identify which persons utilize or provide significant safety-related services. In interpreting this proposed provision, emphasis would be placed upon the words "significant" and "safety-related." FRA does not expect a railroad to identify every person that provides it services. For example, a railroad would be expected to identify a signal contractor that routinely performed services on its behalf, but not a contractor hired on a one-time basis to pave a grade crossing. If a railroad was uncertain whether a person should be identified, it would be encouraged to contact FRA for further guidance. Generally, however, this section would require identification of those persons whose significant safety-related services or utilization would be affected by the railroad's SSP. FRA recognizes that not all railroad operations are the same; thus, not all persons that utilize or provide significant safety-related services will be the same. During its review of a railroad's SSP plan, FRA will determine whether the persons the railroad has sufficiently described significant safety-related services and identified the proper persons.

NY MTA recommended that FRA permit railroads to use the same safety-related matrix for designating employees that was proposed in the Training Standards NPRM to identify persons that provide significant safety-related services. NY MTA believes this will be more practical for staff changes, while still establishing accountability. On November 7, 2014, FRA published in the **Federal Register** a Final Rule entitled "Training, Qualification, and Oversight for Safety-Related Railroad Employees." 79 FR 66460. Generally, the Training Standards Rule requires each railroad or contractor that employs one or more "safety-related railroad employee" as defined by § 243.5, to develop and submit a training program to FRA for approval and to designate the minimum qualifications for each occupational category of employee. *Id.* The Training Standards Rule defines "safety-related railroad employee" as follows:

*Safety-related railroad employee* means an individual who is engaged or compensated by an employer to: (1) Perform work covered under the hours of service laws found at 49 U.S.C. 21101, *et seq.*; (2) Perform work as an operating railroad employee who is not subject to the hours of service laws found at 49 U.S.C. 21101, *et seq.*; (3) In the application of parts 213 and 214 of this chapter, inspect,

install, repair, or maintain track, roadbed, and signal and communication systems, including a roadway worker or railroad bridge worker as defined in § 214.7 of this chapter; (4) Inspect, repair, or maintain locomotives, passenger cars or freight cars; (5) Inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter; (6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition; (7) Directly instruct, mentor, inspect, or test, as a primary duty, any person while that other person is engaged in a safety-related task; or (8) Directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with § 243.205.

79 FR 66502.

Pursuant to § 243.101(c), the railroad is required to provide a table or other suitable format that lists, among other things, the railroad's safety-related employees. 49 CFR 243.101(c). While the matrix required by the Training Standards rule may provide the railroads with guidance regarding which persons provide significant safety-related services, it is not clear whether the matrix would cover persons that utilize significant safety-related services. Therefore, FRA declines to adopt NY MTA's suggestion.

The Labor Organizations expressed concern that railroads may contract out the majority of their safety-related services or allow a third party to perform such services to evade their statutory obligations under this part. The Labor Organizations believe that simply requiring identification of the persons that a railroad may or may not use for safety-related services would make it very difficult for FRA to determine whether the railroads are complying with this part. To avoid such difficulty, the Labor Organizations request that FRA make clear that the responsibility for compliance with this rule is non-delegable. Pursuant to §§ 270.3 and 270.7, as explained above in the accompanying section-by-section analysis, the railroad is ultimately responsible for compliance with this final rule and cannot delegate this duty. Section 270.7(b) provides that a railroad may contract with another person to perform the duties under this rule; however, that person is required to perform these duties in the same manner as the railroad and is subject to FRA enforcement action. The railroad remains accountable even if it does contract with another person to perform the duties required by this rule. Of course, the other person must perform the required duties in compliance with

this rule, and both the railroad and the contracted person are subject to FRA enforcement action.

Finally, an individual also commented that it is important to ensure that persons providing significant safety-related services are qualified or credentialed, or both, to provide such services. FRA believes such a requirement is unnecessary because persons that perform any duty on behalf of the railroad are required to perform these duties consistent with this regulation and any other applicable safety laws and regulations. Therefore, a railroad is required to ensure that any person that provides significant safety-related services do so consistent with this regulation and any other applicable safety laws and regulations.

Paragraph (d)(3) incorporates text from proposed paragraph (f)(4) of the NPRM. FRA determined that the requirements in proposed paragraph (f)(4) were better placed in paragraph (d) because the requirements are part of the railroad system description. Paragraph (d)(3) requires the railroad to describe the relationship and responsibilities between it and certain other persons. These persons include any host railroads, contract operators, shared track/corridor operators, and other persons that utilize or provide significant safety-related services as identified by the railroad in paragraph (d)(2) of this section. Describing the relationship and responsibilities between the railroad and any host railroads, contract operators, or shared track/corridor operators should be relatively straight forward because a railroad most likely has entered into contracts or memoranda of agreement with these persons that outline this information. The description should be detailed enough so that FRA can understand the basis of the relationship and the responsibilities of each person based on that relationship. For example a commuter railroad may contract out operation of the commuter trains to one corporation and contract out track maintenance on the commuter railroad's own trackage to another corporation. For a certain section of the route, the commuter railroad's trains are hosted by another railroad on the other railroad's tracks and that other railroad provides the dispatching and signal/track maintenance for that portion of track. The commuter railroad would need to outline these relationships and responsibilities in the plan. Not only to ensure that FRA understands, but also to ensure the railroad has a complete understanding of who performs the various activities. Many departments know who and what they do and

contract out, but do not have a grasp of the big picture for the entire commuter railroad.

Paragraph (e), proposed as paragraph (f) in the NPRM, requires a railroad to set forth a statement in its SSP plan that describes the management and organizational structure of the railroad. RSIA requires a railroad's hazard analysis to identify and analyze the railroad's management structure. 49 U.S.C. 20156(c). Under this section, the railroad will identify its management structure and how safety responsibilities are distributed throughout the railroad.

As discussed previously, to maintain consistency and increase clarity, proposed paragraphs (c)(2) and (3) have been incorporated into paragraph (e) of this section. The statement pursuant to paragraph (e) shall include a chart or other visual representation of the organizational structure of the railroad; description of the railroad's management responsibilities within the SSP; description of how the safety responsibilities are distributed within the railroad organization; clear identification of the lines of authority used by the railroad to manage safety issues; and a description of the roles and responsibilities in the railroad's system safety program for each host railroad, contract operator, shared track/corridor operator, and other person that utilizes or provides significant safety-related services as identified by the railroad pursuant to (d)(2) of this section. The statement shall also describe how each host railroad, contractor operator, shared track/corridor operator, and any other person that utilizes or provides significant safety-related services as identified by the railroad pursuant to paragraph (d)(2) of this section supports and participates in the railroad's system safety program, as appropriate. Under paragraph (e)(1), the chart or other visual representation of the organizational structure of the railroad does not need to be overly detailed. Rather, it must identify the divisions within the railroad, the key management positions within each division, and titles of the officials in those positions.

Under paragraph (e)(2), the railroad shall describe the railroad's management's responsibilities within the SSP. This description clarifies who within the railroad's management are responsible for which aspects of the SSP.

Under paragraph (e)(3), a railroad must identify how the safety responsibilities are distributed within the railroad's departments. A railroad may have one department that handles safety matters or there may be multiple

departments and each department has separate and distinct responsibilities for handling safety matters. Regardless of how the railroad distributes the overall responsibility to manage safety issues, it is important that the railroad identifies and describes how safety is being managed on its system.

Under paragraph (e)(4), the railroad also needs to clearly identify which of the management positions within the department(s) are responsible for managing the safety issues within the railroad. Identification of these lines of authority allows FRA to determine who within the organization and at what level has responsibility for managing the safety issues. While FRA recognizes that safety is everybody's responsibility within the railroad organization, the management personnel responsible for managing the safety issues need to be identified.

Paragraph (e)(5) requires the railroad to describe the roles and responsibilities in the railroad's SSP for each host railroad, contract operator, shared track/corridor operator, and any other person that utilizes or provides significant safety-related services. Since these persons play a key role in the safe operation of the railroad, their role and responsibilities in the railroad's SSP must be described.

Paragraph (e)(5) also requires the railroad to describe how each host railroad, contractor, shared track/corridor operator, and any other person that utilizes or provides significant safety-related services as identified by the railroad pursuant to paragraph (d)(2) supports and participates in the railroad's SSP, as appropriate.

Paragraph (f), proposed as paragraph (g) in the NPRM, requires a railroad's SSP plan to include a description of the process the railroad will use to implement its SSP. RSIA requires passenger railroads to implement a SSP plan that is approved by the Secretary. 49 U.S.C. 20156(a)(1)(C). Under this section, the railroad will describe how it will implement its SSP, which will allow FRA, during initial plan approval and subsequent audits, to determine if the railroad is properly implementing its SSP.

The implementation process must, at a minimum, address the roles and responsibilities of each position (including those held by employees, contractors, and other persons that utilize or provide significant safety-related services) that has significant responsibilities to implement the SSP. The addition of persons that utilize significant safety-related services is consistent with the discussion in paragraph (d)(2). The NPRM proposed

that the statement would address the roles and responsibilities of each position and job function that has significant responsibilities to implement the SSP. FRA determined that the term "job function" was redundant; therefore, all references in the rule have been removed. The process must also identify the milestones necessary to be reached to properly implement the SSP. FRA did not receive any comments in response to paragraph (f); however, as discussed in the next paragraph, FRA has included the requirement in paragraph (f) that the SSP be fully implemented within 36 months of FRA approval. Further, in the NPRM this paragraph proposed to require an implementation plan; however, FRA has determined that a description of the implementation process is more appropriate than requiring a formal plan.

FRA notes that in the NPRM there was no proposal for the railroad to specify a timeframe in which it would be required to fully implement, as defined in § 270.5, its SSP; however FRA believes such a timeline is necessary. FRA has determined that 36 months is a sufficient amount of time for a railroad to fully implement its SSP. With such a time frame, a railroad can effectively allocate the resources necessary to fully implement its SSP while also prioritizing the implementation of specific elements. Further, with this timeframe, the railroad will be able to more precisely set the milestones as required by this section. While "fully implemented" is defined in § 270.5, there are no rigid criteria that determine if a program is fully implemented. To determine if a program is fully implemented, FRA will consider the extent to which each section of the plan is implemented and the railroad, along with its stakeholders, are actively fulfilling each section. For example, regarding paragraph (c), System safety program goals, FRA will consider the extent to which a railroad has developed written goals that are long-term, meaningful, measurable, and focused on the identification of hazards and the mitigation or elimination of the resulting risks, and whether there are programs in place for the railroad to achieve the written goals.

The positions that will be described pursuant to paragraph (f) are those that are responsible for implementing the major elements of the SSP, to the extent that the individuals having these positions have clear and concrete roles and responsibilities. Not every individual who participates in the railroad's SSP needs to be described as part of the implementation process but

rather only those individuals who have significant responsibilities for implementing the railroad's SSP. The phrase "significant responsibilities" is intended to be broadly defined to provide the railroads the flexibility to determine, based on their individual operations, what may be considered "significant responsibilities."

In its SSP plan a railroad will set forth the milestones to demonstrate that it has properly implemented its SSP. Each railroad's SSP will be different; therefore, the milestones that must be achieved to properly implement a SSP will be different. A railroad has the flexibility to determine, based on its own SSP and not rigid requirements, realistic benchmarks that need to be achieved to properly implement its SSP. FRA understands that there may be unforeseeable circumstances that can cause a railroad to adjust the implementation of its SSP and subsequently adjust these milestones. The important consideration is that the railroad sets forth milestones that can be used to determine the progress of the railroad's implementation of its SSP.

Paragraph (g), proposed paragraph (h) in the NPRM, addresses a railroad's maintenance and repair program. RSIA requires a railroad's hazard analysis to "identify and analyze" the railroad's "infrastructure" and "equipment." 49 U.S.C. 20156(c). Under this section, the railroad will identify its procedures and processes for the maintenance, repair, and inspection of such infrastructure and equipment. This identification is necessary for the railroad to conduct a thorough risk-based hazard analysis and will allow FRA, during initial plan review and subsequent audits, to determine if the railroad's SSP sufficiently addresses the risk and hazards generated by the railroad's infrastructure and equipment. FRA received three comments in response to this paragraph. Based on these comments, paragraph (g)(4) was added.

Paragraph (g)(1) requires a railroad's SSP plan to identify and describe the processes and procedures used for maintenance and repair of its infrastructure and equipment directly affecting railroad safety. The phrase "infrastructure and equipment directly affecting railroad safety" is intended to be broadly understood to provide the railroad the opportunity to take a realistic survey of its particular operations and make the determination of which infrastructure and equipment directly affect the safety of that railroad. However, as guidance, a list of the types of infrastructure and equipment that are considered to directly affect railroad safety is provided. This list includes:

Fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, passenger train/station platform interface (gaps), and traction power distribution systems. The list in the NPRM did not include passenger train/station platform interface (gaps); however, FRA believes passenger train/station platform interface (gaps) are an important element of a railroad's infrastructure and will provide the railroad with further opportunities to identify hazards and the resulting risks and eliminate or mitigating these hazards. Once the railroad has determined what infrastructure and equipment directly affect railroad safety, it will then identify and describe the processes and procedures used for the maintenance and repair of that infrastructure and equipment. The safety of a railroad's operations depends greatly upon the condition of its infrastructure and equipment; therefore, these maintenance and repair processes and procedures should and are expected to already be in place.

Under paragraph (g)(2), each description of the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting safety must include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment. Multiple FRA regulations require a railroad to conduct testing and inspection of infrastructure and equipment, and paragraph (g)(2) addresses the processes and procedures that the railroad has developed to meet these regulatory standards. For example, pursuant to 49 CFR part 234, a railroad must inspect, test, and repair warning systems at highway-rail grade crossings. Under paragraph (g)(2), the railroad will describe the internal procedures it has developed to conduct such inspections, tests, and repairs and how it educates its employees on the proper way to conduct the inspection, testing and repair of highway-rail grade crossing warning systems. As discussed below, in certain situations, paragraph (g)(3) permits referencing these manuals in the SSP plan rather than providing the entire manual.

Typically, railroads have a manual or manuals that describe the maintenance and testing procedures and processes used to conduct testing and inspections of the infrastructure and equipment. FRA has included paragraph (g)(3) to address the use of such manuals in a SSP plan. Rather than including an entire manual in its SSP plan, if the manual satisfies all applicable Federal regulations, in most cases simply

referencing the manual in the SSP plan will satisfy this paragraph. If a manual does not comply with all applicable Federal regulations, it cannot be included in the plan. If any the regulations that apply to these are updated, the manuals and references to such will need to be updated as well. Approval of a SSP plan that references manuals that describe the maintenance and testing procedures and processes used to conduct testing and inspections of the infrastructure and equipment does not necessarily mean that the manuals satisfy all applicable regulations. Rather, each manual must independently comply with the applicable regulations and is subject to a civil penalty if not in compliance. If FRA finds it necessary to review the manuals, FRA will examine whether the manuals are current, if they are readily available to the employees who are performing the functions the manuals address, and if these employees have been trained on their use.

While FRA is always concerned with the safety of railroad employees performing their duties, employee safety in maintenance and servicing areas generally falls within the jurisdiction of OSHA. It is not FRA's intent in this rule to displace OSHA's jurisdiction regarding the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection in 49 CFR part 218. In other rules, FRA has included a provision that makes it clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. *See, e.g.,* 49 CFR 238.107(c).

In the NPRM, FRA sought comment on whether such a clarifying statement was necessary for any such subject matter that the proposed rule may affect. APTA, the Labor Organizations, and an individual commenter all provided comments in response to this request. All of the commenters agree that the final rule should contain such a clarifying statement; therefore, paragraph (g)(4) has been included in this section. Modeled after 49 CFR 238.107(c), paragraph (g)(4) makes clear that FRA neither intends to displace OSHA jurisdiction with respect to employee working conditions generally nor specifically with respect to the maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety. FRA does not intend to approve any specific portion of a SSP plan that relates exclusively to employee working conditions covered by OSHA. The term "approve" is used to make it clear that any part of a plan that relates to employee working

conditions exclusively covered by OSHA will not be approved even if the overall plan is approved. Additionally, the term “specific” reinforces that the particular portion of the plan that relates to employee working conditions exclusively covered by OSHA will not be approved; however, the rest of the plan may still be approved. As discussed below, paragraph (g)(4) also applies to paragraph (k) regarding OSHA jurisdiction over any workplace safety programs. If there is any confusion regarding whether a plan covers an OSHA-regulated area, FRA is available to provide assistance.

Paragraph (h), proposed as paragraph (i) in the NPRM, requires a railroad’s SSP plan to set forth a statement describing the railroad’s processes and procedures for developing, maintaining, and ensuring compliance with the railroad’s rules and procedures directly affecting railroad safety and the railroad’s processes for complying with applicable railroad safety laws and regulations. RSIA requires a railroad’s hazard analysis to identify and analyze the railroad’s operating rules and practices. 49 U.S.C. 20156(c). Under this paragraph, the railroad will identify the railroad’s operating rules and practices. FRA did not receive any comments in response to this paragraph as proposed in the NPRM; however, the term “maintenance” has been included in paragraph (h)(1) to be consistent with paragraph (h)(3). This statement describes how the railroad not only develops, maintains, and complies with its own safety rules, but also how the railroad complies with applicable railroad safety laws and regulations. The statement includes identification of the railroad’s operating and safety rules and procedures that are subject to review under chapter II, subtitle B of title 49 of the Code of Federal Regulations, *i.e.*, all of FRA’s railroad safety regulations.

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

FRA regulations”; however, to be consistent with the other requirements in paragraph (h), FRA has revised this language to “railroad safety laws and regulations.”

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

Paragraph (i), proposed as paragraph (j) in the NPRM, requires each railroad to train necessary personnel on in its SSP plan. As proposed, paragraph (i) did not have the explicit requirement that the railroad train the necessary employees; thus, paragraph (i)(1) has been added to make this clear. Paragraph (i) also requires that each railroad establish and describe its plan how the necessary personnel will be trained on the SSP. As proposed in the NPRM, paragraph (i) did not require a railroad to establish a plan addressing how its employees will be trained on the SSP. Since some railroads will not have a SSP in place before the effective date of this final rule, FRA determined that it was necessary to include the requirement that a railroad not only describe but also establish a plan addressing how its employees will be trained on the SSP. This ensures that a railroad has such a plan in place and that it can be properly described pursuant to this paragraph.

The SSP training plan will describe the procedures in which employees that are responsible for implementing and supporting the program and any other person that utilizes or provides significant safety-related services will be trained on the railroad’s SSP. The NPRM proposed that “contractors who provide significant safety-related services” needed to be trained as well. However, FRA determined that the phrase “persons utilizing or performing significant safety-related services” includes contractors who provide significant safety-related services; therefore, the phrase “contractors who provide significant safety-related services” has been removed. A railroad’s SSP can be successful only if those who are responsible for implementing and supporting the program understand the requirements and goals of the program. To this end, a railroad would train those responsible for implementing and supporting the

railroad’s SSP on the elements of the program so that they have the knowledge and skills to fulfill their responsibilities under the program.

For each position or job title that has been identified under paragraph (f)(1)(i) as having significant responsibility for implementing a railroad’s SSP, the railroad’s training plan must describe the frequency and the content of the training on the SSP that the position or job title receives. If the railroad does not identify a position or job title under paragraph (f)(1)(i) as having significant responsibility to implement the SSP but the position or job title is safety-related or has a significant impact on safety, personnel in these positions will be required to receive basic training on the system safety concepts and the system safety implications of their position. Even though the personnel may not have responsibilities to implement the railroad’s SSP, they do have an impact on the program because their position is safety-related or has a significant impact on safety, or both. It is important that all persons who may have an impact on the success of a railroad’s SSP understand the requirements of the program so they can work together to achieve its goals.

Paragraph (i)(5) provides that a railroad may conduct its SSP training by classroom, computer-based, or correspondence training. Paragraph (i) is not intended to limit the forms of training; rather, it provides the railroads the flexibility to conduct training using methods other than traditional classroom training. SSP training may also be combined with a railroad’s regular safety or rules training and in some cases SSP training could be included in field “tool box” safety training sessions. APTA requested that FRA make it clear in the rule text that the methods listed in paragraph (i)(4) were illustrative and not restrictive. FRA has revised the text of paragraph (i)(4) to address this concern. Additionally, for clarity and consistency with 49 CFR part 243, the methods listed are “classroom, computer-based, or correspondence training,” which differs slightly from the NPRM; however, as discussed, the list is only illustrative and not restrictive.

Paragraph (i)(6) requires each railroad to keep a record of all training conducted under paragraph (i) and describe the process it will use to maintain and update these training records. The requirement that the railroad keep a record of all training was originally proposed in paragraph (i)(1); however, FRA believes it is more consistent to include it in paragraph (i)(6). Paragraph (i)(7) requires each railroad to describe the process that it

will use to ensure that it is complying with the requirements of the training plans as required by this part.

NY MTA commented that the training required under this part should apply only to railroads that contract out their operations. NY MTA believed that contractors who are not responsible for actual railroad operations will be governed by the then-forthcoming Training Standards Rule, which proposed to require these contractors to certify that they have trained their employees on all the appropriate safety protocols

Requiring a SSP training component for certain railroad employees and officers is necessary because FRA's Training Standards Rule would not cover such SSP training for each type of employee or officer that this final rule describes as needing the training. As discussed *supra*, in late 2014, FRA published the final Training Standards Rule. 79 FR 66460. Generally, the Training Standards Rule requires each railroad or contractor that employs one or more "safety-related railroad employee" as defined by § 243.5, to develop and submit a training program to FRA for approval and to designate the minimum qualifications for each occupational category of employee. 49 CFR part 243. Some employees and officers required by paragraph (i) to receive system safety training would be considered a "safety-related railroad employee" under the Training Standards Rule and others would not. Since all employees and officers required to receive system safety program training under this final rule would not be required to receive such training pursuant to the Training Standards Rule, FRA declines to narrow the applicability of paragraph (i) as suggested by NY MTA. Furthermore, having a training component in this final rule does not create a duplicate training program filing requirement or require duplicate training as the Training Standards Rule specifically permits an employer to elect to cross-reference training programs or plans required by other FRA regulations in a part 243 submission, rather than resubmitting that program or plan for additional FRA review and approval. 49 CFR 243.103(b). As on-the-job training (OJT) is not expected to be a requirement of any SSP training program or plan, the provision of § 243.103(b) that mentions adding an OJT component would not be applicable to this final rule.

Paragraph (j), proposed as paragraph (k) in the NPRM, requires that a railroad's SSP plan describe the processes used by the railroad to

manage emergencies that may arise within its system. A strong SSP will include effective emergency management processes. This description will allow FRA, during initial plan review and subsequent audits, to understand the railroad's emergency management processes, assess whether the railroad is complying with them, and determine if the processes adequately cover potential emergencies. FRA did not receive any comments in response to the proposal; its text remains unchanged in this final rule. The description must include the processes the railroad uses to comply with the applicable emergency equipment standards in part 238 of this chapter and the passenger train emergency preparedness requirements in part 239 of this chapter.

Paragraph (k), proposed as paragraph (l) in the NPRM, requires that the railroad's SSP plan describe the programs that the railroad has established that protect the safety of its employees and contractors. The description must include: (1) The processes that have been established to help ensure the safety of employees and contractors while working on or in close proximity to the railroad's property as described in paragraph (d) of this section; (2) the processes to help ensure that employees and contractors understand the requirements established by the railroad pursuant to paragraph (f)(1) of this section; (3) any fitness-for-duty programs or any medical monitoring programs; and (4) the standards for the control of alcohol and drug use in part 219 of this chapter.

Workplace safety is an integral part of a railroad's SSP and has a significant impact on railroad safety. Workplace safety touches many of the elements embedded in a SSP and should also be part of the railroad's overall safety philosophy and culture. This description will allow FRA, during initial plan review and subsequent audits, to understand the railroad's workplace safety programs and determine whether the railroad's SSP sufficiently addresses any gaps in the programs.

The NPRM originally proposed that the statement "describe any" of the programs and processes listed; however, FRA believes that this may have indicated that a railroad would not be required to describe all of the programs and processes listed, which was not the intent. FRA has revised the language to make clear that a railroad is required to describe all of the programs and processes listed. FRA also notes that proposed paragraph (k)(3) listed "fatigue management programs established by

this part" as one of the fitness-for-duty programs to be described. However, as discussed in the Statutory Background section, to minimize confusion regarding the separate FMP Working Group process and the ongoing fatigue management plans rulemaking, the placeholder in this rule for fatigue management plans, paragraph (s), has been deleted. Therefore, the proposed requirement in paragraph (k)(3) that the railroad describe "fatigue management programs established by this part" has not been included in this final rule.

Moreover, in the NPRM, paragraph (k)(3) proposed that the statement include a description of "fitness-for-duty programs, including standards for the control of alcohol and drug use contained in part 219 of this chapter, and medical monitoring programs." However, the standards under part 219 are not necessarily "fitness-for-duty programs." Therefore, to minimize the potential for confusion, the final rule separates the required description of any fitness-for-duty programs or any medical monitoring programs (paragraph (k)(3)) from the description of the standards for the control of alcohol and drug use in part 219 of this chapter (included as paragraph (k)(4)). This change from the NPRM does not add to or remove any of the substantive requirements proposed in the NPRM.

Employees and contractors of the railroad are exposed to many hazards and risks while on railroad property. A railroad's SSP is required to take into consideration the safety of these persons and the programs and processes the railroad already has in place to address the hazards they face and resulting risks. As explained in the discussion of paragraph (g)(4), FRA is always concerned with the safety of employees in performing their duties; however, employee safety in maintenance and servicing areas generally falls within the jurisdiction of OSHA. It is not FRA's intent in this rule to displace OSHA's jurisdiction regarding the safety of employees while performing inspections, tests, and maintenance, except where FRA has already addressed workplace safety issues, such as blue signal protection. As with paragraph (g), FRA requested comment on whether it is necessary to include in the final rule a provision making clear that FRA does not intend to displace OSHA's jurisdiction over certain subject matters. Paragraph (g)(4) was included in response to the comments received and that provision makes clear that nothing in this rule, including paragraph (k), is intended to displace OSHA's jurisdiction.

The Labor Organizations raised a concern on whether paragraph (k) would create new, if any, rights for carriers to use fitness-for-duty programs and medical monitoring programs to undermine the forthcoming statutory-mandated fatigue management program. The Labor Organizations requested that FRA make clear in the final rule that the SSP regulation is not a fitness-for-duty or medical standards regulation. Neither paragraph (k) nor the SSP rule as a whole create any new rights regarding fitness-for-duty or medical monitoring programs, consistent with FRA's intent.

Paragraph (l), proposed as paragraph (m) in the NPRM, requires a railroad to establish and describe in its SSP plan the railroad's public safety outreach program to provide safety information to the railroad's passengers and the general public. Paragraph (l) also requires the railroad's safety outreach program to have a means in which railroad passengers and the general public can report hazards to the railroad.

A railroad's passengers and the general public play a vital role in the success of the railroad's SSP. The public safety outreach program requires the railroad to directly communicate safety information to both passengers and the general public and also allow these individuals to alert the railroad about safety hazards they observe. FRA will review the programs during the initial SSP plan review and subsequent audits to determine if the railroad's SSP sufficiently addresses any gaps in the programs.

FRA did not receive any comments in response to this paragraph; however, as proposed in the NPRM, paragraph (l) did not require a railroad's safety outreach to include a means for railroad passengers and the general public to report hazards.

As proposed in the NPRM, a railroad's safety outreach program would only provide safety information to railroad passengers and the general public, which was not the intent. While it is important for a railroad's safety outreach program to provide the necessary safety information to the railroad's passengers and to the general public so that they can minimize their exposure to the hazards and resulting risks on the railroad and take appropriate precautions, it is not the sole purpose of the program. FRA believes that it is also important for railroad passengers and the general public to provide the railroad with information regarding any hazards they observed. This information will allow the railroad to address these identified hazards and resulting risks and improve the safety of the overall railroad and the

safety information provided to the railroad passengers and the general public.

Paragraph (m), proposed as paragraph (n) in the NPRM, requires that a railroad's SSP plan describe the processes that the railroad uses to receive notification of accidents/incidents, investigate and report those accidents/incidents, and develop, implement, and track any corrective actions found necessary to address an investigation's finding(s). These processes should already be in place because they are necessary to comply with the requirements of part 225 of this chapter. Accidents and incidents can reveal hazards and risks on the railroad's system, which the railroad can then address as part of its SSP. While 49 CFR part 225 sets forth FRA's accident/incident reporting requirements, this section focuses on the actions the railroad will take to address accident/incident investigation results. These actions are important to the overall safety of a railroad's operations and will provide information to the railroad on what additional actions it can take as part of its SSP to address the hazards and resulting risks that contributed to the accident/incident.

FRA did not receive any comments in response to this paragraph as proposed in the NPRM. However, FRA has modified the paragraph to address "accidents/incidents"—rather than just "accidents," as proposed. This makes clear FRA's intent that the paragraph covers events that provide the railroad with information that may improve the safety of the railroad, which is not exclusive to accidents.

Paragraph (n), proposed as paragraph (o) in the NPRM, requires a railroad to establish and describe in its SSP plan processes that the railroad has or puts in place to collect, maintain, analyze, and distribute safety data in support of the SSP. Accurate safety data collection and the analysis and distribution of that data within a railroad can help the railroad determine where safety problems or hazards exist, develop targeted programs to address the problems and hazards, and focus resources towards the prevention of future incidents and improvement of safety culture. This description will assist FRA's review of these programs during the initial SSP plan review and audits to determine if the railroad's SSP sufficiently addresses any gaps in the programs. As proposed in the NPRM, paragraph (n) did not require a railroad to establish processes to collect, maintain, analyze, and distribute safety data in support of the SSP. Since some

railroads will not have a SSP in place before the effective date of this final rule, FRA determined that it was necessary to include the requirement that a railroad not only describe but also establish SSP data acquisition processes. This ensures that a railroad has these processes in place and that it can be properly described pursuant to this paragraph. The data acquisition process described in APTA's System Safety Manual provides guidance on the processes a railroad may use to comply with this part.

Paragraph (o), proposed as paragraph (p) in the NPRM, requires a railroad's SSP plan to describe the process(es) it employs to address safety concerns and hazards during the safety-related contract procurement process. This applies to safety-related contracts to help ensure that the railroad can address as necessary safety concerns and hazards that may result from the procurement. FRA did not receive any comments in response to this proposed paragraph. However, the term "process" was changed to "process(es)" to recognize that a railroad may have more than one process in place.

The main components of a SSP are the risk-based hazard management program and the risk-based hazard analysis. The railroad will use the risk-based hazard management program to describe the various methods, processes, and procedures it will employ to properly and effectively identify, analyze, and mitigate or eliminate hazards and resulting risks. In turn, through the risk-based hazard analysis the railroad will actually identify, analyze, and determine the specific actions it will take to mitigate or eliminate the hazards and the resulting risks. Paragraphs (p) and (q), proposed as paragraphs (q) and (r) in the NPRM, set forth the elements of the railroad's risk-based hazard management program and risk-based hazard analysis. Both of these paragraphs implement sections 20156(c) through (f). FRA received multiple comments addressing the risk-based hazard management program and the risk-based hazard analysis, and these comments are addressed accordingly.

The risk-based hazard management program will be a fully implemented program within the railroad's SSP. Paragraph (p) requires a railroad to establish and describe the various methods, processes, and procedures that, when implemented, will identify, analyze, and mitigate or eliminate hazards and the resulting risks on the railroad's system. This paragraph embodies FRA's intent to provide each railroad with the flexibility to tailor its

SSP to its specific operations. Paragraph (p) does not set forth rigid requirements for a risk-based hazard management program. Rather, more general guidelines are provided and the railroad is able to apply these general guidelines to its specific operations.

APTA commented that paragraph (p) and paragraph (q), Risk-based hazard analysis, do not contain a discussion of the variety of controls or the flexibility this SSP rule provides to the railroads to choose which procedures they will put into place to mitigate or eliminate risks. APTA points out there was substantial discussion at the RSAC on this issue and it was recognized that there are many methods a railroad can apply to keep risk as low as reasonably practicable. APTA further points out that the analysis methods were grouped by RSAC into non-formal (*e.g.*, 5 Y method) and formal (*e.g.*, fault trees and cut sets). APTA therefore requests that FRA clarify that the understandings reached by the RSAC, and which were voted upon as recommendations, are still available as tools and have not been replaced by a formal analysis required by paragraphs (p) and (q).

FRA makes clear that the rule does not limit the methods a railroad may use in its risk-based hazard management program. FRA recognizes that there was agreement in the RSAC that many methods exist to keep risk low, such as MIL-STD-882 or the Government Electronics & Information Technology Association 010 Standard. However, this rule does not prescribe which of these methods must be used. Specifically, the discussion in the NPRM of proposed paragraph (q)(5) (paragraph (p)(1)(i) of the final rule) explained that the railroad would determine the methods it would use in the risk-based hazard analysis in proposed paragraph (r) (paragraph (q) of the final rule), to identify hazards on various aspects of its system. FRA intends that each railroad use this opportunity to use known methods and consider any new or novel techniques or methods to identify hazards that best suits that railroad's operations.

FRA notes that paragraph (p) is structured differently from what was proposed in the NPRM; however, the substance of paragraph (p) remains the same.

Paragraph (p)(1) requires the railroad's risk-based hazard management program to contain eight elements. All of these elements will be fully described in the railroad's SSP plan. First, the railroad shall establish the processes or procedures that will be used in the risk-based hazard analysis to identify the hazards on the railroad's

system. This will be the railroad's opportunity to consider any new or novel techniques or methods that best suit the railroad's operations to identify hazards.

Second, the railroad must establish the processes or procedures that will be used in the risk-based hazard analysis that will analyze the identified hazards and, therefore, support the risk-based hazard management program. These processes and procedures will allow the railroad to analyze the hazards and, thus, gain the necessary knowledge to effectively identify the resulting risk.

Third, the railroad must establish the methods that will be used in the risk-based hazard analysis to determine the severity and frequency of hazards and to determine the corresponding risk. Once the railroad has identified the hazards, it will determine the corresponding risk. By developing a method that effectively identifies the severity and frequency of the hazards and determines the resulting risks, the railroad will be able to effectively prioritize the mitigation or elimination of the hazards and resulting risks.

In its comments on the NPRM, Parsons Brinckerhoff inquired as to FRA's intent behind using the terms "calculate" and "resulting risk" in the proposed rule text for paragraph (p)(1)(iii). Parsons Brinckerhoff questioned if FRA's use of the term "calculate" meant that the estimation of the resulting risk should be quantitative and that the use of the term "resulting risk" meant that the risk is a precise product of determining severity and consequence of hazards. Parsons Brinckerhoff suggested replacing "calculate the resulting risk" with "determine the corresponding risk" so that paragraph (p)(1)(iii) is more consistent with paragraph (p)(1)(iv) and allows for a broader range of risk assessment methodologies, which may include: Quantitative, semi-quantitative, qualitative, or some combination of all three. FRA agrees that the estimation of the risk does not necessarily have to involve a formal quantitative analysis, and therefore FRA adopts Parsons Brinckerhoff's suggested language.

Fourth, the railroad must establish the methods that will be used in the risk-based hazard analysis to identify the actions that mitigate or eliminate hazards and corresponding risks. Here the railroad will identify the methods or techniques it will use to determine which actions it will need to take to mitigate or eliminate the identified hazards and risks. As is the case with identifying the hazards and resulting risks, this is the railroad's opportunity to consider any new or novel methods

best suited to the railroad's operations to mitigate or eliminate hazards and resulting risks. FRA recognizes that not all hazards and resulting risks can be eliminated or even mitigated, due to costs, feasibility, or other reasons. However, FRA expects the railroads to consider all reasonable actions that may mitigate or eliminate hazards and the resulting risks and to implement those actions that are best suited for that railroad's operations.

Fifth, the railroad must establish the process that will be used in the risk-based hazard analysis to set goals for the risk-based hazard management program and how performance against the goals will be reported. Establishing clear and concise goals will play an important role in the success of a railroad's risk-based hazard management program. The goals should be tailored so that the central goal of the risk-based hazard management program (to effectively identify, analyze, and mitigate or eliminate hazards and resulting risks) is supported for the individual railroad.

Sixth, the railroad must establish a process to make decisions that affect the safety of the rail system relative to the risk-based hazard management program. Railroads make numerous decisions every day that affect the safety of the rail system and this paragraph requires a railroad to describe how those decisions will be made when they relate to the risk-based hazard management program. FRA notes that Parsons Brinckerhoff commented whether this paragraph was meant to address risk acceptance, based on its reading of the discussion of this paragraph in the NPRM. Parsons Brinckerhoff requested that FRA revise this paragraph to make that clear, if it was FRA's intent.

Risk acceptance is a process in which an organization determines the appropriate level of risk to accept. An organization will determine which risks are acceptable based on the resources available to mitigate or eliminate those risks. While risk acceptance is an integral part of a SSP, FRA does not intend this paragraph to establish a risk acceptance requirement. Rather, the overall risk-based hazard management program, in part, establishes a risk acceptance framework for the railroad.

Seventh, the railroad must establish the methods that will be used in the risk-based hazard analysis to support continuous safety improvement throughout the life of the rail system. Consistent with the overall SSP, the railroad will implement methods as part of the risk-based hazard management program that will support continuous safety improvement.

Eighth, the railroad must establish the methods that will be used in the risk-based hazard analysis to maintain records of identified hazards and risks and the mitigation or elimination of the identified hazards and risks throughout the life of the rail system. In this paragraph the railroad will describe how it plans to maintain the records of the results of the risk-based hazard analysis. The railroad will also describe how it will maintain records of the mitigation or elimination of the identified hazards and risks. FRA notes that the proposal in the NPRM expressly addressed only the description of the methods used to maintain records of mitigating the identified hazards and risks. Because the hazards and risks may be eliminated by the railroad—not just mitigated—the text of this paragraph in the final rule makes clear that records of the elimination of the identified hazards and risks are covered as well. As a separate matter, while the railroad will not be required to provide in its SSP plan submission to FRA any of the specific records addressed by this paragraph, the railroad will be required to make the results of the risk-based hazard analysis available upon request to representatives of FRA pursuant to § 270.201(a)(2).

Paragraph (p)(2) requires the risk-based hazard management program to identify certain key individuals. First, the railroad must identify the position title of the individual(s) responsible for administering the risk-based hazard management program. These positions will be responsible for developing and implementing the risk-based hazard management program. Rather than identifying the specific individual(s), the railroad will identify the position(s) responsible for administering the risk-based hazard management program so that the SSP will not have to be updated merely because an individual changes positions. This clarification addresses an AAR comment on the NPRM in which AAR opposed the proposed requirements in paragraphs that the railroad identify the individuals responsible for administering the hazard management program and participating in hazard management teams or safety committees. AAR believes the problem with identifying such individuals is that whenever one of these individuals is removed or added, the plan must be amended and no real purpose is served. As a result, FRA makes clear that the final rule only requires the identification of the position titles, not the specific individuals.

Second, the railroad must identify the stakeholders who will participate in the hazard management program. This

means the railroad will identify the persons who will be affected by and may play a role in the risk-based hazard management program.

Third, the railroad must identify the position title of the participants and structure of any hazard management teams or safety committees that a railroad may establish to support the risk-based hazard management program. By establishing these types of teams or committees, the railroad can focus on specific hazards and risks and more thoroughly consider the specific actions to effectively mitigate or eliminate the hazards and risks.

Paragraph (q), proposed as paragraph (r) in the NPRM, provides that once FRA has approved a railroad's SSP plan pursuant to § 270.201(b), the railroad shall conduct a risk-based hazard analysis. Paragraph (q)(1) serves to implement the section 20156(c) statutory mandate that a railroad must conduct a "risk analysis." As discussed earlier, section 20156(c) requires the railroad, as part of its development of a railroad safety risk reduction program (e.g., a SSP), to "identify and analyze the aspects of its railroad, including operating rules and practices, infrastructure, equipment, employee levels and schedules, safety culture, management structure, employee training, and other matters, including those not covered by railroad safety regulations or other Federal regulations, that impact railroad safety." *Id.* Paragraph (q)(1) follows the language of section 20156(c); however, in the list of the aspects of the railroad system that must be analyzed, paragraph (q)(1) does not include "safety culture." Safety culture, which paragraph (b)(2) of this section requires the railroad to describe, is not something that a railroad can necessarily "identify and analyze" as readily as the other aspects listed. Nonetheless, the railroad must describe how it measures the success of its safety culture pursuant to paragraph (t) of this section.

As proposed in the NPRM, paragraph (q)(1) originally included employee fatigue as identified in proposed paragraph (s), in the list of the aspects of the railroad system that must be analyzed. However, as discussed in the Statutory Background section above, to minimize confusion regarding the separate FMP Working Group process and the ongoing fatigue management plans rulemaking, proposed paragraph (s) has not been included in the final rule; therefore the requirement that the railroad analyze employee fatigue as part of its risk analysis is not included in paragraph (q)(1) of the final rule. FRA also notes that proposed paragraph

(q)(1) included "new technology as identified in paragraph (s) of this section"; however, since paragraph (r) of the final rule addresses a separate analysis regarding new technology, including new technology in paragraph (q)(1) would be duplicative.

As provided in the final rule, paragraph (q)(1) requires a railroad to analyze operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations. Pursuant to paragraphs (d), (e), and (g) through (i) of this section, a railroad is required to describe in its plan its operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, and employee training; therefore, the analysis and identification of hazards and resulting risks regarding these aspects pursuant to paragraph (q)(1) should be straightforward. The railroad will determine which aspects of the railroad system have an impact on railroad safety that are not covered by railroad safety regulations or other Federal regulations. When analyzing the various aspects, the railroad will apply the risk-based hazard analysis methodology previously identified in paragraphs (p)(1)(i) through (iii) of this section.

In commenting on the NPRM, Parsons Brinckerhoff stated that paragraph (q)(1) proposed to require that railroads apply the risk-based hazard analysis up through the application of mitigations but that it would not require the railroads to achieve an acceptable level of risk. While the rule does not specifically require a railroad to reduce risk to an acceptable level, paragraph (q)(2) requires a railroad, in part, to implement specific actions that will mitigate or eliminate the identified hazards and resulting risks. FRA believes that requiring railroads to achieve an acceptable level of risk would set forth an ambiguous standard because, due to differences in the size and complexity of passenger railroad operations, an acceptable level of risk for one railroad may not necessarily be the same for another railroad. Requiring a railroad to implement specific actions that will mitigate or eliminate the identified hazards and resulting risks will reduce risk and if FRA determines that a railroad is not properly addressing and reducing risk, FRA will work with the railroad and other stakeholders to address this issue and may take enforcement action if necessary.

Parsons Brinckerhoff also believed that proposed paragraph (q)(1) would not require the application of the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system. Pursuant to paragraph (p)(1)(vii), the railroad will be required to describe the methods it will implement as part of the risk-based hazard management program that will support continuous safety improvement throughout the life of the rail system. Further, as discussed below, pursuant to paragraph (q)(3) a railroad will be required to conduct a risk-based hazard analysis when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety. FRA believes paragraphs (p)(1)(vii) and (q)(3) support continuous safety improvement throughout the life of the rail system.

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

FRA makes clear that a risk-based hazard analysis is not a one-time event. Railroads operate in a dynamic environment and certain changes in that environment may expose new hazards and risks that a previous risk-based hazard analysis did not address. Paragraph (q)(3) identifies the changes that FRA believes are significant enough to require that a railroad conduct a new risk-based hazard analysis. Railroads must conduct a risk-based hazard analysis when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

As part of its SSP plan, paragraph (r), proposed as paragraph (s) in the NPRM, requires a railroad to conduct a technology analysis and set forth a technology analysis and implementation plan. Paragraph (r) implements sections 20156(d)(2) and 20156(e). Paragraph (r) has been substantially modified from the proposal in the NPRM. As proposed in the NPRM, this paragraph would have required railroads to first conduct

a technology analysis, then establish a technology implementation plan containing the results of the technology analysis, and, if the railroad determined to implement any of the technologies, establish a plan and a prioritized implementation schedule for the development, adoption, implementation and maintenance of the technologies over a 10-year period.

FRA believes that the technology analysis and implementation plan requirements should be consistent with the risk-based hazard management program and risk-based hazard analysis requirements. Therefore, FRA has modified paragraph (r) from the proposed rule to ensure that it is consistent with these other requirements. A railroad, in its SSP plan submission to FRA, will describe the process it will use to: (1) Identify and analyze technologies that will mitigate or eliminate the hazards identified by the risk-based hazard analysis, and (2) analyze the safety impact, feasibility, and costs and benefits of implementing the identified technologies. The initial submission to FRA is required to describe only the processes the railroad will use to identify and analyze technology that will mitigate or eliminate hazards and the resulting risks.

The requirement that the railroad “periodically update as necessary” its technology analysis and implementation plan has been added to paragraph (r)(1). This was not proposed in the NPRM; however, section 20156(e) requires the plan to be periodically updated as necessary.

As with the overall SSP, the railroads will have flexibility to determine the processes they will use pursuant to paragraph (r)(2). One of the purposes of the technology analysis and implementation plan is to provide railroads and their stakeholders the opportunity to consider current, new, and novel technology to address hazards and the resulting risks; therefore, FRA encourages the railroads to consider as many different types of technology as possible.

Once FRA reviews and approves a railroad’s technology analysis and implementation plan, as part of the SSP plan approval process, the railroad will apply the process identified in paragraph (r)(2)(i) to identify and analyze current, new, or novel technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis. As with risk-based hazard analysis, the railroad will not conduct its technology analysis until after FRA has approved its technology analysis

and implementation plan. Section 20156(e)(2) mandates that a railroad consider certain technologies as part of its technology analysis. These technologies are: Processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

Once the railroad has identified and analyzed current, new, or novel technologies that will mitigate or eliminate the hazards and resulting risks, the railroad shall apply the processes described in paragraph (r)(2)(ii) to analyze the safety impact, feasibility, and costs and benefits of implementing these technologies. FRA expects the railroads to engage in an appropriate and realistic analysis of the technologies. FRA is not requiring that a railroad use a specific formula to determine whether it should implement any of the technology analyzed in the technology analysis. Rather, the railroad must consider the safety impact, feasibility, and the costs and benefits of these technologies and, based on the railroad’s specific operations, decide whether to implement any of the technologies. Technology has proved to be an invaluable tool to manage hazards across all modes of transportation, and a robust SSP certainly needs to include risk mitigation technology.

If a railroad decides to implement any of the technologies identified in paragraph (r)(3), the railroad would be required to update its technology analysis and implementation plan in its SSP to describe how it will develop, adopt, implement, maintain, and use the technologies. This description should be sufficient to allow FRA and other interested stakeholders to determine which technologies the railroad will implement, how they will be implemented, how the technologies will eliminate or reduce hazards and the resulting risks, and how the technologies will be maintained. The railroad will also be required to set forth in its SSP plan a prioritized implementation schedule for the development, adoption, implementation, and maintenance of those technologies over a 10-year period. By establishing this implementation schedule, the railroad will be able to describe its plan as to how it will apply technology on its system to mitigate or eliminate the identified hazards and resulting risks.

Paragraph (r)(5) provides that, except as required by 49 CFR part 236, subpart I (Positive Train Control Systems), if a railroad decides to implement a positive train control (PTC) system as part of its technology implementation plan, the railroad shall set forth and comply with a schedule for implementation of the PTC system consistent with the deadlines in the Positive Train Control Enforcement and Implementation Act of 2015 (PTCEI Act), Public Law 114–73, 129 Stat. 576–82 (Oct. 29, 2015), and 49 CFR 236.1005(b)(7). The NPRM proposed that the railroad would have to implement the PTC system by December 31, 2018, which was consistent with 49 U.S.C. 20156(e)(4)(B). However, Congress subsequently passed the PTCEI Act and FRA has revised paragraph (r)(5) to reflect the changes to PTC implementation deadlines set forth in the Act. This paragraph does not, in itself, require a railroad to implement a PTC system. In the NPRM, FRA sought comment on whether a railroad electing to implement a PTC system would find it difficult to meet the December 31, 2018 implementation deadline. If so, FRA invited comment as to what measures could be taken to assist a railroad struggling to meet the deadline and achieve the safety purposes of the statute. FRA received one comment in response to this request. AAR commented that it does not object to this requirement but that it is impossible to meet the 2015 deadline for an interoperable nationwide PTC system that complies with the statutory mandate. Consequently, AAR believes that no railroad will take advantage of paragraph (r)(5). FRA recognizes the challenges associated with implementing a PTC system; however, FRA also recognizes that PTC is a technology that a railroad may seek to implement to eliminate or mitigate hazards and the resulting risks. Therefore, the regulation provides railroads the flexibility to decide whether they want to implement a PTC system as part of their technology analysis and implementation plan; if they do so, they must comply with an implementation schedule consistent with the deadlines in the PTCEI Act.

Consistent with the risk-based hazard analysis, a railroad will not include its technology analysis conducted pursuant to paragraph (r)(3) in the SSP submission to FRA under § 270.201. The SSP plan should only include the processes used to conduct its technology analysis as described in paragraph (r)(3). FRA may work with the railroads to ensure that the technology analysis is robust and

analyzes a sufficient number of technologies. To achieve this goal, FRA, its representatives, and States participating under part 212 of this chapter will have access to the railroad's technology analysis pursuant to paragraph (r)(5). Furthermore, in its initial submission, a railroad will not include the description and implementation schedule required by paragraph (r)(4) because the railroad will not draft the description and implementation schedule until FRA approves the railroad's technology analysis and implementation plan.

Paragraph (s) sets forth the requirements for ensuring that safety issues are addressed whenever there are certain changes to the railroad's operations. Paragraph (s)(1) requires each railroad to establish and set forth a statement in its SSP plan that describes the processes and procedures used by the railroad to manage significant operational changes, system extensions, system modifications, or other circumstances that will have a direct impact on railroad safety. Since these changes have a direct impact on safety, it is vital that the railroad has a process to manage these changes so that safety is not compromised. Change management processes ensure that, when there is a need for a change to a safety-critical program, the proposed change is vetted through a formalized process within the organization. This description will assist FRA's review of these processes during the initial SSP plan review and subsequent audits to determine if the railroad's SSP sufficiently addresses any gaps in the processes. The term "significant changes that will have a direct impact on railroad safety" is intended to be broadly understood; however, the other changes listed (significant operational changes, system extensions, system modifications) are the type of changes that will also necessitate a process/procedure to properly manage them.

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

notified and approve of the change. Configuration management is a process that ensures that all safety-critical documentation relating to the railroad and its various components is current and reflects the actual functional and physical characteristics of the railroad. This description will assist FRA's review of these processes during the initial SSP plan review and subsequent audits to determine if the railroad's SSP sufficiently addresses any gaps in the processes.

Paragraph (s)(3) requires the railroad to establish and describe in its SSP plan the process it uses to certify that safety concerns and hazards are adequately addressed before the initiation of operations or major projects to extend, rehabilitate, or modify an existing system or repair vehicles and equipment. Through a process certifying that safety concerns have been addressed before the railroad initiates operations or major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment, the railroad helps to minimize the potential for any negative impact on safety resulting from any of these activities.

In commenting on the NPRM, APTA states that safety certifications are not common in commuter rail operations mostly because these railroads follow FRA regulations and standards and most, if not all, safety certifications have been performed because an FTA funding agreement required one to be performed. According to APTA, FTA does not have a set of regulations and standards to allow operation on the general railroad system of transportation that applies to all railroads under FTA's jurisdiction. Without these national standards, APTA notes that FTA and transit properties rely on design criteria and best engineering practices, and since these design criteria differ at each transit agency, safety certification is the method relied upon to ensure the system is safe. APTA believes that it would be a rare occasion when a commuter railroad would be required to perform a safety certification under paragraph (s)(3) and that the paragraph uses the term "major projects" without elaboration. APTA does not believe that every project will need safety certification unless it falls outside of FRA's existing standards. APTA therefore recommends that FRA clarify the term "major projects" by adding to the end of the sentence: "not otherwise addressed by existing FRA standards."

FRA expects every major project to be designed and built so that it meets or exceeds existing FRA standards. However, paragraph (s)(3) requires a

process that certifies the major project is in compliance with these FRA standards or with appropriate design criteria, or both. Safety certification is part of APTA's Manual for the Development of System Safety Program Plans for Commuter Railroads. Section 6 of APTA's manual, Safety Assurance, contains Element 22, Configuration Management, and within Element 22 is section 6.1.1.4, Safety Certification. Section 6.1.1.4 states: "Safety Certification is used to oversee the addition and introduction of completely new systems and the integration to the existing system if the project is not a new start. The US DOT Federal Transit Administration and APTA have jointly published a manual on how to conduct a safety certification program." A railroad is free to use the standards published in the manual/guide that APTA and FTA have developed regarding safety certification to comply with paragraph (s)(3).

As discussed previously, a SSP can only be effective at mitigating or eliminating hazards and risks if the railroad has a robust and positive safety culture. Pursuant to § 270.101(b), the railroad will design its SSP so that it promotes and supports a positive safety culture; pursuant to § 270.103(b)(2), the railroad will identify in its SSP plan its safety culture; and pursuant to paragraph (t) a railroad will describe in its SSP plan how it measures the success of its safety culture. A railroad cannot have a robust safety culture unless it actively promotes it and evaluates whether it is successful. With respect to measuring safety culture, the rule permits railroads to identify the safety culture measurement methods that they find most effective and appropriate for their own operations. It is important that a railroad regularly measure its safety culture. This measurement may be based upon the DOT's 10 traits of a positive safety culture discussed above or the Nuclear Regulatory Commission's nine traits. See 76 FR 34777-78, Jun. 14, 2011. The key is to be continuously measuring because organizational culture, which safety culture is a part of, can change. Measuring to determine a positive safety culture demonstrates that there is a clear connection, and inverse relationship, between safety culture and event occurrence. Measuring safety culture, such as findings from previous employee assessments, demonstrates that there is a positive relationship between safety culture and employee engagement which supports improved decision-making. When measuring safety culture, FRA expects a railroad to

use a method that is capable of correlating a railroad's safety culture with actual safety outcomes. A safety culture assessment focuses on the people side of safety—cultural behaviors that enable, equip, and empower—such as communication, trust, leadership, commitment, peer group norms and organizational influences. For example, such measurement methods can include surveys that assess safety culture using validated scales, or some other method or measurement that appropriately identifies aspects of the railroad's safety culture that correlate to safety outcomes. Ultimately, FRA expects a railroad to demonstrate that improvements in the measured aspects of safety culture will reliably lead to reductions in accidents, injuries, and fatalities.

Measuring safety culture that is done on a regular basis would be very difficult to establish costs and benefits. As discussed above DOT has 10 traits to guide the measurement of safety culture. A number of different tools have been developed to measure safety culture, and are used in various industries, including aviation and certain manufacturing sectors. To illustrate, one research review listed 24 different tools used to measure safety culture in the health care industry alone.<sup>6</sup> It is important to note that each tool measures factors using its own scale, and the scales are not calibrated across the different tools. Calibration is the process of finding a mathematical relationship between different scales—the Fahrenheit and Celsius temperature scales are calibrated, for example, so it is possible to convert a reading from one scale to the other. Thus, although in the aggregate many studies suggest there is a link between improved safety culture and decreases in accidents or injuries,<sup>7</sup> it is not possible to definitively quantify the benefits that accrue due to improvements in safety culture. FRA recognizes that there are many ways to accomplish the task of measuring a railroad's safety culture. For purposes of this rule FRA will assume that this is accomplished with some type of survey instrument.<sup>8</sup>

<sup>6</sup> Health Foundation. "Evidence scan: Measuring safety culture," [http://patientsafety.health.org.uk/sites/default/files/resources/measuring\\_safety\\_culture.pdf](http://patientsafety.health.org.uk/sites/default/files/resources/measuring_safety_culture.pdf) as of October 30, 2014 (February, 2011) p. 7.

<sup>7</sup> O'Toole, Michael. "The Relationship between employees' perceptions of safety and organizational culture," *The Journal of Safety Research*, 33 (2002) pp 231-243.

<sup>8</sup> One organization that provides safety culture surveys includes a price list on their Web site. Perhaps averaging a few such organizations' prices would help refine this estimate. See [http://www.nsc.org/safety\\_work/employee\\_perception\\_](http://www.nsc.org/safety_work/employee_perception_)

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

As discussed in the Statutory Background section, FRA's Study concluded that it is in the public interest to protect certain information generated by railroads from discovery or admission into evidence in litigation. Section 20119(b) provides FRA with the authority to promulgate a regulation if FRA determines that it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to prescribe a rule that addresses the results of the Study.

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

Section 270.105, Discovery and admission as evidence of certain information, sets forth the discovery and admissibility protections that are based on the Study's results and the RSAC recommendations. These protections are narrow and apply only to information that was generated solely for a railroad's SSP, and aim to ensure that a litigant will not be better or worse off than if the protections had never existed. FRA intends these provisions to be strictly construed.

FRA modeled § 270.105 after 23 U.S.C. 409. In section 409, Congress enacted statutory protections for certain information compiled or collected pursuant to Federal highway safety or construction programs. See 23 U.S.C. 409. Section 409 protects both data compilations and raw data. Intermodal Surface Transportation Efficiency Act of 1991, sec. 1035(a), 105 Stat. 1978; National Highway System Designation Act of 1995, sec. 323, 109 Stat. 591. A litigant may rely on section 409 to withhold certain documents from a discovery request, in seeking a protective order, or as the basis to object to a line of questioning during a trial or

[surveys/Pages/SurveyCosts.aspx](#) (showing costs for safety culture surveys of different levels of complexity).

deposition. Section 409 extends this protection to information that has never been in any Federal entity's possession.

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

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

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

FRA believes that given the similar concepts between section 409 and section 20119 and the Supreme Court's expressed acknowledgement of the constitutionality of section 409, section 409 is an appropriate model for § 270.105.

Under § 270.105(a) there are certain circumstances in which information will not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. This information may not be used in such litigation when it is compiled or collected solely for the purpose of planning, implementing, or evaluating a SSP. Section 270.105(a) applies to information whether or not it is also in the Federal government's possession.

FRA notes that paragraph (a) has been reformatted for clarity from the proposal in the NPRM. Paragraph (a) is divided into paragraph (a)(1) and (2) after its introductory text. However, the formatting change does not, in itself, result in any substantive change to the paragraph.

Paragraph (a)(1) describes what may be considered "information" for the purposes of this section. Section 20119(a) identifies reports, surveys, schedules, lists, and data as the forms of information that should be included as part of FRA's Study. However, FRA does not necessarily view this as an exclusive list. In the statute, Congress directed FRA to consider the need for protecting information that includes a railroad's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks. *Id.* While the railroad is not required to provide in the SSP plan that it submits to FRA the results of the risk-based hazard analysis and the specific elimination or mitigation measures it will be implementing, the railroad may have a specific plan within its SSP that does contain this information. Therefore, to adequately protect this type of information, the term "plan" is included in the definition of "information" to cover a railroad's submitted SSP plan and any elimination or mitigation plans the railroad otherwise develops within its SSP. FRA also deems it necessary to include "documents" in this provision to maintain consistency and properly effectuate Congress' directive in section 20119.

This paragraph does not protect all information that is part of a SSP; these protections will extend only to information that is compiled or collected after August 14, 2017, solely

for purpose of planning, implementing, or evaluating a system safety program. The term "compiled or collected" is taken directly from section 20119(a). FRA recognizes that railroads may be reluctant to compile or collect extensive and detailed information regarding the safety hazards and resulting risks on their systems if this information could potentially be used against them in litigation. The term "compiled" refers to information that was generated by the railroad for the purposes of a SSP; whereas the term "collected" refers to information that was not necessarily generated for the purposes of the SSP, but was assembled in a collection for use by the SSP. It is important to note that in this context, only the collection is protected; however, each separate piece of information that was not originally compiled for use by the SSP remains subject to discovery and admission into evidence subject to any other applicable provision of law or regulation.

Section 20119(b) prohibits the protections from becoming effective until one year after the adoption of the SSP rule. The necessary text has been added to paragraph (a) to implement this effective date.

The information has to be compiled or collected solely for the purpose of planning, implementing, or evaluating a SSP. APTA commented that the use of the term "solely" is not adequately explained in the text of the regulation. APTA proposes that FRA either use a more appropriate term such as "primarily" or "initially" or that FRA define "solely" in the rule text, not just in the preamble. FRA agrees. The use of the term "solely" is deliberate and it is important that the term is understood as used within the four corners of the regulation. Therefore, FRA has included paragraph (a)(2), which defines the term "solely."

As discussed in the section-by-section analysis for § 270.1(c), NY MTA recommended that the term "solely" be deleted from paragraph (a) to protect studies or risk analyses that are not developed expressly to comply with this part. NY MTA believes that it is in the public interest to ensure that railroads conduct on-going and thorough self-critical examinations and expressed concern if these types of studies or analyses are not protected, they may be used against the railroad in court. As discussed below in response to APTA's request that FRA extend the protections to information collected as part of programs that existed before the SSP regulation but were similar to a SSP, FRA has the authority to protect only documents that are created pursuant to

a SSP; therefore, omitting the term “solely” would improperly expand the protections beyond the limits of FRA’s authority.

The term “solely” is intended to narrow circumstances in which the information will be protected. The use of the term “solely” means that the original purpose of compiling or collecting the information was exclusively for the railroad’s SSP. A railroad cannot compile or collect information for one purpose and then try to use paragraph (a) to protect that information because it uses that information for its SSP as well. The railroad’s original and singular purpose of compiling or collecting the information must be for planning, implementing, or evaluating its SSP in order for the protections to be extended to that information. The term “solely” also means that a railroad shall continue to use the information only for its SSP. If a railroad subsequently uses, for any other purpose, information that was initially compiled or collected for its SSP, paragraph (a) does not protect that information to the extent that it is used for the non-system safety program purpose. The use of that information within the railroad’s SSP, however, will remain protected. If the railroad is required by another provision of law or regulation to collect the information, the protections of paragraph (a) do not extend to that information because it is not being compiled or collected solely for the purpose of planning, implementing, or evaluating a SSP. For example, 49 CFR 234.313 requires railroads to retain records regarding emergency notification system (ENS) reports of unsafe conditions at highway-rail grade crossings. Those individual records are not protected by § 270.105. However, if as part of its risk-based hazard analysis a railroad collects several of its § 234.313 reports from a specific time period for the sole purpose of determining if there are any hazards at highway-rail grade crossings, this collection will be protected as used in the SSP. If the railroad decides to use the collection for another purpose other than in its SSP, such as submitting it to an ENS maintenance contractor for routine maintenance, the protections are not extended to that non-SSP use.

The information must be compiled or collected solely for the purpose of planning, implementing, or evaluating a SSP. The three terms—planning, implementing, or evaluating—are taken directly from section 20119(a). These terms cover the necessary uses of the information compiled or collected solely for the SSP. To properly plan and develop a SSP, a railroad will need to

determine the proper processes and procedures to identify hazards, the resulting risks, and elimination or mitigation measures to address those hazards and risks. This planning will involve gathering information about the various analysis tools and processes best suited for that particular railroad’s operations. This type of information is essential to the risk-based hazard analysis and is information that a railroad does not necessarily already have. In order for the railroad to plan its SSP, the protections are extended to the SSP planning stage. The NPRM used the term “developing” instead of “planning”; however, to remain consistent with section 20119(a), FRA has determined that the term “planning” is more appropriate.

Based on the information generated by the risk-based hazard analysis, the railroad will implement measures to eliminate or mitigate the hazards and risks identified. To properly implement these measures, the railroad will need the information regarding the hazards and risks on the railroad’s system identified during the development stage. Therefore, the protection of this information is extended to the implementation stage.

The protections do not apply to information regarding mitigations that the railroad implements. Rather, the railroad’s statement of mitigation measures, which could include various proposed and alternate mitigations for a specific hazard, that address the hazards identified by the risk-based hazard analysis is protected. Additionally, the underlying risk analysis information that the implemented mitigation measure addresses is also protected. For instance, if a railroad builds a structure to address a risk identified by the risk-based hazard analysis, the information regarding that structure (*e.g.*, blueprints, contracts, permits, etc.) is not protected by this section; however, the underlying risk-based hazard analysis that identified the hazard and any statement of mitigations that included the structure is protected.

The protections also do not apply to any hazards, risks, or mitigations that fall under the exclusive jurisdiction of another Federal agency. If FRA does not have jurisdiction over a hazard, risk, or mitigation, then the protections under this paragraph cannot be extended to that hazard, risk, or mitigation.

The railroad will also be required to evaluate whether the measures it implements to mitigate or eliminate the hazards and risks identified by the risk-based hazard analysis are effective. To do so, it will need to review the information developed by the risk-based

hazard analysis and the methods used to implement the elimination/mitigation measures. The use of this information in the evaluation of the railroad’s SSP is protected.

The information covered by this section shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. The protections affect the discovery, admission into evidence, or consideration for other purposes of the information described in this section. The first two situations come directly from section 20119(a); however, FRA determined that for the protections to be effective they must also apply to any other situation where a litigant might try to use the information in a Federal or State court proceeding that involves a claim for damages involving personal injury, wrongful death, or property damage. For example, under this section a litigant will be prohibited from admitting into evidence a railroad’s risk-based hazard analysis. Nonetheless, without the additional language: “or considered for other purposes,” the railroad’s risk-based hazard analysis could be used by a party for the purpose of refreshing the recollection of a witness or by an expert witness to support an opinion. The additional language ensures that the protected information remains out of such a proceeding completely. The protections would be ineffective if a litigant were able to use the information in the proceeding for another purpose. To encourage railroads to perform the necessary vigorous risk analysis and to implement truly effective elimination or mitigation measures, the protections are extended to any use in a proceeding.

This section applies to Federal or State court proceedings that involve a claim for damages involving personal injury, wrongful death, or property damage. This means, for example, if a proceeding has a claim for personal injury and a claim for property damage, the protections are extended to that entire proceeding; therefore, a litigant cannot use any of the information protected by this section as it applies to either the personal injury or property damage claim. Section 20119(a) required the Study to consider proceedings that involve a claim for damages involving personal injury or wrongful death; however, to effectuate Congress’ intent behind section 20156, that railroads engage in a robust and candid hazard analysis and develop meaningful mitigation measures, FRA has determined that it is necessary for

the protections to be extended to proceedings that involve a claim solely for property damage. The typical railroad accident resulting in injury or death also involves some form of property damage. Without extending the protection to proceedings that involve a claim for property damage, a litigant could bring two separate claims arising from the same incident in two separate proceedings, the first for property damages and the second one for personal injury or wrongful death, and be able to conduct discovery regarding the railroad's risk analysis and to introduce this analysis in the property damage proceeding but not in the personal injury or wrongful death proceeding. This would mean that a railroad's risk analysis could be used against the railroad in a proceeding for damages. If this were the case, a railroad would be hesitant to engage in a robust and candid hazard analysis and develop meaningful elimination or mitigation measures. Such an approach would be nonsensical and would completely frustrate Congress' intent in providing FRA the ability to protect that information which is necessary to ensure that open and complete risk assessments are performed and appropriate mitigation measures are selected and implemented. Therefore, to be consistent with Congressional intent behind section 20156, FRA has decided to extend the protections in paragraph (a) to proceedings that involve a claim for property damage. Furthermore, RSAC, which includes railroads and rail labor organizations as members, recommended to FRA that the protections be extended in this way to proceedings that involve a claim for property damage.

Paragraph (b) ensures that the protections set forth in paragraph (a) do not extend to information compiled or collected for a purpose other than that specifically identified in paragraph (a). This type of information shall continue to be discoverable, admissible into evidence, or considered for other purposes if it was before the date the protections take effect. The type of information that will not receive the protections provided by paragraph (a) include: (1) Information that was compiled or collected on or before August 14, 2017; (2) information that was compiled or collected on or before August 14, 2017, and continues to be compiled or collected, even if used to plan, implement, or evaluate a railroad's SSP; or (3) information that is compiled or collected after August 14, 2017, for a purpose other than that specifically identified in paragraph (a) of this

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

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

In commenting on the NPRM, the Labor Organizations requested that FRA provide a list of examples of information that is currently discoverable and admissible and will remain so after the enactment of the protections. The Labor Organizations pointed out that such a list was provided to FRA during the Risk Reduction Working Group deliberations and they would like the list to be placed in the discussion of the final rule. While the list that was provided was instructive, as mentioned in the previous paragraph, evidentiary decisions are based on the facts of each particular case and a court's ruling in one case does not guarantee that another court's ruling in another jurisdiction will be the same. FRA believes that the examples provided in the previous paragraph are more than sufficient to provide a general idea of the types of information covered by paragraph (b) that are not protected.

APTA requested that FRA extend the protections to information collected as part of programs that existed before the SSP regulation but were similar to a SSP. APTA pointed out that this information will now be collected under the SSP rule and therefore should receive the protections provided by paragraph (a). APTA believes that the exclusions in paragraph (b) will incentivize railroads with existing SSP-

like programs to shut down their programs in anticipation of this part because the information from the SSP-like programs will not be protected even if it were collected as part of the SSP under this part. While FRA understands APTA's concern, FRA does not have the authority to provide retroactive protection to information that was compiled or collected before the protections take effect. The study section 20119(a) mandated only addresses information compiled and collected pursuant to the statutory-mandated risk reduction program. Since a SSP is a risk reduction program mandated by statute (section 20156), the information protections can only be extended to information compiled or collected pursuant to a SSP. This means that any information compiled or collected before the protections take effect is not protected because that is not information compiled or collected pursuant to a SSP. Furthermore, since this is information compiled or collected before the protections take effect, the fact that after the protections take effect the information will be compiled or collected pursuant to the SSP does not mean that the information will then be protected. By virtue of the information being compiled or collected before the SSP rule protections take effect, it is not information collected "solely" for the SSP that is protected by this rule. To clarify this distinction, FRA has included language in the exception in paragraph (b)(2).

Pursuant to paragraph (b)(2), if a railroad compiled or collected certain information that was subject to discovery, admissibility, or consideration for other purposes before the protections take effect and the railroad continues to collect the same type of information pursuant to its SSP required by this part, that information will not be protected by paragraph (a) of this section. For example, before this section takes effect and all else being equal, a litigant that would have been able to have admitted into evidence certain information the railroad compiled will still be able to have that type of information admitted after this section takes effect even if the railroad compiles the information pursuant to this rule. The protections are designed to apply only when the original purpose for the generation of the information was for a SSP required by this part. The original purpose of the generation of the information for the SSP-like programs that existed before the SSP rule would not be for a SSP required by this part; therefore, such information is not protected by paragraph (a).

Paragraph (b)(3) reaffirms that information that is compiled or collected for a purpose other than solely for the purpose of planning, implementing, or evaluating a SSP, shall not be protected.

This section is not intended to replace any other protections provided by law or regulation. Accordingly, paragraph (c) states that the protections set forth in this section will not affect or abridge in any way any other protection of information provided by another provision of law or regulation. Any such provision of law or regulation shall apply independently of the protections provided by this section.

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

NY MTA commented that it is in the public interest to protect risk analysis information from production in

response to FOIA requests and State freedom of information laws. NY MTA requested that the protection from these types of information disclosure laws be applied to information about system vulnerabilities that could be of interest to terrorist threats. As discussed in the Statutory Background section, section 20118(c) gives FRA the discretion to prohibit the public disclosure of risk analyses or risk mitigation analyses obtained under other FRA regulations if FRA determines that the prohibition of public disclosure is necessary to promote public safety. Furthermore, if a railroad believes that certain risk analysis information qualifies as Sensitive Security Information (SSI), the information can be submitted to FRA for such a determination. If FRA determines the information qualifies as SSI or if the railroad has some other acceptable basis for requesting confidential treatment, pursuant to 49 CFR 209.11, the information will be appropriately marked and handled, which includes redacting it from any publicly disclosed documents.

Section 20119(b) mandates that the effective date of any rule prescribed pursuant to that section must be one year after the adoption of that rule. As discussed in the Statutory Background section, FRA is developing, with the assistance of the RSAC, a separate risk reduction rule that would implement the requirements of sections 20156, 20118, and 20119 for Class I freight railroads and railroads with inadequate safety performance. In the NPRM for this final rule, FRA proposed to apply the protections and the exceptions for SSP information proposed in that NPRM to the information in the forthcoming RRP final rule. The effect of that proposal would have been to make the protections for the forthcoming RRP final rule applicable one year after the publication of this final rule establishing part 270 rather than one year after publication of the RRP final rule. FRA sought comment on this proposal and received one comment from APTA, who supported the proposal.

After further consideration, FRA has determined to implement the RRP protections in the RRP final rule rather than in this rule. Because section 20119(b) states that “[a]ny such rule prescribed pursuant to this subsection shall not become effective until 1 year after its adoption,” FRA has concluded that the RSIA requires that each rule’s implementing information protections must have its own independent implementation timeline. (Emphasis added.) FRA believes this revised approach is a better reflection of the

Congressional intent in section 20119(b). Further, the revised approach ensures that FRA has complied with notice and comment procedures of the Administrative Procedure Act for both the SSP and RRP rulemakings.

#### Section 270.107 Consultation Requirements

This section implements section 20156(g)(1), which states that a railroad required to establish a SSP must “consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program.” This section also implements section 20156(g)(2), which further provides that if a “railroad carrier and its directly affected employees, including any nonprofit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, cannot reach consensus on the proposed contents of the plan, then directly affected employees and such organizations may file a statement with the Secretary explaining their views on the plan on which consensus was not reached.” Section 20156(g)(2) requires FRA to consider these views during review and approval of a railroad’s SSP plan. The consultation requirements were proposed in § 270.102 of the NPRM; however, to remain consistent with CFR section numbering format, this section is designated as § 270.107 in this final rule.

RSAC did not provide recommended language for this section. Rather, FRA worked with the System Safety Task Group to receive input regarding how the consultation process should be addressed, with the understanding that language would be provided in the NPRM for review and comment. In response to consultation process language proposed in the NPRM, FRA received comments from AAR, APTA, Labor Organizations, Metra, NY MTA, and an individual commenter.

The Labor Organizations commented that FRA improperly classified the process under section 20156(g) as one of consultation. The Labor Organizations believe that section 20156(g) requires a process of negotiation or bargaining with the directly affected employees, not one of consultation. Nothing in the text of section 20156(g) requires railroads to negotiate or bargain with directly affected employees; rather, the statute requires the railroads to “consult with, employ good faith and use [their]

best efforts to reach agreement with” directly affected employees (including the Labor Organizations) on the contents of the SSP plan. Throughout the RSAC discussions, FRA referred to this process as one of consultation, not one of negotiation or bargaining. The proposed text in the NPRM is consistent with section 20156(g), and FRA does not agree with the Labor Organizations’ belief that the statute requires a process of negotiation or bargaining. Requiring a process of negotiation and bargaining would be beyond the scope of section 20156(g).

APTA believes that the consultation requirements in the final rule should mirror text in section 20156(g), and nothing more is needed. Specifically, APTA believes that anything more than the statutory text would be counter-productive, interfere with business relationships, and blur the line between FRA and the National Labor Relations Board’s (NLRB) responsibilities. FRA disagrees. FRA believes that § 270.107 and the accompanying Appendix clarify and provide a workable framework for the railroads. As for the blurring of FRA’s and NLRB’s responsibilities, APTA did not provide any examples in which FRA proposed to intrude upon NLRB’s responsibilities. It isn’t clear, therefore, to which NLRB responsibilities APTA is referring.

Paragraph (a)(1) of this section implements section 20156(g)(1) by requiring a railroad to consult with its directly affected employees on the contents of its SSP plan. As part of that consultation, a railroad must utilize good faith and best efforts to reach agreement with its directly affected employees on the contents of its plan. APTA requested that FRA expand the consultation requirement to include all parties, including the directly affected employees and those with significant safety responsibilities because, as proposed, the rule would not require any entities other than the railroads to consult in good faith. APTA is concerned that some railroads may not have authority or leverage to successfully bring the other parties to the table during the consultations. FRA agrees that all of the necessary entities should participate in the consultation process; however, section 20156(g) requires only the railroad to employ good faith and use its best efforts to reach agreement with all of its directly affected employees. Pursuant to paragraph (b)(2), if the railroad and certain directly affected employees cannot reach agreement, the railroad will provide a consultation statement to FRA that identifies any known areas of non-agreement and an explanation of

why the railroad believes agreement was not reached. This will be the railroad’s opportunity to explain whether the result of non-agreement is due to the directly affected employees not acting in good faith or not using their best efforts. Pursuant to paragraph (c), the employees will then have the opportunity to file a statement which will be their opportunity to explain why they or why the railroad believes they did not use good faith or best efforts. Since section 20156(g) requires only the railroad to act in good faith and use best efforts, FRA may approve a plan even if the directly affected employees did not act in good faith or did not use their best efforts, just as long as the railroad employed good faith and best efforts. This means that a railroad will satisfy section 20156(g) if it can show that it acted in good faith and used best efforts to reach agreement, even if other parties did not. FRA believes this will provide the “authority” or “leverage” raised by APTA for a railroad to bring the necessary parties to the table. The directly affected employees will not be able to block approval of a railroad’s SSP plan by not acting in good faith or using their own best efforts, as APTA suggests. Rather, the consultation process is the opportunity for the directly affected employees to provide input and work with the railroad to create a SSP plan that addresses any issues the employees believe are critical to the safety of the railroad. If the directly affected employees fail to act in good faith or do not use their best efforts, they will miss an opportunity to have their voices fully heard and may end up being required to comply under the regulation with a SSP plan in which they did not effectively provide input.

APTA also requested that the consultation process be modified so that the process provides a structure for working collaboratively in the development of the SSP and a methodology to handle disputes or reasonable differences in opinion on how to implement the plan. FRA believes that § 270.107 and Appendix B provide a workable, but flexible framework so that the parties can work collaboratively on the development of a SSP and handle any disputes that arise. APTA did not provide any suggestions regarding what type of modifications should be made, so it is unclear to FRA what in the rule should be modified from the NPRM.

Paragraph (a)(2) as proposed in the NPRM specified that the term directly affected employees included any non-profit employee labor organization representing a class or craft of the railroad’s directly affected employees.

The proposed paragraph made it clear that a railroad that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization. However, FRA has removed this language from paragraph (a)(2) and incorporated it into paragraphs (a)(1) and (2).

Paragraph (a)(2) clarifies that if a railroad contracts out significant portions of its operations, the contractor and the contractor’s employees performing the railroad’s operations shall be considered directly affected employees for the purposes of this part. While this provision was not expressly proposed in the NPRM, FRA believes it is necessary to address how the consultation process will be handled when a railroad contracts out significant portions of its operations to other entities. The contracts should be ongoing and involve significant aspects of the railroad’s operations. For example, if a railroad contracts out maintenance of its locomotives and rail cars to another entity, it is vital for the employees who are performing this maintenance to be part of that railroad’s SSP and have the opportunity to provide their valuable input on the SSP. Another example would be if a railroad contracts out the actual operations of its passenger rail to another entity; the contracted entity that is operating the trains on behalf of the railroad would certainly need to be part of the consultation process. If a railroad is unsure whether a contracted entity is a directly affected employee for the purposes of this part, FRA encourages the railroads and other interested stakeholders to contact FRA for guidance.

Paragraph (a)(3) in the NPRM proposed to require a railroad to meet with its directly affected employees no later than 180 days after the effective date of the final rule to discuss the consultation process. This requirement has been included in paragraph (a)(3) of the final rule. This meeting will be the railroad’s and directly affected employees’ opportunity to schedule, plan, and discuss the consultation process. FRA does not expect a railroad to discuss any substantive material until the information protections provisions of § 270.105 become applicable. Because some commenters appeared to believe that this meeting would discuss the substance of the SSP plan, FRA is including language in paragraph (a)(3) specifying that the railroad is not required to discuss the substance of a SSP plan. Rather, this meeting should be administrative in nature so that all parties understand the consultation

process as they go forward and that they may engage in substantive discussions as soon as possible after the protections of § 270.105 become applicable. The meeting will also be an opportunity for the railroad to educate the directly affected employees on system safety and how it may affect them. Under paragraph (a)(3)(ii), the railroad will be required to provide notice to the directly affected employees no less than 60 days before the meeting is held.

In commenting on the NPRM, the Labor Organizations pointed out that the meeting under paragraph (a)(3) is the only meeting required by this rule and there is no requirement to have a meeting to discuss the substance of the SSP plan. The Labor Organizations believe that meetings regarding the substance of the SSP plan can occur before the protections of § 270.105 become applicable, because in the past with other programs (e.g., the Confidential Close Call Reporting Program), the railroads and the Labor Organizations have agreed to confidentiality. As stated in the previous paragraph, the meeting required by paragraph (a)(3) will be the railroad's and the Labor Organizations' opportunity to schedule and plan the consultation process. This means that at the first meeting, the parties will schedule the future meetings to discuss the substance of the SSP plan. Since every railroad operation varies by scale and work force, FRA believes setting forth a rigid consultation meeting schedule would be unworkable and inconsistent with the flexibility that the SSP aims to provide. The initial meeting under paragraph (a)(3) provides both the railroad and the labor organizations the flexibility to tailor the consultation process to their specific needs. Additionally, FRA has extended the time between the date that the § 270.105 information protections are applicable and when the railroads will be required to submit their SSP plans, thereby extending the amount of time during which consultation on the substance of the SSP plans will occur. As for consultation on the substance of a SSP plan before the date the § 270.105 protections are applicable, nothing in the rule restricts any railroad from doing so, and if the parties can enter into a confidentiality agreement regarding this information, they are free to do so. FRA does note, however, that any such confidentiality agreement is unrelated to this rule and would not affect the use of any such information in legal proceedings, to the extent otherwise permitted by law.

The Labor Organizations also expressed concern with the amount of

time estimated in the rule's Paperwork Reduction Act analysis for the railroads to consult with the directly affected employees and the amount of time to prepare a statement under paragraph (b)(2). The Paperwork Reduction Act analysis estimated that each railroad would have four consultation meetings at 4 hours each for a total of 16 hours and that a statement under paragraph (b)(2) would take 20 minutes to prepare. The Labor Organizations claim that these estimated time periods are too short and would result in an inconsequential amount of time for consultation on the contents of the plan. FRA notes that the time periods in the Paperwork Reduction Act analysis were only estimates and comments were requested on these estimates. *See* 77 FR 55401. The Labor Organizations' comments do not provide suggested time periods that they believe are more appropriate. However, in this final rule, FRA has reevaluated the burdens under the Paperwork Reduction Act and is providing new estimates based on the Labor Organizations' concerns. FRA has increased its estimate of the number of consultations with directly affected employees to 28 and has increased the burden time of each consultation to 40 hours. Further, FRA has increased the number of consultation statements to 30. Of these, 28 consultation statements will take 80 hours to complete and two consultations will take two hours to complete.

Multiple commenters requested FRA modify the timeline in paragraph (a)(3). APTA believes that the proposed consultation (and SSP implementation) schedule is not practical and may not be possible to comply with. APTA states that the requirement to have the initial consultation with the directly affected employees within 180 days of the effective date of the rule is not reasonably achievable. According to APTA, some railroads would be hard pressed to meet this deadline due to the size of their operations and the variety of directly affected employees they would be required to notify. APTA proposes that, rather than requiring the initial consultation to be completed, § 270.201 should require that the initial consultation only begin within the 180 days. FRA notes that § 270.107(a)(3) requires the railroad only to meet "to discuss the consultation process," not to complete the initial consultation process. As discussed in the previous paragraph, this meeting will be administrative in nature and FRA does not expect the railroad to discuss the substance of the SSP plan. FRA makes clear that it does not expect the railroad

to complete an initial consultation on the substance of the SSP plan within this 180-day period; rather, it is understandable that the railroad will wait until the date the § 270.105 protections become applicable before it begins the consultation on the substance of the plan. APTA also requested that the deadline to file the SSP plan pursuant to § 270.201 be extended so that there would be more time to consult with the directly affected employees on the substance of the SSP plan. FRA is extending this time period as discussed in the section-by-section analysis for § 270.201(a), below.

NY MTA and Metra proposed that FRA extend the 180-day deadline for the meeting to 365 days due to the number of employees working under numerous contracts that would need to meet to discuss the consultation process. FRA declines to extend this 180-day period to 365 days because it would be inconsistent with the purpose of requiring the meeting. As discussed above, this meeting will be administrative in nature and FRA does not expect the meeting to address the substance of the SSP plan. If the time period were extended to 365 days after the effective date of the rule, a railroad could hold the initial meeting on day 364, and 121 days<sup>9</sup> later the railroad would be required to submit the SSP plan to FRA. This would make it very difficult for the railroads and directly affected employees to initiate and complete the consultation process in a timely and meaningful manner. Instead, by having the initial meeting within 180 days after the effective date of the rule, all parties will have a clear understanding of the consultation process, so that once the meetings begin regarding the substance of the SSP plan (presumably after the date the § 270.105 protections become applicable), the parties can focus on the SSP plan and not the actual consultation process.

NY MTA also commented that the consultation process should not even begin until after the date the protections in § 270.105 become applicable because protection is needed to ensure that railroads and employees are not discouraged from actively identifying hazards. FRA agrees that the consultation regarding the substance of a SSP plan could not fully begin until after the date the § 270.105 protections

<sup>9</sup>Based on comments received, the deadline to submit SSP plans to FRA pursuant to § 270.201 is extended to 545 days after the publication of the final SSP rule. This is discussed further in the section-by-section analysis for § 270.201(a)(1). The statement that a railroad would have 121 days to submit an SSP plan takes into account this extension of the submission deadline.

become applicable, which is why the meeting required by paragraph (a)(3) is required only to address the consultation process, not the substance of the SSP plan.

Finally, Metra requested that FRA clarify that the 60-day notification requirement only applies to the initial meeting to discuss the consultation process, and no other meeting. FRA agrees and has included paragraph (a)(3)(ii), which is based on the last sentence of proposed paragraph (a)(3). Paragraph (a)(3)(ii) provides that a railroad shall notify the directly affected employees of the preliminary meeting no less than 60 days before it is held, thereby clarifying that the 60-day period refers only to this preliminary meeting.

Paragraph (a)(4) directs readers to Appendix B for additional guidance on how a railroad might comply with the consultation requirements of § 270.107. The appendix and the comments received in response are discussed later in this preamble in the section-by-section analysis for the Appendix B.

An individual commenter requested that the consultation requirements be more detailed. The commenter suggested adding the following requirements: (1) Visibly post the SSP requirements under this part before the SSP is created because, according to the commenter, the parties tend to get “dug in” once the consultation begins and everyone has expressed their position; (2) hold biannual or quarterly meetings between parties regarding safety hazards and risks and provide the meeting minutes to FRA; (3) have a system in which perceived unsafe work orders can be challenged; (4) do not allow a fully implemented SSP to be changed in a way that reduces safety without FRA approval; and (5) establish a committee to make recommendations on uniform minimum standards for working on the right-of-way, including intercity rail.

As for the commenter's first and second suggested requirements, FRA seeks to provide the railroads and their directly affected employees the flexibility to tailor the consultation process to their specific operations. Therefore, adopting these requirements would only take away some of this flexibility. The commenter's third suggested requirement is actually a type of mitigation measure a railroad may put in place to address identified hazards and resulting risks. However, FRA is not requiring specific mitigation measures under this rule; consequently, FRA declines to adopt the suggested mitigation measure. The commenter's fourth suggested requirement raises an issue that is addressed in § 270.201(c), below. Finally, regarding the

commenter's fifth suggested requirement, FRA's RSAC has established working groups and task forces to address safety across a wide range of areas, including right-of-way safety. In fact, the safety of roadway workers along the right-of-way is specifically addressed in FRA's regulations at 49 CFR part 214. Accordingly, FRA believes it unnecessary to adopt this suggested requirement.

Paragraph (b) requires a railroad to submit, together with its SSP plan, a consultation statement. The purpose of this consultation statement is twofold: (1) To help FRA determine whether the railroad has complied with § 270.107(a) by, in good faith, consulting with and using its best efforts to reach agreement with its directly affected employees on the contents of its SSP plan; and (2) to ensure that the directly affected employees with which the railroad has consulted are aware of the railroad's submission of its SSP plan to FRA for review. The consultation statement must contain specific information described in paragraphs (b)(1) through (4) of this section.

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

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

In commenting on the NPRM, AAR believes that paragraph (b)(2) should be removed. AAR states that a railroad cannot know the motivation behind its directly affected employees' decision (including a labor union's decision) to disagree with a railroad's SSP plan. FRA agrees that the railroad may not know the actual reason(s) why its directly affected employees could not reach

agreement with it on the contents of the SSP plan. It is because of this that paragraph (b)(2) requires an explanation only as to why the railroad believes agreement was not reached—not what the directly affected employees believe. If agreement cannot be reached, this statement will provide a record of the railroad's account of the consultation process, and in turn will serve to help FRA evaluate whether good faith and best efforts were used.

In the NPRM, § 270.102(b)(3) proposed to require that the consultation statement identify any provision that would affect a provision of a collective bargaining agreement between the railroad and a non-profit employee labor organization and then explain how the railroad's SSP plan would affect it. In commenting on the NPRM, AAR believes this proposal is unnecessary and requested that FRA delete it. FRA agrees and has not included this provision in the final rule. Generally, FRA is not involved in the collective bargaining process and does not intend to become involved in the process because of this rule. However, if the labor organizations believe that the railroad's SSP plan violates the collective bargaining agreement, they may include this as part of their statement pursuant to paragraph (c)(1) of this section.

Under paragraph (b)(3) in the final rule, proposed as paragraph (b)(4), the consultation statement must include a service list containing the name and contact information for the international/national president of any non-profit employee labor organization representing directly affected employees and any directly affected employee who significantly participated in the consultation process independently of a non-profit labor organization. This paragraph also requires a railroad (at the same time it submits its proposed SSP plan and consultation statement to FRA) to provide individuals identified in the service list a copy of the SSP plan and consultation statement. This service list will help FRA determine whether the railroad has complied with the § 270.107(a) requirement to consult with its directly affected employees. Requiring the railroad to provide individuals identified in the service list with a copy of its submitted plan and consultation statement also serves to notify those individuals that they have 30 days under § 270.107(c)(2) (discussed below) to submit a statement to FRA if they were not able to come to reach agreement with the railroad on the contents of the SSP plan.

As proposed in the NPRM, this paragraph would have required the

consultation statement to include a service list containing the names and contact information for the international/national president and general chairperson of the non-profit employee labor organizations representing a class or craft of the railroad's directly affected employees; any labor organization representative who participated in the consultation process; and any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. In its comments on the NPRM, AAR requested that the service list be limited to the international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. AAR believes that including the general chairperson of these labor organizations and any labor organization representative who participated in the consultation process would be overly burdensome and that a railroad's inadvertent failure to serve one of the parties listed could be used against them and lead to FRA not approving the plan. AAR cites certain regulations of the Surface Transportation Board (STB) for which, when notification of labor unions is required, notice is given to the national office of the labor unions of the employee affected. *See* 49 CFR 1150.32(e) and 1150.42(e). AAR believes that service on the union presidents is sufficient because the unions are capable of notifying the necessary employees. FRA agrees. To minimize the paperwork burden and the potential for confusion, the service list under paragraph (b)(3) contains only the following: (1) The international/national president of any non-profit employee labor organization representing directly affected employees and (2) any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When directly affected employees are represented by a non-profit employee labor organization, limiting service to the president of the labor organization serves to ensure that the employees receive the same version of the SSP plan, thereby minimizing potential confusion.

In commenting on the NPRM, the Labor Organizations requested that when a railroad submits its SSP plan and consultation statement to FRA, the railroad also "simultaneously" send a copy of these documents to all individuals identified in the service list. FRA agrees and has adopted this suggestion to ensure the directly

affected employees receive the SSP plan and consultation statement at approximately the same time FRA does so that they have sufficient time to submit a statement to FRA pursuant to paragraph (c)(2).

Finally, FRA notes that APTA, in commenting on the NPRM, believes that paragraph (b) applies different standards to the parties (railroads and directly affected employees) and presumes that failure to reach agreement would be based on the railroad's failure to use good faith. APTA recognizes that RSIA allows directly affected employees to file a statement with FRA regarding the areas of disagreement; however, APTA believes that paragraph (b) effectively shifts the burden to the railroads. APTA also claims that paragraph (b) presumes that if no agreement is reached, the SSP plan is deficient and the railroad failed to act in good faith, instead of considering the possibility that the SSP plan is adequate but the parties simply disagree. APTA therefore requests that proposed paragraphs (b)(1) through (3) not be included in the final rule.

As discussed previously, FRA has not included proposed paragraph (b)(3) in this final rule. FRA also makes clear that, if there is disagreement between the railroad and certain directly affected employees, including their union representatives, the failure to reach an agreement does not, in itself, lead to a presumption that the railroad acted in bad faith or failed to use best efforts. Rather, the consultation statement required by paragraph (b) is the railroad's opportunity to explain why it believes there was disagreement. If paragraphs (b)(1) and (2) were not included in the final rule, as requested by APTA, FRA would only have the statement from the directly affected employees as an explanation as to why agreement was not reached. To make a balanced and well-informed decision on whether the railroad used good faith and best efforts, FRA believes it necessary to have a statement from both the railroad and the directly affected employees. Further, as noted in the discussion of paragraph (a)(1), FRA may approve a plan even if there is disagreement between the parties, as long as FRA can determine that the railroad consulted in good faith and used its best efforts to reach agreement. In this regard, it would be more difficult for FRA to make this determination without the consultation statement required by paragraphs (b)(1) and (2).

Paragraph (c)(1) implements section 20156(g)(2) by providing that, if a railroad and its directly affected employees cannot reach agreement on the proposed contents of a SSP plan,

then the directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached. The FRA Associate Administrator for Railroad Safety and Chief Safety Officer will consider any such views during the plan review and approval process. Appendix C sets forth the procedures for the submission of statements by directly affected employees.

Paragraph (c)(2) specifies that a railroad's directly affected employees have 30 days following the date of the railroad's submission of its proposed SSP plan to submit the statement described in paragraph (c)(1) of this section. While the NPRM proposed to provide the directly affected employees 60 days to file such a statement, FRA believes that 30 days is more appropriate. This decision takes into account that paragraph (b)(3) ensures that the directly affected employees are provided the SSP plan and the consultation statement at approximately the same time the documents are provided to FRA for review, as requested by the Labor Organizations. Moreover, pursuant to § 270.201(b), FRA will review a SSP plan within 90 days of receipt, as discussed below. As a result, if the directly affected employees were to have up to 60 days to submit a statement when agreement on the SSP plan was not reached, FRA would have only 30 days to consider the directly affected employees' views while reviewing the SSP plan. Thirty days would not be enough time to ensure that the directly affected employees' views are sufficiently addressed during the SSP plan review process.

Paragraph (d) requires that a railroad's SSP plan include a description of the process a railroad will use to consult with its directly affected employees on any substantive amendments to the railroad's SSP plan. As with its initial SSP plan, a railroad must use good faith and best efforts to reach agreement with directly affected employees on any substantive amendments to the plan. Examples of substantive amendments could include the following: The addition of new stakeholder groups (or the removal of a stakeholder group); major changes to the processes employed, including changes to the frequency of governing body meetings; or changing the organizational level of the manager responsible for the SSP (e.g., changing from the Chief Safety Officer to someone who reports to the Chief Safety Officer). Requiring a railroad to detail that process in its plan facilitates the consultation by

establishing a known path to be followed. A railroad that does not follow this process when substantively amending its SSP plan may be subject to penalties for failing to comply with the provisions of its plan. However, this requirement does not apply to non-substantive amendments (e.g., amendments updating names and addresses of railroad personnel). If a railroad is uncertain as to whether a proposed amendment is substantive or non-substantive, it should contact FRA for guidance.

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

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

#### *Section 270.201 Filing and Approval*

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

Paragraph (a)(1) requires that each railroad submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer no later than February 8, 2018, or not less than 90 days before commencing operations, whichever is later. In the NPRM, FRA proposed requiring submission no later 395 days after the effective date of the final rule; however, many commenters expressed concern regarding this timeframe. The commenters believe that 395 days after the effective date of the rule is not a sufficient amount of time for a railroad to draft its SSP and conduct the necessary consultation with directly affected employees pursuant to § 270.107. The commenters point out that since the protections under § 270.105 do not go into effect until 365 days after the publication date of the rule, the requirement that the railroad submit its plan to FRA 395 days after the effective date does not provide enough time to conduct consultation regarding the substance of the SSP. To address these concerns, FRA has extended this submission deadline.

The final rule requires a railroad to submit its SSP plan 180 days after the effective date of the protections. Per section 20119(b), the protections cannot go into effect until 1 year after adoption of the final rule. The final rule will not be effective until 60 days after publication. Therefore, 365 days after

publication, the railroad will have 180 days to submit its SSP. In other words, the railroad will submit its SSP plan to FRA 545 days after publication or 485 days after the effective date of the rule. FRA believes providing the railroads with additional time to submit their plans will allow for sufficient time to draft the SSP plan and conduct the necessary consultation with the directly affected employees pursuant to § 270.107.

In addition, APTA raised concerns regarding the requirement that new starts submit their plans not less than 90 days before commencing operations. APTA believes this is not sufficient time if operations begin before the protections under § 270.105 are effective and therefore requests FRA consider extending the amount of time a railroad has to submit a plan before commencing operations. Under paragraph (a)(1), a railroad must have its SSP plan in place 90 days before commencing operations, or by February 8, 2018 (i.e., 180 days after the date the protections of § 270.105 become applicable), whichever is later. This means that if a new start is commencing operations before the date the protections of § 270.105 become applicable, the railroad will have at least until 180 days after the date the protections of § 270.105 become applicable to submit a plan, given that the later submission date will apply. Accordingly, FRA believes that the rule provides a sufficient amount of time for a new start to develop its SSP plan in consultation with its directly affected employees and submit the plan to FRA for approval.

Paragraph (a)(2) provides that the railroad shall not include the results of its risk-based hazard analysis in its SSP plan that it submits to FRA pursuant to paragraph (a)(1) of this section. The SSP plan should only include the processes and methods used in the risk-based hazard analysis as described in § 270.103(p). However, since the risk-based hazard analysis is a vital element of a SSP, FRA will be available to assist the railroads and other stakeholders to ensure that this analysis is robust and addresses all the necessary aspects of the railroad's operations. To achieve this goal, representatives of FRA and States participating under part 212 of this chapter will have access to the railroad's risk-based hazard analysis pursuant to paragraph (a)(2).

As part of its submission, the railroad must provide certain additional information. Primarily, under paragraph (a)(3), the SSP plan submission shall include the signature, name, title, address, and telephone number of the chief official responsible for safety and

who bears primary managerial authority for implementing the SSP for the submitting railroad. By signing, this chief official is certifying that the contents of the SSP plan are accurate and that the railroad will implement the contents of the program as approved by FRA. The SSP plan shall also include the contact information for the primary person managing the SSP and the senior representatives of host railroads, contract operators, and shared track/corridor operators, if any, and any other person who utilizes or provides significant safety-related services. The term "person" has been included in paragraph (a)(3)(iii) to clarify what was meant by "others" as proposed in the NPRM. The inclusion of a person that utilizes or provides significant safety-related services is consistent with the discussion of § 270.103(d)(2). The contact information for the primary person managing the SSP is necessary so that FRA knows who to contact regarding any issues with the railroad's SSP. Likewise, the contact information for the senior representatives of any host railroad, contract operator, shared track/corridor operator, or other person who utilizes or provides significant safety-related services is necessary so that FRA knows who to contact regarding the involvement of these parties in implementing and supporting the railroad's SSP. Separately, FRA notes that it has included proposed paragraph (a)(5) in paragraph (a)(3) to maintain clarity. Paragraph (a)(5) in the NPRM proposed to require the chief official responsible for safety and who bears primary managerial authority for implementing the railroad's SSP to certify that the contents of the railroad's SSP plan are accurate and that the railroad will implement the contents of the program as approved by § 270.201(b). This proposed requirement is specifically reflected in paragraph (a)(3)(i).

Paragraph (a)(4) references the requirements of § 270.107(b), which requires a railroad to submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its SSP. When the railroad provides the consultation statement to FRA, § 270.107(b)(3) also requires that the railroad simultaneously provide a copy of the statement to certain directly affected employees identified in a service list. The directly affected employees can then file a statement for FRA's consideration in evaluating the proposed plan if they do so within 30 days after the railroad has filed its

consultation statement, as discussed in § 270.107(c)(2).

Paragraph (b) sets forth the FRA approval process for a railroad's SSP plan. Within 90 days of receipt, FRA will review the SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. FRA notes that the NPRM also proposed that FRA review would alternatively take place "within 90 days of receipt of each SSP plan submitted before the commencement of railroad operations." However, FRA has not included this alternative condition in the final rule because it would be duplicative and erroneously imply a difference in the 90-day period, when there would be none. FRA's review will consider any statement submitted by directly affected employees pursuant to § 270.107. As with drafting the plan, FRA intends to work with the railroad and any necessary stakeholders when reviewing the plan.

Once FRA determines whether a railroad's SSP plan complies with the requirements of this part, FRA will notify, in writing, each person identified by the railroad in § 270.201(a)(3) whether the railroad's SSP plan is approved or not. The NPRM proposed that FRA notify "the primary contact person of each affected railroad"; however, to maintain consistency within this section, FRA revised the language to "each person identified by the railroad in § 270.201(a)(3)." If FRA does not approve a plan, it will inform the railroad of the specific points in which the plan is deficient. FRA will also provide the notification to each individual identified in the service list accompanying the consultation statement required under § 270.107(b). When the railroad receives notification that the plan is not approved and notice of the specific points in which the plan is deficient, the railroad has 90 days to correct all of the deficiencies identified and resubmit the plan to FRA under paragraph (b)(3). FRA had received comments expressing concern that 60 days was not a sufficient amount of time for a railroad to address the deficient points of a SSP plan, as proposed in the NPRM. To address this concern, FRA has extended the deadline to 90 days in the final rule.

AAJ and the Labor Organizations expressed concern that railroads may claim that they are immune from any safety hazard claim or that a State law claim is preempted because FRA has approved a railroad's SSP plan. The Labor Organizations provided the example that if an employee is injured because of defective ballast in a yard,

and a State has a regulation that sets forth walkway standards, a railroad may claim that the State law is preempted because FRA had approved the railroad's SSP which included walkway safety. Accordingly, the Labor Organizations suggested the following language to address this concern: "Neither the approval by FRA of a railroad's System Safety Plan nor its compliance by a railroad shall be admitted into evidence in a lawsuit seeking damages for alleged negligence, nor shall a railroad claim that a state law or regulation is preempted, or that a federal law or regulation is precluded, because of such FRA approval or a railroad's compliance." FRA understands the concerns expressed by the commenters, and has included paragraph (b)(4) to address those concerns.

The final rule requires the development of a SSP that must be approved by FRA. Under § 270.103(p), the SSP includes a risk-based hazard management program that establishes the processes used in the risk-based hazard analysis to identify hazards and corresponding risks on the railroad's system and the methods used to identify actions that mitigate or eliminate the hazards and corresponding risks. Section 270.201(a)(2) provides that the railroad shall not include in its SSP the risk-based hazard analysis that is conducted pursuant to § 270.103(q). Section 270.103(q) in turn provides that once FRA approves a railroad's SSP, the railroad is to apply the risk-based hazard analysis to identify and analyze hazards on the railroad's system, determine the resulting risks, and identify and implement specific actions that will mitigate or eliminate the hazards. Since FRA will not be reviewing or approving the specific mitigation and elimination measures that a railroad may adopt to address the hazards and risks that it identifies, the final rule is not intended to preempt State standards of care regarding the specific risk mitigation and mitigation actions a railroad will implement under its SSP. Accordingly, § 270.201(b)(4) clarifies that FRA approval of a railroad's SSP plan under this final rule does not constitute approval of the specific mitigation and elimination measures that the railroad will implement pursuant to § 270.103(q)(2) and should not be construed as establishing a Federal standard of care regarding those specific actions.

Paragraph (c) addresses the process a railroad will follow whenever it amends its SSP. When a railroad amends its SSP plan it shall submit the amended SSP plan to FRA not less than 60 days before

the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the proposed changes to the original, approved SSP plan. The cover letter should provide enough information so that FRA knows what is being added, removed, or changed from the original approved SSP. The railroad will also be required to follow the process described pursuant to § 270.107(d) regarding the consultation with directly affected employees concerning the amendment(s) to the SSP plan. The railroad will describe in the cover letter the process it used to consult with its directly affected employees on the amendment(s).

FRA recognizes that some amendments may be safety-critical and that the railroad may not be able to submit the amended SSP plan to FRA 60 days before the proposed effective date of the amendments. In these instances, the railroad shall submit the amended SSP plan to FRA as near as possible to 60 days before the proposed effective date of the amendment(s). The railroad shall provide an explanation why the amendment is safety-critical and describe the effects of the amendment. The requirement that the railroad explain why the amendment is safety-critical was not proposed in the NPRM; however, it was added to the final rule to ensure that it is clear to FRA and other stakeholders the nature of the amendment and why the railroad believes it is safety-critical.

FRA also recognizes that some amendments may be purely administrative in nature. While § 270.201 subjects all changes to a SSP plan to a formal review and approval process, FRA believes that purely administrative changes should be excluded from the process so that the agency can focus its resources on more substantive matters. FRA has therefore included paragraph (c)(1)(iii) in the final rule to limit the need for formal FRA approval of purely administrative changes to previously approved SSP plans. This paragraph will allow these specific types of amendments to become effective immediately upon filing with FRA and thereby help to streamline the approval process. All other proposed amendments must comply with the formal approval process in paragraph (c) of this section.

Except as provided in paragraph (c)(1)(iii), FRA will review the proposed amended SSP plan within 45 days of receipt, under paragraph (c)(2)(i). FRA will then notify the primary contact person whether the proposed amended SSP plan has been approved by FRA. If the amended plan is not approved, FRA

will provide the specific points in which each proposed amendment to the plan is deficient. If FRA does not notify the railroad whether the amended plan is approved or not by the proposed effective date of the amendment(s) to the plan, the railroad may implement the amendment(s) to the plan. This implementation, however, is subject to FRA's pending decision regarding whether the amendment is approved or not. This provision provides flexibility for railroads to implement proposed amendments pending FRA's decision, should FRA not affirmatively act within the prescribed time periods. However, should FRA not approve a proposed amendment, the railroad must follow the procedures in paragraph (c)(2)(iii) to re-implement the amendment.

If a proposed amendment to the SSP plan is not approved by FRA, the railroad has two options: Correct all deficiencies and resubmit the amendment to FRA, or provide notice to FRA that it is retracting the proposed amendment. The final rule makes clear that the railroad may retract the proposed amendment rather than correct it, whichever option it believes best. The railroad will have 60 days following receipt of FRA's written notice that any proposed amendment was not approved to either submit a corrected copy of the amendment that addresses all deficiencies noted by FRA or to submit notice that the railroad is retracting the amendment.

Paragraph (d) allows FRA to reopen consideration of a plan or amendment after initial approval of the plan or amendment. Examples of the types of cause for which FRA may reopen review include FRA's determination that the railroad is not complying with its plan or plan amendment, and FRA's awareness of material information about which FRA was unaware when it originally reviewed the plan or amendment. The determination of whether to reopen consideration will be made solely within FRA's discretion on a case-by-case basis.

FRA sought comment in the NPRM on whether electronic submission of a SSP plan should be permitted and, if so, what type of process FRA should use to accept such submissions. All of the commenters who responded to this request supported electronic submission. Therefore, paragraph (e) permits documents to be submitted electronically. To provide guidance on electronic submission, FRA added Appendix C, Procedures for Submission of System Safety Program Plans and Statements from Directly Affected Employees, which is addressed below.

#### Section 270.203 Retention of System Safety Program Plan

This section sets forth the requirements for a railroad's retention of its SSP plan. FRA did not receive any comments in response to this section and, therefore, it remains unchanged from the NPRM. A railroad will be required to retain at its system headquarters, and at any division headquarters, a copy of its SSP plan and a copy of any amendments to the plan. The railroad must make the plan and any amendments available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

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

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

#### Section 270.301 General

To determine whether a SSP is successful, it will need to be evaluated by both the railroad and FRA on a periodic basis. This section sets forth the general requirement that a railroad's SSP and its implementation will be assessed internally by the railroad and audited externally by FRA or FRA's designee. FRA did not receive any comments in response to this section and, therefore, it remains unchanged from the NPRM.

#### Section 270.303 Internal System Safety Program Assessment.

This section sets forth the requirements for the railroad's internal SSP assessment. FRA did not receive any comments in response to this section and, therefore, it remains substantively unchanged from the NPRM. Once FRA approves a railroad's SSP plan, the railroad shall conduct an annual assessment of the extent to which: (1) The SSP is fully implemented; (2) the railroad is in compliance with the implemented elements of the approved SSP plan; and (3) the railroad has achieved the goals set forth in § 270.103(c). This internal assessment will provide the railroad with an overall survey of the progress of its SSP implementation and the areas in which improvement is necessary.

As part of its SSP plan, the railroad will describe the processes used to: (1) Conduct internal SSP assessments; (2) report the findings of the internal SSP assessments internally; (3) develop, track, and review recommendations as a result of the internal SSP assessments;

(4) develop improvement plans based on the internal SSP assessments that, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; and (5) manage revisions and updates to the SSP plan based on the internal SSP assessments. By describing these processes, the railroad will detail how it plans to assess its SSP and how it will improve it if necessary. Since this is an internal assessment, a railroad will tailor the processes to its specific operations.

FRA notes that the NPRM also proposed that the railroad would describe the process it uses to comply with the reporting requirements set forth in proposed § 270.201. However, FRA has determined that it is not necessary to adopt this proposed requirement, and it is not included in this paragraph (b).

Within 60 days of completing its internal assessment, the railroad will submit a copy of its internal assessment report to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590. The NPRM did not specify the individual at FRA to whom the internal assessment report will be sent, which has been clarified in the final rule. This report will include the SSP assessment and the status of internal assessment findings and improvement plans. The railroad will also outline the specific improvement plans for achieving full implementation of its SSP and the milestones it has set forth. The railroad's chief official responsible for safety shall certify the results of the railroad's internal SSP plan assessment.

#### Section 270.305 External Safety Audit

This section sets forth the process FRA will utilize when it conducts audits of a railroad's SSP. FRA did not receive any comments in response to this section and, therefore, it is essentially unchanged from the NPRM. These audits will evaluate the railroad's compliance with the elements required by this part in the railroad's approved SSP plan. Because this section is predicated on the railroad's SSP plan and any amendments having already been approved by FRA pursuant to § 270.201(b) and (c), this section permits FRA to focus on the extent to which the railroad is complying with its own program.

Similar to the SSP plan review process, FRA does not intend the audit to be conducted in a vacuum. Rather,

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

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

If FRA does not approve a railroad's improvement plan, FRA will notify the railroad of the specific deficiencies in the improvement plan. The railroad will then amend the improvement plan to correct the deficiencies identified by FRA and provide FRA a copy of the amended improvement plan no later than 30 days after the railroad has received notice from FRA that its improvement plan was not approved. This process is similar to the process provided in § 270.201(b)(3) when FRA does not initially approve a railroad's SSP. Upon request, the railroad shall provide to FRA and States participating under part 212 of this chapter for review a report regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

#### Appendix A to Part 270—Schedule of Civil Penalties

Appendix A to part 270 contains a schedule of civil penalties for use to enforce this part. Because such penalty schedules are statements of agency policy, notice and comment are not required before their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, FRA invited comment on the penalty schedule. However, FRA did not receive any comments other than the Labor Organizations' comment that the NPRM lacked a penalty schedule. As noted above, FRA typically does not include a

penalty schedule in an NPRM. Accordingly, FRA is issuing this penalty schedule reflecting the requirements of this final rule.

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

Appendix B contains guidance on how a railroad could comply with § 270.107, which states that a railroad must in good faith consult with and use its best efforts to reach agreement with all of its directly affected employees on the contents of the SSP plan. The appendix begins with a general discussion of the terms "good faith" and "best efforts," explaining that they are separate terms and that each has a specific and distinct meaning. For example, the good faith obligation is concerned with a railroad's state of mind during the consultation process, and the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement with its directly affected employees. The appendix also explains that FRA will determine a railroad's compliance with the § 270.107 requirements on a case-by-case basis and outlines the potential consequences for a railroad that fails to consult with its directly affected employees in good faith and using best efforts.

The appendix also contains specific guidance on the process a railroad may use to consult with its directly affected employees. This guidance would not establish prescriptive requirements with which a railroad must comply, but provides the road map for how a railroad may conduct the consultation process. The guidance also distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly. Overall, however, the appendix stresses that there are many compliant ways in which a railroad may choose to consult with its directly affected employees and that FRA believes, therefore, that it is important to maintain a flexible approach to the § 270.107 consultation requirements, so a railroad and its directly affected employees may consult in the manner best suited to their specific circumstances.

#### Appendix C to Part 270—Procedures for Submission of System Safety Program Plans and Statements From Directly Affected Employees

Appendix C provides railroads and directly affected employees the option to file SSP plans or consultation statements electronically. As discussed above, the NPRM requested comment regarding whether electronic submission of SSP materials should be allowed. All of the comments received in response to this request supported electronic submission, and, therefore, Appendix C has been added.

FRA intends to create a secure document submission site and needs basic information from railroads or directly affected employees before setting up a user's account. To provide secure access, information regarding the points of contact is required. 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 a railroad's points of contact. Thus, FRA needs each point of contact to understand that by providing any email addresses, the railroad is consenting to receive approval and disapproval notices from FRA by email. Railroads that allow notice from FRA by email gain the benefit of receiving such notices quickly and efficiently.

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

FRA may be able to develop a secure document submission site so that confidential materials would be identified and not shared with the general public. However, FRA does not expect the information in a SSP plan to be of such a confidential or proprietary nature, particularly since each railroad is required to share the submitted SSP plan with individuals identified in the service list pursuant to § 270.107(b)(3). SSP records in FRA's possession are also exempted from disclosure under the Freedom of Information Act pursuant to section 20118, and § 270.105 protects any information compiled or collected solely for the

purpose of developing, implementing, or evaluating a SSP from discovery, admission into evidence, or consideration for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, and property damage. Accordingly, FRA does not at this time believe it is necessary to develop a document submission system which addresses confidential materials at this time.

**VII. Regulatory Impact and Notices**

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

This final rule has been evaluated under existing policies and procedures, and determined to be “Other Significant” under both Executive

Orders 12866 and 13563 and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this final rule.

This final rule directly responds to the Congressional mandate in section 20156(a) that FRA, by delegation from the Secretary, require each railroad that provides intercity rail passenger or commuter rail passenger transportation to establish a railroad safety risk reduction program. This final rule also implements section 20119(b), which authorizes FRA, by delegation from the Secretary, to issue a regulation protecting from discovery and admissibility into evidence in litigation documents generated for the purpose of developing, implementing, or evaluating a SSP. FRA believes that all of the

requirements of this final rule are directly or implicitly required by these statutory mandates and will promote railroad safety.

Most of the 30 existing commuter and intercity passenger railroads required to comply with the final rule belong to the APTA system safety program and are currently participating in the APTA system safety triennial audit program. The rule adopts many of the elements contained in the APTA “Manual for the Development of System Safety Program Plans for Commuter Railroads.”<sup>10</sup> The rule’s costs and benefits are incremental to the APTA program. Because FRA believes all but one covered railroad follows the APTA program, FRA does not expect this rule will have significant costs. Table E–1 presents a summary of the rule’s benefits and costs.

**TABLE E–1—SUMMARY OF THE RULE’S COSTS AND BENEFITS**

		Undiscounted	Discounted at 7 percent	Discounted at 3 percent
Estimated Costs .....	Over 20-years ... Annualized .....	<sup>11</sup> \$4,743,039 237,152	\$2,327,224 219,674	\$3,412,651 229,384
Cost From Risk Analyses and Risk Mitigation .....	.....	Not estimated, as FRA lacks information to reliably estimate such costs, and it does not know the level of hazards and risks on each railroad and means railroads will use to mitigate.		
Benefits .....	.....	Not estimated but expected to include safety improvements and operational efficiencies resulting primarily from more robust SSPs, additional and improved risk analysis and mitigation, better information about systems, and improved safety culture.		

The SSP NPRM RIA was performed on a breakeven basis. FRA modified that approach in this final rule because FRA could not estimate all relevant regulatory costs, namely those resulting from risk analysis and risk mitigation. These costs are not reasonably predictable until data protections are in place and each railroad produces and implements their SSP plans assessing their hazards and risk levels. Nevertheless, the pool of potential safety benefits is large as evidenced by the number of accidents and incidents experienced on passenger railroads this rule could impact. FRA expects railroads will achieve sufficient safety benefits to justify quantified and unquantified costs.

**Costs**

The rule has requirements in addition to those in the APTA program. FRA estimated the rule’s costs for those additional requirements which include: Documenting the SSP plan and the safety certification process; SSP training; preparing for and providing information in response to external audits; providing mitigation method information to FRA; preparing technology analysis results and providing them to FRA; providing an annual assessment of SSP performance and improvement plans; consulting with directly affected employees and preparing consultation statements; amending SSP plans; retaining records;

and conducting internal SSP assessments. (Table E–1 above summarizes these costs.) FRA did not estimate the full incremental costs of railroads conducting additional and more robust hazard and risk analysis or implementing actions to mitigate identified hazards and risks. FRA lacks information to reliably estimate such costs, as it does not know the level of hazards and risks on each railroad and the means railroads will use to mitigate these risks.

**Benefits**

FRA could not estimate the final rule’s full benefits quantitatively as SSPs are primarily an organizational structure and program to manage safety

<sup>10</sup> [http://www.apta.com/resources/reportsandpublications/Documents/commuter\\_rail\\_manual.pdf](http://www.apta.com/resources/reportsandpublications/Documents/commuter_rail_manual.pdf) (last accessed on March 22, 2016).

<sup>11</sup> The NPRM estimated the costs of the proposed rule to be \$4.1 million. FRA estimates the final rule’s costs are \$4.7 million, a nominal increase of \$620,000 (14.6 percent). The cost estimate increased

from the NPRM to the final rule due to the following: (1) Application of the Congressional Budget Office real wage forecasts for each year of the analysis; (2) updating the wage inputs used to account for the Surface Transportation Board’s newest wage rates for 2012 and a 2015 base year; and (3) an adjustment to allow more time for railroad consultation with directly affected

employees and statement preparation. (The consultation time with labor and affected employees is \$135,000 of the \$620,000 total.) See: <http://www.dot.gov/regulations/economic-values-used-in-analysis> (DOT’s guidance on Value of a Statistical Life (VSL)). (The VSL was further updated June 17, 2015 to \$9.4 million.)

through hazard analysis and mitigation. FRA cannot accurately estimate the rule's incremental safety benefits because FRA cannot reliably predict the specific risks each railroad will identify or the specific actions they will take to mitigate such risks relative to the APTA program. For these reasons, FRA assessed the rule's benefits qualitatively. FRA expects that safety and operational benefits will result from mechanisms in the rule leading to improved safety analysis and risk mitigation, including (1) requirements to demonstrate a robust SSP to FRA, (2) requirements designed to improve safety culture, and (3) protection of certain SSP information. Railroad management and employees will have to achieve the safety goals in their SSPs, but there will also be FRA oversight to monitor and require corrective actions if and when necessary.

Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information from discovery and admission into evidence in Federal or State court proceedings for damages involving personal injury and wrongful death, including the railroad's assessment of its safety risks and its mitigation measures. FRA contracted with an outside organization to conduct this study and the study concluded it was in the public interest to withhold this type of information from these types of proceedings. Thus, the rule sets forth protections of certain SSP information from discovery, admission into evidence, or use for other purposes in a proceeding for damages. FRA expects the information protections will result in railroads conducting more robust risk-based hazard analysis, keeping more detailed records of hazards and risks, and implementing additional actions to mitigate safety risks. FRA could not estimate the costs of the information protections or the resulting incremental safety risk analysis and mitigation activities, but believes they are justified by the resultant safety improvements' benefits.

In conclusion, FRA determined the final rule's benefits justify its costs. To illustrate, FRA estimated the total cost of passenger railroad accidents/incidents is \$33 billion (discounted at 3 percent) and \$51 billion (discounted at 3 percent) over a 20-year future period. These costs show the potential pool of safety benefits this rule can impact is very large, especially compared to the rule's quantified costs. FRA expects railroads will implement the most cost-effective mitigations to eliminate or mitigate hazards. Railroads are not required to implement mitigations with

net costs and FRA expects that railroads will implement mitigations with net benefits. FRA expects railroads can achieve sufficient safety benefits to justify both the costs FRA could estimate and those it could not.

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

FRA developed the final rule under Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) to ensure potential impacts of rules on small entities are properly considered.

The Regulatory Flexibility Act (RFA) requires an agency to review regulations to assess their impact on small entities. An agency must conduct a regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities.

FRA conducted an Initial Regulatory Impact Analysis (IRFA) pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)) for the SSP NPRM. 77 FR 55397-99, Sept. 7, 2012. Furthermore, FRA invited all interested parties to submit data and information regarding this certification. The comments received are addressed below. FRA certifies that this final rule would not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads would be affected by this final rule, none would be significantly impacted.

#### 1. Description of Regulated Entities and Impacts

The "universe" of the entities under consideration includes only those small entities that can reasonably be expected to be directly affected by the provisions of this final rule. For this final rule there is only one type of small entity that is affected: Small railroads.

"Small entity" is defined in 5 U.S.C. 601. Section 601(6) defines "small entity" as having "the same meaning as the terms 'small business', 'small organization' and 'small governmental jurisdiction'" as defined by section 601. Section 601(3) defines "small business" as having the same meaning as "small business concern" under section 3 of the Small Business Act. Section 601(4) defines "small organization" as "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field." Section 601(5) defines "small governmental jurisdiction" as "governments of cities,

counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand."

The U.S. Small Business Administration (SBA) stipulates "size standards" for small entities. It provides that the largest a for-profit railroad business firm may be (and still classify as a "small entity") is 1,500 employees for "Line-Haul Operating" railroads, and 500 employees for "Short-Line Operating" railroads.<sup>12</sup>

Federal agencies may adopt their own size standards for small entities in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad.<sup>13</sup> FRA used this definition for this rule making in preparation of the proposed rule along with the stipulation on government entities or agencies that serve small communities as stated above.

#### Passenger and Commuter Railroads

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

For purposes of this analysis, FRA analyzed two intercity passenger railroads, Amtrak and the Alaska Railroad.<sup>14</sup> Neither is considered a small entity. Amtrak is a Class I railroad and the Alaska Railroad is a Class II railroad. The Alaska Railroad is owned by the State of Alaska, which has a population well in excess of 50,000.

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

<sup>12</sup> "Table of Size Standards," U.S. Small Business Administration, January 31, 1996, 13 CFR part 121.

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

<sup>14</sup> There are state-sponsored intercity passenger rail services, the vast majority of which will be part of Amtrak's SSP.

they are not considered to be small entities.

#### Significant Economic Impact Criteria

FRA estimates that the total cost for the final rule will be \$4.7 million (undiscounted)—\$2.3 million (discounted at 7 percent), or \$3.4 million (discounted at 3 percent), for the railroad industry over a 20-year period. The cost burden to the two small entities will be considerably less on average than that of the other 28 railroads. FRA estimates impacts on these two railroads could range on average between \$1,590 and \$3,346 annualized (non-discounted) to comply with the regulation, depending on the existing level of compliance and discount rate. This estimate was prepared and presented in the IRFA for the NPRM and adjusted in the final rule for revised cost factors applied in the Regulatory Impact Analysis, *e.g.* inflating wages and salaries at 1.07 percent per annum.

Since the time that the NPRM IRFA was prepared, both of the two small entities herein have produced preliminary SSP plans. That plan preparation, with the assistance of FRA and others, will have accomplished much of the work effort envisioned for preparing the formal SSP Plans once the Rule is in effect.

Based on this, FRA concludes that the expected burden of this final rule will not have a significant impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

#### Substantial Number Criteria

This final rule will likely burden only two small railroads; however, this is two out of 30 total railroads impacted by this Rule, and two out of two small railroads. Thus, as noted above, this final rule will impact a substantial number of small railroads.

#### Public Comments and Revisions to the Analysis

The final rule is a performance-based rule and the NPRM, and the regulatory evaluation for the NPRM, requested comments and input on the rulemaking and its supporting documents. The following provides a summary of the comments received that pertained to RFA for small businesses, and how those comments were addressed. FRA did not receive any comments from SBA.

APTA commented that they “believe FRA has applied faulty criteria in determining only two railroads should be treated as small entities.” FRA determined that there would be only

two passenger railroads affected by the SSP rulemaking as small entities. In applying the guidelines of RFA, FRA includes most Class III railroads impacted by a rule as a small business. Only one railroad that will be governed under this final rule is a Class III railroad. RFA guidelines also indicate that if the entity is a part of or agent of governments of cities, counties, towns, townships, villages, or special districts serving a population of more than 50,000, they would not be classified as a small business. Essentially all, except the two railroads FRA classified as small businesses, are a governmental related transportation agency serving population areas of 50,000 or more or an intercity service provider (Amtrak and Alaska), or both.<sup>15</sup> (The definition, SBA based, of small entity that FRA used in the IRFA, results in only two entities considered to be small.)

APTA also suggested that FRA should ensure “that this proposed rule’s requirements are commensurate to the size of the entity” and “compliance with this proposed rule should include flexibility, scalability, and program maturity as relevant factors to determine whether a program is fully implemented.” FRA does expect the structure and scope of a SSP will be commensurate with the size and maturity of the entity. FRA has regularly provided assistance to both new and smaller passenger entities, including the two small entities considered herein, with setting up their safety programs, and with approaches to hazard and risk management. FRA will continue to provide that assistance in the plan development phase of preparing their SSP Plans. The SSP regulation provides a scalable approach that will be easier to implement on a small railroad.

#### 2. Certification

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. FRA invited all interested parties to submit data and information regarding the potential economic impact that will result from adoption of the proposals in the NPRM and has addressed those comments in determining that although a substantial number of small railroads will be affected by this final rule, none of these entities will be significantly impacted.

<sup>15</sup> Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*): “Small governmental jurisdictions” are governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

#### C. Federalism

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

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

This rule adds part 270, System Safety Program. FRA notes that this part could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and codified at 49 U.S.C. 20106 (Sec. 20106). Sec. 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially

local safety or security hazard” exception to Sec. 20106. FRA has determined that certain State laws may be preempted by this part. FRA is aware of one State that has a State Safety Oversight program pursuant to 49 CFR part 659 that has certain elements that will be preempted by part 270. Further, § 270.105(d) specifically addresses the preemption of State discovery rules and sunshine laws to the extent those laws would require disclosure of information protected by § 270.105 in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage. The preemption of State discovery rules and sunshine laws are discussed further in the section-by-section analysis of § 270.105(d). In addition, as previously discussed, section 20119(b) authorizes FRA to issue a rule governing the

discovery and use of risk analysis information in litigation.

In sum, FRA has analyzed this proposed rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined that this proposed rule has minimal federalism implications. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

**D. International Trade Impact Assessment**

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The

statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

**E. Paperwork Reduction Act**

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

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
270.103—System Safety Program Plan (SSPP)—Comprehensive Written SSPP Meeting All of This Section’s Requirements.	30 railroads .....	30 plans .....	40 hours (32 hrs. for plan + 8 hrs. review).	1,200
—System Safety Training by RR of Employees/Contractors/Others.	30 railroads .....	450 trained individuals	2 hours .....	900
—Records of System Safety Trained Employees/Contractors/Others.	30 railroads .....	450 records .....	2 minutes .....	15
—Furnishing of RR Results of Risk-based Hazard Analysed Upon FRA/Participating Part 212 States.	30 railroads .....	10 analyses results .....	20 hours .....	200
—Furnishing of Descriptions of Railroad’s Specific Risk Mitigation Methods That Address Hazards Upon FRA Request.	30 railroads .....	10 mitigation methods descriptions.	10 hours .....	100
—Furnishing of Results of Railroad’s Technology Analysis Upon FRA/Participating Part 212 States’ Request.	30 railroads .....	30 results of technology analysis.	40 hours .....	1,200
270.107(a)—Consultation Requirements—RR Consultation with Its Directly Affected Employees on System Safety Program Plan (SSPP).	30 railroads .....	30 consults (w/labor union reps.).	40 hours .....	1,200
—RR Notification to Directly Affected Employees of Preliminary Meeting at Least 60 Days Before Being Held.	30 railroads .....	30 notices .....	8 hours .....	240
—(b) RR Consultation Statements .....	30 railroads .....	28 statements + 2 statement.	80 hours + 2 hours .....	2,244
—Copies of Consultations Statements by RR to Service List Individuals.	30 railroads .....	30 copies .....	1 minute .....	1
270.201—SSPPs Found Deficient by FRA and Requiring Amendment.	30 railroads .....	4 amended plans .....	40 hours .....	160
—Review of Amended SSPPs Found Deficient and Requiring Amendment.	30 railroads .....	1 amended plans .....	40 hours .....	40
—Reopened Review of Initial SSPP Approval For Cause Stated.	30 railroads .....	2 amended plans .....	40 hours .....	80
270.203—Retention of SSPPs .....	30 railroads .....	37 copies .....	10 minutes .....	6
—Retained copies of SSPPs				
270.303—Annual Internal SSPP Assessments/ Reports Conducted by RRs.	30 railroads .....	30 evaluation reports ...	40 hours .....	1,200
—Certification of Results of RR Internal Assessment by Chief Safety Official.	30 railroads .....	30 statements .....	8 hours .....	240
270.305—External Safety Audit .....	30 railroads .....	6 plans .....	40 hours .....	240
—RR Submission of Improvement Plans in Response to Results of FRA Audit.				
—Improvement Plans Found Deficient by FRA and Requiring Amendment.	30 railroads .....	2 amended plans .....	24 hours .....	48
—RR Status Report to FRA of Implementation of Improvements Set Forth in the Improvement Plan.	30 railroads .....	2 reports .....	4 hours .....	8
Appendix B—Additional Documents Provided to FRA Upon Request.	30 railroads .....	2 documents .....	30 minutes .....	1

CFR Section/Subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Notifications/Good Faith Consultation with Non-Represented Employees by RRs.	2 railroads .....	2 notices/consults .....	8 hours .....	16
—Meeting with Non-Represented Employees within 180 Days of Final Rule Effective Date About Consultation Process.	2 railroads .....	2 meetings .....	8 hours .....	16
Appendix C—Written Requests by RRs to File Required Submissions Electronically.	30 railroads .....	20 written requests .....	30 minutes .....	10
Totals .....	30 railroads .....	1,240 replies/responses	6.832 hours .....	9,365

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

F. Environmental Assessment

FRA has evaluated this rule under 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 rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. See 64 FR 28547, May 26, 1999. Section 4(c)(20) reads as follows: “(c) Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. \* \* \* The following classes of FRA actions are categorically excluded:

\* \* \* (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.”

Consistent 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 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 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that

may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. For the year 2015, this monetary amount of \$100,000,000 has been adjusted to \$156,000,000 to account for inflation. This final rule will not result in the expenditure of more than \$156,000,000 by the public sector in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

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

## I. Privacy Act

Interested parties should be aware that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78), or you may visit <http://www.transportation.gov/privacy.html>.

### List of Subjects in 49 CFR Part 270

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

### The Rule

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

## PART 270—SYSTEM SAFETY PROGRAM

### Subpart A—General

Sec.

270.1 Purpose and scope.

270.3 Application.

270.5 Definitions.

270.7 Penalties and responsibility for compliance.

### Subpart B—System Safety Program Requirements

270.101 System safety program; general.

270.103 System safety program plan.

270.105 Discovery and admission as evidence of certain information.

270.107 Consultation requirements.

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

270.201 Filing and approval.

270.203 Retention of system safety program plan.

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

270.301 General.

270.303 Internal system safety program assessment.

270.305 External safety audit.

Appendix A to Part 270—Schedule of Civil Penalties

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

Appendix C to Part 270—Procedures for Submission of SSP Plans and Statements from Directly Affected Employees

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

## Subpart A—General

### § 270.1 Purpose and scope.

(a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by railroads. This part requires certain railroads to establish a system safety program that systematically evaluates railroad safety hazards and the resulting risks on their systems and manages those risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities.

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

(c) This part prescribes the protection of information generated solely for the purpose of planning, implementing, or evaluating a system safety program under this part.

### § 270.3 Application.

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

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

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

(b) This part does not apply to:

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

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

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

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

### § 270.5 Definitions.

As used in this part—

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

*Configuration management* means a process that ensures that the

configurations of all property, equipment, and system design elements are accurately documented.

*FRA* means the Federal Railroad Administration.

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

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

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

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

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

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

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

*Railroad* means—

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

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

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

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

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

*Risk-based hazard management* means the processes (including documentation) used to identify and analyze hazards, assess and rank corresponding risks, and eliminate or mitigate the resulting risks.

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

*SSP plan* means system safety program plan.

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

*System safety program* means a comprehensive process for the application of management and engineering principles and techniques to optimize all aspects of safety.

*System safety program plan* means a document developed by the railroad that implements and supports the railroad's system safety program.

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

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

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$839 and not more than \$27,455 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violation has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$109,819 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311 (formerly codified in 45 U.S.C. 438(e)). Appendix A to this part contains a schedule of civil penalty amounts used in connection with this part.

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

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

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

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

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

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

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

approved by FRA under the process specified in § 270.201.

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

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

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

(2) Describe the safety philosophy and safety culture of the railroad; and

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

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

(1) Long-term;

(2) Meaningful;

(3) Measurable; and

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

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

(2) Each railroad shall identify the persons that enter into a contractual relationship with the railroad to either perform significant safety-related services on the railroad's behalf or to utilize significant safety-related services provided by the railroad for purposes related to railroad operations.

(3) Each railroad shall describe the relationships and responsibilities between the railroad and: host railroads, contract operators, shared track/corridor operators, and persons providing or utilizing significant safety-related services as identified by the railroad pursuant to paragraph (d)(2) of this section.

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

This statement shall include the following:

- (1) A chart or other visual representation of the organizational structure of the railroad;
- (2) A description of the railroad's management responsibilities within the system safety program;
- (3) A description of how safety responsibilities are distributed within the railroad organization;
- (4) Clear identification of the lines of authority used by the railroad to manage safety issues; and
- (5) A description of the roles and responsibilities in the railroad's system safety program for each host railroad, contract operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified by the railroad pursuant to (d)(2) of this section. As part of this description, the railroad shall describe how each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified by the railroad pursuant to paragraph (d)(2) of this section supports and participates in the railroad's system safety program, as appropriate.

(f) *System safety program implementation process.* (1) Each railroad shall set forth a statement in its SSP plan that describes the process the railroad will use to implement its system safety program. As part of the railroad's implementation process, the railroad shall describe:

(i) Roles and responsibilities of each position that has significant responsibility for implementing the system safety program, including those held by employees and other persons utilizing or providing significant safety-related services as identified by the railroad pursuant to (d)(2) of this section; and

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

(2) A railroad's system safety program shall be fully implemented within 36 months of FRA's approval of the SSP plan pursuant to subpart C of this part.

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

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

(3) If a railroad has a manual or manuals that comply with all applicable Federal regulations and that describe the processes and procedures that satisfy this section, the railroad may reference those manuals in its SSP plan. FRA approval of a SSP plan that contains or references such manuals is not approval of the manuals themselves; each manual must independently comply with applicable regulations and is subject to a civil penalty if not in compliance with applicable regulations.

(4) The identification and description required by this section of the processes and procedures used for maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety is not intended to address and should not include procedures to address employee working conditions that arise in the course of conducting such maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety as set forth in the plan. FRA does not intend to approve any specific portion of a SSP plan that relates exclusively to employee working conditions.

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

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

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

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

(i) *System safety program employee/contractor training.* (1) Each employee who is responsible for implementing and supporting the system safety program, and any persons utilizing or providing significant safety-related

services will be trained on the railroad's system safety program.

(2) Each railroad shall establish and describe in its SSP plan the railroad's system safety program training plan. A system safety program training plan shall set forth the procedures by which employees that are responsible for implementing and supporting the system safety program, and any persons utilizing or providing significant safety-related services will be trained on the railroad's system safety program. A system safety program training plan shall help ensure that all personnel who are responsible for implementing and supporting the system safety program understand the goals of the program, are familiar with the elements of the program, and have the requisite knowledge and skills to fulfill their responsibilities under the program.

(3) For each position identified pursuant to paragraph (f)(1)(i) of this section, the training plan shall describe the frequency and content of the system safety program training that the position receives.

(4) If a position is not identified under paragraph (f)(1)(i) of this section as having significant responsibility to implement the system safety program but the position is safety-related or has a significant impact on safety, personnel in those positions shall receive training in basic system safety concepts and the system safety implications of their position.

(5) Training under this subpart may include, but is not limited to, classroom, computer-based, or correspondence training.

(6) The railroad shall keep a record of all training conducted under this part and update that record as necessary. The system safety program training plan shall set forth the process used to maintain and update the necessary training records required by this part.

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

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

(k) *Workplace safety.* Each railroad shall set forth a statement in its SSP plan that describes the programs

established by the railroad that protect the safety of the railroad's employees and contractors. The statement shall include a description of:

(1) The processes that help ensure the safety of employees and contractors while working on or in close proximity to the railroad's property as described in paragraph (d) of this section;

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

(3) Any fitness-for-duty programs or any medical monitoring programs; and

(4) The standards for the control of alcohol and drug use in part 219 of this chapter.

(l) *Public safety outreach program.* Each railroad shall establish and set forth a statement in its SSP plan that describes its public safety outreach program to provide safety information to railroad passengers and the general public. Each railroad's safety outreach program shall provide a means for railroad passengers and the general public to report any observed hazards.

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

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

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

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

(1) The risk-based hazard management program shall establish:

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

(ii) The processes or procedures used in the risk-based hazard analysis to

analyze identified hazards and support the risk-based hazard management program;

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

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

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

(vi) The process to make decisions that affect the safety of the rail system relative to the risk-based hazard management program;

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

(viii) The methods used to maintain records of identified hazards and risks and the mitigation or elimination of the identified hazards and risks throughout the life of the rail system.

(2) The railroad's description of the risk-based hazard management program shall include:

(i) The position title of the individual(s) responsible for administering the risk-based hazard management program;

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

(iii) The position title of the participants and structure of any hazard management teams or safety committees that a railroad may establish to support the risk-based hazard management program.

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

(2) A risk-based hazard analysis shall identify and the railroad shall implement specific actions using the methods described in paragraph (p)(1)(iv) of this section that will mitigate or eliminate the hazards and

resulting risks identified by paragraph (q)(1) of this section.

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

(r) *Technology analysis and implementation plan.* (1) A railroad shall develop, and periodically update as necessary, a technology analysis and implementation plan as described by this paragraph. The railroad shall include this technology analysis and implementation plan in its SSP plan.

(2) A railroad's technology analysis and implementation plan shall describe the process the railroad will use to:

(i) Identify and analyze current, new, or novel technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis pursuant to paragraph (q)(1) of this section; and

(ii) Analyze the safety impact, feasibility, and costs and benefits of implementing the technologies identified by the processes under paragraph (r)(2)(i) of this section that will mitigate or eliminate hazards and the resulting risks.

(3) Once FRA approves a railroad's SSP plan pursuant to § 270.201(b), including the technology analysis and implementation plan, the railroad shall apply:

(i) The processes described in paragraph (r)(2)(i) of this section to identify and analyze technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis pursuant to paragraph (q)(1) of this section. At a minimum, the technologies a railroad shall consider as part of its technology analysis are: Processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology; and

(ii) The processes described in paragraph (r)(2)(ii) of this section to the technologies identified by the analysis under paragraph (r)(3)(i) of this section.

(4) If a railroad decides to implement any of the technologies identified in paragraph (r)(3) of this section, in the technology analysis and implementation plan in the SSP plan, the railroad shall:

(i) Describe how it will develop, adopt, implement, maintain, and use the identified technologies; and

(ii) Set forth a prioritized implementation schedule for the development, adoption, implementation and maintenance of those technologies over a 10-year period.

(5) Except as required by subpart I of part 236 of this chapter, if a railroad decides to implement a positive train control system as part of its technology analysis and implementation plan, the railroad shall set forth and comply with a schedule for implementation of the positive train control system consistent with the deadlines in the Positive Train Control Enforcement and Implementation Act of 2015, Public Law 114–73, 129 Stat. 576–82 (Oct. 29, 2015), and 49 CFR 236.1005(b)(7).

(6) The railroad shall not include in its SSP plan the analysis conducted pursuant to paragraph (r)(3) of this section. The railroad shall make the results of any analysis conducted pursuant to paragraph (r)(3) of this section available upon request to representatives of FRA and States participating under part 212 of this chapter.

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

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

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

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

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

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

(t) *Safety culture*. A railroad shall set forth a statement in its SSP plan that describes how it measures the success of its safety culture identified in paragraph (b)(2) of this section.

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

(a) *Protected information*. Any information compiled or collected after August 14, 2017, solely for the purpose of planning, implementing, or evaluating a system safety program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage. For purposes of this section—

(1) “Information” includes plans, reports, documents, surveys, schedules, lists, or data, and specifically includes a railroad's analysis of its safety risks under § 270.103(q)(1) and a railroad's statement of mitigation measures under § 270.103(q)(2); and

(2) “Solely” means that a railroad originally compiled or collected the information for the exclusive purpose of planning, implementing, or evaluating a system safety program under this part. Information compiled or collected for any other purpose is not protected, even if the railroad also uses that information for a system safety program. “Solely” also means that a railroad continues to use that information only for its system safety program. If a railroad subsequently uses for any other purpose information that was initially compiled or collected for a system safety program, this section does not protect that information to the extent that it is used for the non-system safety program purpose. The use of that information within the railroad's system safety program, however, remains protected. This section does not protect information that is required to be compiled or collected pursuant to any other provision of law or regulation.

(b) *Non-protected information*. This section does not affect the discovery, admissibility, or consideration for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage of information compiled or collected for a purpose other than that specifically identified in paragraph (a) of this section. Such information shall continue to be discoverable, admissible, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage if it was discoverable, admissible, or considered for other

purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage on or before August 14, 2017. Specifically, the types of information not affected by this section include:

(1) Information compiled or collected on or before August 14, 2017;

(2) Information compiled or collected on or before August 14, 2017, and that continues to be compiled or collected, even if used to plan, implement, or evaluate a railroad's system safety program; or

(3) Information that is compiled or collected after August 14, 2017, and is compiled or collected for a purpose other than that identified in paragraph (a) of this section.

(c) *Information protected by other law or regulation*. Nothing in this section shall affect or abridge in any way any other protection of information provided by another provision of law or regulation. Any such provision of law or regulation applies independently of the protections provided by this section.

(d) *Preemption*. To the extent that State discovery rules and sunshine laws would require disclosure of information protected by this section in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage, those rules and laws are preempted.

**§ 270.107 Consultation requirements.**

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

(2) A railroad that consults with such a non-profit employee labor organization as required by paragraph (a)(1) of this section is considered to have consulted with the directly affected employees represented by that organization. If a railroad contracts out significant portions of its operations, the contractor and the contractor's employees performing the railroad's operations shall be considered directly affected employees for the purposes of this part.

(3) A railroad shall have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. A railroad is not required to discuss the substance of a SSP plan during this preliminary meeting. A railroad must:

(i) Hold the preliminary meeting no later than April 10, 2017; and

(ii) Notify the directly affected employees of the preliminary meeting no less than 60 days before it is held.

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

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

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

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

(3) A service list containing the name and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad's directly affected employees. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a railroad submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified in the service list.

(c) *Statements from directly affected employees.* (1) If a railroad and its directly affected employees cannot reach agreement on the proposed contents of a SSP plan, the directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining their views on the plan on which agreement was not reached with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer at Mail Stop 25, 1200 New Jersey Ave SE., Washington, DC 20590. The FRA Associate Administrator for Railroad Safety and Chief Safety Officer shall consider any such views during the plan review and approval process.

(2) A railroad's directly affected employees have 30 days following the date of the railroad's submission of a proposed SSP plan to submit the statement described in paragraph (c)(1) of this section.

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

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

#### § 270.201 Filing and approval.

(a) *Filing.* (1) Each railroad to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590, no later than February 8, 2018 or not less than 90 days before commencing operations, whichever is later.

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

(3) The SSP plan shall include:

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

(ii) The contact information for the primary person responsible for managing the system safety program; and

(iii) The contact information for the senior representatives of any host railroad, contract operator, shared track/corridor operator or persons utilizing or providing significant safety-related services.

(4) As required by § 270.107(b), each railroad must submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its system safety program plan. Directly affected employees may also file a statement in accordance with § 270.107(c).

(b) *Approval.* (1) Within 90 days of receipt of a SSP plan, FRA will review

the SSP plan to determine if the elements prescribed in this part are sufficiently addressed in the railroad's submission. This review will also consider any statement submitted by directly affected employees pursuant to § 270.107(c).

(2) FRA will notify each person identified by the railroad in § 270.201(a)(3) in writing whether the proposed plan has been approved by FRA, and, if not approved, the specific points in which the SSP plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 270.107(b).

(3) If FRA does not approve a SSP plan, the affected railroad shall amend the proposed plan to correct all deficiencies identified by FRA and provide FRA with a corrected copy of the SSP plan not later than 90 days following receipt of FRA's written notice that the proposed SSP plan was not approved.

(4) Approval of a railroad's SSP plan under this part does not constitute approval of the specific actions the railroad will implement under its SSP plan pursuant to § 270.103(q)(2) and shall not be construed as establishing a Federal standard regarding those specific actions.

(c) *Review of amendments.* (1)(i) A railroad shall submit any amendment(s) to the SSP plan to FRA not less than 60 days before the proposed effective date of the amendment(s). The railroad shall file the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s). The cover letter shall also describe the process the railroad used pursuant to § 270.107(d) to consult with its directly affected employees on the amendment(s).

(ii) If an amendment is safety-critical and the railroad is unable to submit the amended SSP plan to FRA 60 days before the proposed effective date of the amendment, the railroad shall submit the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s) and why the amendment is safety-critical to FRA as near as possible to 60 days before the proposed effective date of the amendment(s).

(iii) If the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, FRA approval is not required under the process in paragraphs (c)(1)(i) and (ii) of this section, although the railroad shall still file the proposed amendment with FRA's Associate

Administrator for Railroad Safety and Chief Safety Officer. These proposed amendments may be implemented by the railroad upon filing with FRA. All other proposed amendments must comply with the formal approval process in paragraph (c) of this section.

(2)(i) Except as provided in paragraph (c)(1)(iii) of this section, FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person of each affected railroad whether the proposed amended plan has been approved by FRA, and if not approved, the specific points in which each proposed amendment to the SSP plan is deficient.

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

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

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

(e) *Electronic submission.* All documents required to be submitted to FRA under this part may be submitted electronically. Appendix C to this part provides instructions on electronic submission of documents.

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

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

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

**§ 270.301 General.**

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

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

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

(1) The system safety program is fully implemented;

(2) The railroad is in compliance with the implemented elements of the approved system safety program; and

(3) The railroad has achieved the goals set forth in § 270.103(c).

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

(1) Conduct internal system safety program assessments;

(2) Internally report the findings of the internal system safety program assessments;

(3) Develop, track, and review recommendations as a result of the internal system safety program assessments;

(4) Develop improvement plans based on the internal system safety program assessments. Improvement plans shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; and

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

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

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

Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590; and

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

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

**§ 270.305 External safety audit.**

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

(b)(1) Within 60 days of FRA's written notification of the results of the audit, the railroad shall submit to FRA for approval an improvement plan to address the audit findings that require corrective action. At a minimum, the improvement plan shall identify who is responsible for carrying out the necessary tasks to address audit findings and specify target dates and milestones to implement the improvements that address the audit findings.

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

(3) Upon request, the railroad shall provide to FRA and States participating under part 212 of this chapter for review a report upon request regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

**Appendix A to Part 270—Schedule of Civil Penalties**

PENALTY SCHEDULE <sup>1</sup>

	Violation	Willful violation
<b>Subpart B—System Safety Program Requirements</b>		
270.101—System safety program; general:		
(a) Failure to establish a system safety program .....	\$15,000	\$30,000
(a) Failure to include a risk-based hazard management program in the railroad's system safety program ..	10,000	20,000
270.103—System safety program plan:		

PENALTY SCHEDULE <sup>1</sup>—Continued

	Violation	Willful violation
(a)(1) Failure to include and comply with any required element or any sub-element in the SSP plan .....	7,500	15,000
(a)(2) Failure to communicate and coordinate with host railroad on the SSP plan .....	7,500	15,000
<b>270.107—Consultation Requirements:</b>		
(a)(1) Failure to consult with directly affected employees .....	10,000	20,000
Failure to consult in good faith and/or use best efforts .....	10,000	20,000
(a)(3) Failure to hold preliminary meeting .....	7,500	15,000
Failure to hold preliminary meeting within April 10, 2017 .....	5,000	10,000
Failure to notify directly affected employees no less than 60 days before meeting is held .....	7,500	15,000
(b) Failure to submit consultation statement with plan submission .....	7,500	15,000
Failure to include all required elements in consultation statement .....	5,000	10,000
(d) Failure to submit consultation statement with submission of plan amendment .....	5,000	10,000
<b>Subpart C—Review, Approval, and Retention of SSP Plans</b>		
<b>270.201—Filing and approval:</b>		
(a)(1) Failure to file an initial SSP plan .....	10,000	20,000
Failure to file a SSP plan within 90 days of commencing operations .....	10,000	20,000
(a)(3) Failure to include all required information in submission .....	5,000	10,000
(b)(3) Failure to correct identified deficiencies and amend SSP plan .....	7,500	15,000
Failure to submit amended SSP plan .....	7,500	15,000
Failure to submit amended SSP plan within 90 days .....	5,000	10,000
(c)(1)(i) Failure to submit amendment to SSP plan .....	7,500	15,000
Failure to submit amendment to SSP plan within 60 days .....	5,000	10,000
(c)(2)(iii) Failure to submit corrected amendment or notify FRA of retraction .....	7,500	15,000
Failure to submit corrected amendment within 60 days .....	5,000	10,000
<b>270.203—Retention of SSP plan:</b>		
Failure to retain a copy of the SSP plan at the system/division headquarters .....	10,000	20,000
Failure to make records available to representatives of FRA and States participating under part 212 of this chapter .....	7,500	15,000
<b>Subpart D—System Safety Program Internal Assessments and External Auditing</b>		
<b>270.303—Internal program assessment:</b>		
(a) Failure to conduct an annual internal assessment .....	10,000	20,000
Failure to include all required elements in the internal assessment .....	7,500	15,000
(b) Failure to include a statement in the SSP plan describing the required elements .....	5,000	10,000
(c)(1)(i) Failure to submit to FRA the internal assessment report .....	7,500	15,000
Failure for the internal assessment report to contain all required elements and sub-elements .....	5,000	10,000
(c)(1)(ii) Failure to develop and outline improvement plans .....	7,500	15,000
Failure to comply with improvement plans .....	7,500	15,000
(c)(2) Failure of chief official responsible for safety to certify the results of the internal assessment .....	5,000	10,000
<b>270.305—External safety audit:</b>		
(b)(1) Failure to submit improvement plans .....	7,500	15,000
Failure to submit improvement plans within 60 days .....	5,000	10,000
Failure to include all required elements in the improvement plans .....	5,000	10,000
(b)(2) Failure to amend and submit to FRA the improvement plan .....	7,500	15,000
Failure to submit amended improvement plan within 30 days .....	5,000	10,000
(b)(3) Failure to provide a report regarding the status of the implementation of the improvements set forth in the improvement plan .....	7,500	15,000

<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 \$109,819 for any violation where circumstances warrant. See 49 CFR part 209, appendix A.

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

A railroad required to develop a system safety program under this part must in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the SSP plan. See § 270.107(a). This appendix discusses the meaning of the terms “good faith” and “best efforts,” and provides non-mandatory guidance on how a railroad may comply with the requirement to consult with directly affected employees on the contents of its SSP plan. Guidance is provided for employees who are represented by a non-profit

employee labor organization and employees who are not represented by any such organization.

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

“Good faith” and “best efforts” are not interchangeable terms representing a vague standard for the § 270.107 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a railroad must independently meet the standards for both the good faith and best efforts obligations. A railroad that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 270.107.

The good faith obligation requires a railroad to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of a SSP plan. If a railroad consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. For example, a lack of good faith may be found if a railroad’s directly affected employees express concerns with certain parts of the railroad’s SSP plan, and the railroad neither addresses those concerns in further consultation nor attempts to address those concerns by making changes to the SSP plan.

On the other hand, “best efforts” establishes a higher standard than that

imposed by the good faith obligation, and describes the diligent attempts that a railroad must pursue to reach agreement with its employees on the contents of its system safety program. While the good faith obligation is concerned with the railroad's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the railroad in an attempt to reach agreement. This would include considerations such as whether a railroad had held sufficient meetings with its employees to address or make an attempt to address any concerns raised by the employees, or whether the railroad had made an effort to respond to feedback provided by employees during the consultation process. For example, a railroad would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. A railroad may, however, wish to hold off substantive consultations regarding the contents of its SSP until one year after the publication date of the rule to ensure that certain information generated as part of the process is protected from discovery and admissibility into evidence under § 270.105 of the rule. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing SSP plans, FRA will determine on a case-by-case basis whether a railroad has met its § 270.107 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the railroad pursuant to § 270.107(b) and any statements submitted by employees pursuant to § 270.107(c). If FRA finds that these statements do not provide sufficient information to determine whether a railroad used good faith and best efforts to reach agreement, FRA may investigate further and contact the railroad or its employees to request additional information. If FRA determines that a railroad did not use good faith and best efforts, FRA may disapprove the SSP plan submitted by the railroad and direct the railroad to comply with the consultation requirements of § 270.107. Pursuant to § 270.201(b)(3), if FRA does not approve the SSP plan, the railroad will have 90 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the railroad did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a railroad then does not submit to FRA within 90 days a SSP plan meeting the consultation requirements of § 270.107, the railroad could be subject to penalties for failure to comply with § 270.201(b)(3).

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

Because the standard imposed by the best efforts obligation will vary depending upon

the railroad, there may be countless ways for various railroads to comply with the consultation requirements of § 270.107. Therefore, FRA believes it is important to maintain a flexible approach to the § 270.107 consultation requirements, to give a railroad and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a railroad may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of a SSP plan. FRA believes this guidance may be useful as a starting point for railroads that are uncertain about how to comply with the § 270.107 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a railroad may use to consult with represented and non-represented employees could differ significantly.

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

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

As provided in § 270.107(a)(2), a railroad consulting with the representatives of a non-profit employee labor organization on the contents of a SSP plan will be considered to have consulted with the directly affected employees represented by that organization.

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

- Pursuant to § 270.107(a)(3)(i), a railroad must meet with representatives from a non-profit employee labor organization (representing a class or craft of the railroad's directly affected employees) no later than April 10, 2017, to begin the process of consulting on the contents of the railroad's SSP plan. A railroad must provide notice at least 60 days before the scheduled meeting.

- During the time between the initial meeting and the applicability date of § 270.105 the parties may meet to discuss administrative details of the consultation process as necessary.

- Within 60 days after the applicability date of § 270.105 a railroad should have a meeting with the directed affected employees to discuss substantive issues with the SSP.

- Pursuant to § 270.201(a)(1), a railroad would file its SSP plan with FRA no later than February 8, 2018, or not less than 90 days before commencing operations, whichever is later.

- As provided by § 270.107(c), if agreement on the contents of a SSP plan could not be reached, a labor organization (representing a class or craft of the railroad's

directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

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

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

- By December 12, 2016 (*i.e.*, within 60 days of the effective date of the final rule), a railroad may notify non-represented employees that—

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

- (2) The railroad is required to meet with its directly affected employees within 180 days of the effective date of the final rule to address the consultation process;

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

- (4) If a railroad is unable to reach agreement with its directly affected employees on the contents of the proposed SSP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

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

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

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

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

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

non-represented employees 60 days to submit comments to the railroad on the draft.

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

- As provided by § 270.107(c), if agreement on the contents of a SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining his or her views on the plan on which agreement was not reached.

### **Appendix C to Part 270—Procedures for Submission of SSP Plans and Statements From Directly Affected Employees**

This appendix establishes procedures for the submission of a railroad's SSP plan and statements by directly affected employees consistent with the requirements of this part.

#### **Submission by a Railroad and Directly Affected Employees**

As provided for in § 270.101, a system safety program shall be fully implemented and supported by a written SSP plan. Each railroad must submit its SSP plan to FRA for approval as provided for in § 270.201.

As provided for in § 270.107(c), if a railroad and its directly affected employees cannot come to agreement on the proposed contents of the railroad's SSP plan, the directly affected employees have 30 days following the railroad's submission of its proposed SSP plan to submit a statement to

the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining the directly affected employees' views on the plan on which agreement was not reached.

The railroad's and directly affected employees' submissions shall be sent to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590. When a railroad submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified in the service list pursuant to § 270.107(b)(3).

Each railroad and directly affected employee is authorized to file by electronic means any submissions required under this part. Before any person submitting anything electronically, the person shall provide the FRA Associate Administrator for Railroad Safety and Chief Safety Officer with the following information in writing:

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

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

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

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

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

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

A request for electronic submission or FRA review of written materials shall be addressed to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE., Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program or statement. A railroad that electronically submits an initial SSP plan or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Issued in Washington, DC, pursuant to the authority delegated under 49 CFR 1.89(b).

**Sarah E. Feinberg,**  
*Administrator.*

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