(2) Performs an acquisition function closely associated with inherently governmental functions.

Non-public Government information means any information that a covered employee gains by reason of work under a Government contract and that the covered employee knows, or reasonably should know, has not been made public. It includes information that—

(1) Is exempt from disclosure under the Freedom of Information Act (5 U.S.C. 552) or otherwise protected from disclosure by statute, Executive order, or regulation; or

(2) Has not been disseminated to the general public and is not authorized by the agency to be made available to the public.

Personal conflict of interest means a situation in which a covered employee has a financial interest, personal activity, or relationship that could compete with the employee's ability to act impartially and in the best interest of the Government when performing under the contract.

(1) Among the sources of personal conflicts of interest are—

(i) Financial interests of the covered employee, of close family members, or of other members of the household;

(ii) Other employment or financial relationships (including seeking or negotiating for prospective employment or business); and

(iii) Gifts, including travel.

(2) Financial interests may arise from—

(i) Compensation, including wages, salaries, commissions, professional fees, or fees for business referrals;

(ii) Consulting relationships (including commercial and professional consulting and service arrangements, scientific and technical advisory board memberships, or serving as an expert witness in litigation);

(iii) Services provided in exchange for honorariums or travel expense reimbursements;

(iv) Research funding or other forms of research support;

(v) Investment in the form of stock or bond ownership or partnership interest (excluding diversified mutual fund investments);

(vi) Real estate investments;

(vii) Patents, copyrights, and other intellectual property interests; or

(viii) Business ownership and investment interests.

(b) *Requirements.* The Contractor shall—

(1) Have procedures in place to screen covered employees for potential personal conflicts of interest, including—

(i) Obtaining and maintaining a financial disclosure statement from each covered employee when the employee is initially assigned to the task under the contract;

(ii) Ensuring that the disclosure statements are updated by the covered employees at least on an annual basis; and

(iii) Requiring each covered employee to update the disclosure statement whenever his/her personal or financial circumstances change.

(2) For each covered employee—

(i) Prevent personal conflicts of interest, including not assigning or allowing a covered employee to perform any task under the contract if the Contractor has identified a personal conflict of interest for the employee that the Contractor or employee cannot satisfactorily prevent or mitigate in consultation with the contracting agency;

(ii) Prohibit use of non-public Government information for personal gain; and

(iii) Obtain a signed non-disclosure agreement to prohibit disclosure of non-public Government information.

(3) Inform covered employees of their obligation—

(i) To disclose and prevent personal conflicts of interest;

(ii) Not to use non-public Government information for personal gain; and

(iii) To avoid even the appearance of personal conflicts of interest;

(4) Maintain effective oversight to verify compliance with personal conflict-of-interest safeguards;

(5) Take appropriate disciplinary action in the case of covered employees who fail to comply with policies established pursuant to this clause; and

(6) Report to the Contracting Officer any personal conflict-of-interest violation by a covered employee as soon as it is identified. This report shall include a description of the violation and the actions taken by the Contractor in response to the violation. Personal conflict-of-interest violations include—

(i) Failure by a covered employee to disclose a personal conflict of interest; and

(ii) Use by a covered employee of non-public Government information for personal gain.

(c) *Mitigation or waiver.* (1) In exceptional circumstances, if the Contractor cannot satisfactorily prevent a personal conflict of interest as required by paragraph (b)(2)(i) of this clause, the Contractor may submit a request through the Contracting Officer to the Head of the Contracting Activity for—

(i) Agreement to a plan to mitigate the personal conflict of interest; or

(ii) A waiver of the requirement.

(2) The Contractor shall include in the request any proposed mitigation of the personal conflict of interest.

(3) The Contractor shall—

(i) Comply, and require compliance by the covered employee, with any conditions imposed by the Government as necessary to mitigate the personal conflict of interest; or

(ii) Remove the Contractor or subcontractor employee from performance of the contract or terminate the applicable subcontract.

(d) *Remedies.* In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraphs (b), (c)(3), or (e) of this clause may render the Contractor subject to—

(1) Suspension of contract payments;

(2) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;

(3) Termination of the contract for default or cause, in accordance with the termination clause of this contract;

(4) Disqualification of the Contractor from subsequent related contractual efforts; or

(5) Suspension or debarment.

(e) *Subcontract flowdown.* The Contractor shall include the substance of this clause, including this paragraph (e), in subcontracts that exceed $100,000, and in which subcontractor employees may perform acquisition functions closely associated with inherently governmental functions.

(End of clause)

[FR Doc. E9–27309 Filed 11–12–09; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA–2009–0032; Notice No. 3]

RIN 2130–AC20

State Highway-Rail Grade Crossing Action Plans

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: On September 2, 2009, FRA published a direct final rule in the **Federal Register** requiring the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State

highway-rail grade crossing action plans. FRA received one adverse comment regarding the direct final rule. Under FRA regulations, FRA must withdraw a direct final rule where an adverse comment is submitted. As a result, in a separate document elsewhere in this issue of the **Federal Register**, FRA is publishing a removal of the direct final rule provisions, which removes the changes effected by the direct final rule. FRA is also contemporaneously publishing this NPRM. The NPRM complies with a statutory mandate that the Secretary of Transportation (Secretary) issue a rule to require the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State highway-rail grade crossing action plans. This proposed rule is not intended for general application; instead, it would only apply to the ten identified States with the most highway-rail grade crossing collisions over the specified period of time. The proposed rule addresses the contents of the highway-rail grade crossing action plans and certain time periods for plan implementation and coverage.

DATES: *Written Comments:* Written comments on the proposed rule must be received by December 14, 2009. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

Public Hearing: If any person desires an opportunity for oral comment, he or she should notify FRA in writing and specify the basis for the request. FRA will schedule a public hearing in connection with this proceeding if the agency received a written request for a hearing by December 14, 2009.

ADDRESSES: *Comments:* Comments related to Docket Number FRA–2009–0032, may be submitted by any of the following methods:

- *Fax:* 1–202–493–2251.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590.
- *Hand Delivery:* Room W12–140 on the Ground level of the West Building, 1200 New Jersey Ave., SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.
- *Federal eRulemaking Portal:* Go to *http://www.regulations.gov*. Follow the online instructions for submitting comments.

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

Docket: For access to the docket to read background documents or comments received, go to *http://www.regulations.gov* at any time, or to Room W12–140 on the Ground level of the West Building, 1200 New Jersey Ave., SE., Washington, DC between 9 a.m. and 5 p.m. Monday through Friday, except Federal Holidays.

FOR FURTHER INFORMATION CONTACT: Ron Ries, Office of Safety, FRA, 1200 New Jersey Ave., SE., RRS–23, Mail Stop 25, Washington, DC 20590 (Telephone 202–493–6299), or Zeb Schorr, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Ave., SE., Mail Stop 10, Washington, DC 20590 (Telephone 202–493–6072).

SUPPLEMENTARY INFORMATION:

I. Withdrawal of Direct Final Rule

Pursuant to FRA's direct final rulemaking procedures set forth at 49 CFR 211.33, FRA published a direct final rule in the **Federal Register** on September 2, 2009 (74 FR 45336). FRA received one adverse comment regarding the direct final rule. Pursuant to 49 CFR 211.33(d), FRA must withdraw a direct final rule where an adverse comment is submitted. FRA issued and submitted a notice of withdrawal to the Federal Register; however, due to regulatory production schedules and time constraints, the direct final rule was not withdrawn before its effective date. As a result, FRA is publishing a removal of the direct final rule provisions in this issue of the **Federal Register**, which removes the changes effected by the direct final rule, while contemporaneously publishing this NPRM.

II. Notice of Proposed Rulemaking

A. Background

The proposed rule is intended to reduce collisions at highway-rail grade crossings in the ten identified States, and to comply with section 202 of the Rail Safety Improvement Act of 2008 (RSIA), Public Law 110–432, Division A, which was signed into law on October 16, 2008. Section 202 requires the Secretary (delegated to the Federal Railroad Administrator by 49 CFR 1.49) to identify the ten States that have had the most highway-rail grade crossing collisions, on average, over the past three years, and to require those States to develop State highway-rail grade crossing action plans, within a reasonable period of time, as determined by the Secretary. Section 202 further provides that these plans must identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations, and must focus on crossings that have experienced multiple accidents or are at high risk for such accidents. FRA recommends that the action plans include a proposed implementation schedule, although FRA recognizes that any such schedule would be subject to many factors, including the availability of funds and personnel. In addition, any implementation schedule would only be for the purpose of providing quality planning for the timelines identified.

Section 202 also provides the following: The Secretary will provide assistance to the States in developing and carrying out such plans, as appropriate; the plans may be coordinated with other State or Federal planning requirements; the plans will cover a period of time determined to be appropriate by the Secretary; and the Secretary may condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501, to a State identified under this section, on the development of such State's plan.

Lastly, section 202 provides a review and approval process under which, not later than 60 days after the Secretary receives such a State action plan, the Secretary must review and either approve or disapprove it. In the event that the proposed plan is disapproved, section 202 indicates that the Secretary shall notify the affected State as to the specific areas in which the proposed plan is deficient, and the State shall correct all deficiencies within 30 days following receipt of written notice from the Secretary.

B. State Identification

As discussed, Congress expressly directed the Secretary to identify the ten States that have had the most highway-rail grade crossing collisions, on average, over the past three years. FRA maintains a database of highway-rail grade crossing accidents/incidents occurring at public and private grade crossings, as such events must be reported to FRA pursuant to 49 CFR 225.19. From this database, FRA has identified the ten States with the most reported highway-rail grade crossing accidents/incidents at public and private grade crossings during 2006, 2007, and 2008, to be, as follows: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio,

and Texas. FRA will issue letters to these identified States and copies of such letters will be placed in the public docket of this proceeding.

C. Time Period To Develop State Action Plan and Duration of Plan

Section 202 instructs the Secretary to determine the reasonable period of time within which the ten identified States must develop a State highway-rail grade crossing action plan and the period of time to be covered by such a plan. Based on previous experience working with States on highway-rail grade crossing action plans, FRA has determined that States can reasonably develop such plans within one year from the date this regulation goes into effect, and that such plans should cover a period of five years. A five-year period is appropriate because many of the remedial actions that may be included in these plans (e.g., closures and grade separations) may take up to five years to implement. In addition, any identified State that has already developed an action plan in conjunction with a recommendation from DOT's Office of Inspector General must ensure compliance with any final rule arising from this NPRM and must resubmit the plan as required.

D. Assistance and Coordination

FRA would be available, including FRA regional grade crossing managers and FRA experts from the grade crossing and trespasser prevention division, to provide assistance to States in developing and carrying out, as appropriate, the proposed State highway-rail grade crossing action plans. FRA's Safetydata Web site (*http://www.safetydata.fra.dot.gov*) also contains detailed data that may be of use in the development of the plans. In addition, the proposed State highway-rail grade crossing action plans may be coordinated with other State or Federal planning requirements. For example, States may want to coordinate such plans with their Strategic Highway Safety Plans that are required by SAFETEA–LU, as appropriate.

E. Conditioning the Awarding of Grants

Section 202 also empowers the Secretary to condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501, to an identified State under this section on the development of such State's plan. Although FRA does not anticipate employing this authority, FRA reserves its right to pursue such a course of action in the event that an identified State fails to comply with a final rule that arises from this proposed rule.

F. Section-by-Section Analysis

Section 234.1. This paragraph discusses the scope of this part. The amendment proposed to this paragraph would include reference to § 234.11, State Highway-Rail Grade Crossing Action Plans, as being within this part's scope.

Section 234.3. This paragraph discusses what entities are subject to this part. The amendment proposed to this paragraph would except § 234.11, State Highway-Rail Grade Crossing Action Plans, from discussion in this section.

Section 234.4. This paragraph discusses the preemptive effect of this part. The amendment proposed to this paragraph would permit State tort actions, arising from events or activities occurring on or after January 18, 2002, that: Allege a violation of the Federal standard of care established by this part; allege a failure to comply with a party's own plan, rule, or standard created pursuant to this part; or allege a violation of a State law, regulation, or order that is necessary to eliminate or reduce an essentially local safety or security hazard, is not incompatible with a law, regulation, or order of the United States Government, and does not unreasonably burden interstate commerce.

Section 234.6(a) and (b). These paragraphs discuss the civil and criminal penalties a person may be subject to when violating requirements of this part. The amendment proposed to these paragraphs would provide that a violation of § 234.11, State Highway-Rail Grade Crossing Action Plans, would not give rise to either a civil or criminal penalty.

Section 234.11(a). This paragraph discusses that the purpose of this proposed rule is to reduce collisions at highway-rail grade crossings in the ten identified States that have had the most highway-rail grade crossing collisions, on average, over the past three years. This paragraph proposes to make clear that the regulation would not restrict any other State, or other entity, from adopting a highway-rail grade crossing action plan, nor would it restrict any of the identified States from adopting a plan with additional or more stringent requirements not inconsistent with this regulation.

Section 234.11(b). This paragraph proposes that this section would apply to the ten States that have had the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008.

Section 234.11(c). This paragraph proposes to require that each of the ten identified States develop a State highway-rail grade crossing action plan and submit such plans to FRA for review and approval not later than one year after the date this proposed regulation goes into effect. This paragraph also details the proposed requirements of the State highway-rail grade crossing action plans, including that the plans: Identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations; focus on crossings that have experienced multiple accidents or are at high risk for such accidents; and cover a five-year period.

Section 234.11(d). This paragraph identifies the FRA contact information to which the identified States must direct the proposed highway-rail grade crossing action plans for review and approval. This paragraph also proposes that FRA would review and approve or disapprove a State highway-rail grade crossing action plan within 60 days of receiving the plan. This paragraph further proposes that, if the proposed State highway-rail grade crossing action plan is disapproved, FRA would notify the affected State as to the specific areas in which the proposed plan is deficient, and the State would have to correct all deficiencies within 30 days following receipt of written notice from FRA. Lastly, this paragraph proposes that FRA may condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501 to an identified State on the development of that State's highway-rail grade crossing action plan.

G. Regulatory Impact and Notices

Executive Order 12866 and DOT Regulatory Policies and Procedures

This discussion represents the regulatory impact analysis (RIA). There is not a separate RIA for inclusion in the public docket. This NPRM has been evaluated in accordance with existing policies and procedures, and has been determined not to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). The ten States identified are Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas. These ten States would incur the full burden associated with implementation of this NPRM. The estimated quantified compliance cost for these ten States is approximately $259,000 over the next year. The benefits resulting from the prevention of collisions at highway-rail grade crossings are expected to exceed the burden. This analysis includes a quantitative burden measurement and a

qualitative benefit discussion for this NPRM. FRA requests comments on this economic analysis and its underlying assumptions.

The primary burden imposed would be for State labor resources spent to comply with development of the mandated action plans. FRA estimates that, on the average, each State would assign the plan development responsibilities to a team composed of a program manager, a project engineer, a budget analyst, a business specialist, and a legal expert. Listed in Table A are the aggregate salary estimates and man-year allocations for the entire mandated population.

TABLE A—AGGREGATED SALARY SUMMARY OF THE 10 IDENTIFIED STATES

Position	Salary	Hourly rate	Labor hours	Estimate
Program Manager, Transportation	$83,000.00	$39.90	40	$2,793.27
Project Engineer	69,000.00	33.17	80	4,644.23
Budget Analyst	52,000.00	25.00	40	1,750.00
Business Specialist, Transportation	43,000.00	20.67	400	14,471.15
Legal Expert	68,000.00	32.69	40	2,288.46
				25,947.12

The estimated cost is found as the product of the hourly rate, the labor hours, and an estimated overhead rate. Overhead is considered at 75% of the hourly rate. **Example Calculation:** [($39.90 per hour) * (40 hours) * (1 + .75 (overhead rate))] = $2,793.27.

The proposed submission process calls for FRA to review and approve each submitted plan according to the Federal mandate. FRA anticipates that the review time for each of the initial submissions would be 6 hours per plan. Listed in Table B is the aggregated federal burden for the initial and resubmitted plans.

TABLE B—FEDERAL COMPLIANCE SUMMARY

Tasking	States	Labor hours	Rate	Estimate
Plan Submission Review	10	6	$52.50	$5,512.50
				5,512.50

To summarize quantitatively, the State burden that would be imposed by this proposed rule was derived from the estimated sum of the original burden submission from the ten identified States and the burden resubmission from the quantum that may not comply during the initial submission. FRA considers $259,000 to represent the aggregated State burden for the one-year period of this proposed requirement. Listed in Table C is the aggregated burden summary.

TABLE C—AGGREGATED BURDEN SUMMARY

	Estimate	Quantity	Total estimates
State Submission Burden	$25,947.12	10	$259,471.15
			259,471.15

The development of State highway-rail grade crossing action plans would likely result in a reduction in highway-rail grade crossing collisions. Development of such plans would enhance these States' ability to view their population of grade crossings, interpret historical accident information, evaluate the overall state of highway-rail grade crossing safety, and identify particular areas in need of attention. Any patterns of collisions or causal factors would become more readily apparent as a result of the detailed study, assessment, and status reporting involved in the development of the State action plan. In these plans, each State would identify specific solutions for improving safety at individual crossings, including crossing closures or grade separations, with special focus on those crossings that are found to have experienced multiple accidents or that show a heightened risk for accidents. Special emphasis corridors or high risk corridors may also be identified as a result of the analysis component of the State action plan. As each State's highway-rail grade crossing action plan may be coordinated with other State or Federal planning requirements, additional benefits may be obtained through closer integration of grade crossing safety issues into the overall State transportation safety planning efforts.

During the three-year time period, 2006 through 2008, the ten States with the most grade crossing collisions, as currently reported, accounted for 51%, or almost 4,200 accidents, of all grade crossing collisions nationwide. Highway vehicle damage accounted for more than $28.5 million over this three-year time period, and a combined total of 546 lives were lost. Economic research indicates that $6.0 million per statistical life saved is a reasonable estimate of people's willingness to pay for transportation safety improvements. FRA therefore estimates an accumulated $3.28 billion to represent the statistical value of the lives lost as a result of grade crossing collisions in these ten States.

Finally, there were 1,666 injuries over the three-year time period in these ten States. Assuming very conservatively, for purposes of this analysis, that these were all minor in nature (e.g., injuries that may not require professional medical treatment and where recovery is usually rapid and complete) and thus assigning a cost of $12,000 per injury (i.e., 0.2% of the value of a statistical life), injury costs for this period totaled close to $20 million. Thus, the cost to society of the average incident in the three-year time period was $796,000. Prevention of one such incident alone would more than exceed the cost of implementing this proposed rule. FRA believes that it is reasonable to expect that such an incident may be prevented by the implementation of this proposed rule. In addition to the safety benefits, other potential benefits would include: Increased train and highway traffic mobility by reducing collisions, fewer demands on emergency services to respond to crossing collisions, and some improvement in air quality by reducing emissions from vehicles that are unable to move due to crossing collisions.

The findings of this analysis are sensitive to its assumptions. The burden estimates are largely driven by the composition of the State's team and the level of effort expended by each individual. Such factors may vary from team to team. FRA realizes that the level of expertise per State, per team, per member, would vary and, therefore, has applied a 20 percent sensitivity factor above and below the baseline as follows:

TABLE D—AGGREGATED SENSITIVITY ANALYSIS SUMMARY

	Estimate	Low	High
Aggregated Submission Burden	$259,471.15	$207,576.92	$311,365.38

Thus, when defining the projected cost burden to the individual States within the framework of team complexion and with regard to the estimated sensitivity of the individual expertise of the employee selected, FRA finds that it is reasonable to estimate that the burden could range from $20,800 to $31,100 per State. FRA finds that the total cost burden ranges from $208,000 to $311,000.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. Pursuant to section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FRA has issued a final policy that formally establishes ''small entities'' as including railroads that meet the line-haulage revenue requirements of a Class III railroad. 49 CFR part 209, app. C. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity. *Id.* Additionally, section 601(5) defines as ''small entities'' governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Such governments would not be directly impacted by this proposal.

FRA certifies that this proposal would not have a significant economic impact on a substantial number of small entities, as this rule only affects ten identified States. To the extent that this proposal would have any impact on small entities, FRA believes the impact would not be significant. FRA requests comments regarding this analysis.

Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The section that contains the new information collection requirements is noted below, and the estimated burden times to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response (hours)	Total annual burden hours
234.11—State Highway-Rail Grade Crossing Action Plans—Development and Submission of Plans.	10 States	10 plans	600	6,000
Disapproval of State Highway-Rail Grade Crossing Action Plan and Submission of Revised Plan.	10 States	5 revised plans	80	400

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202–493–6292, or Ms. Nakia Jackson at 202–493–6073.

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

OMB is required to make a decision concerning the collection of information

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

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

Environmental Impact

FRA has evaluated this NPRM in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this document is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this NPRM that might trigger the need for a more detailed environmental review. As a result, FRA finds that this NPRM is not a major Federal action significantly affecting the quality of the human environment.

Federalism Implications

Executive Order 13132, ''Federalism'' (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure ''meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.'' ''Policies that have federalism implications'' are defined in the Executive Order to include regulations that have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.'' Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM amends FRA's regulations regarding grade crossing safety. Subject to a limited exception for essentially local safety or security hazards, the requirements of FRA's regulations regarding grade crossing safety are intended to establish a uniform Federal safety standard that must be met, and State requirements covering the same subject would be displaced, whether those standards are in the form of State statutes, regulations, local ordinances, or other forms of State law, including common law. Section 20106 of Title 49 of the United States Code provides that all regulations prescribed by the Secretary related to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety or security hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. This is consistent with past practice at FRA, and within the Department of Transportation.

FRA has analyzed this NPRM in accordance with the principles and criteria contained in Executive Order 13132. This NPRM complies with a statutory mandate. FRA has not consulted with State and local officials in regards to this rule. However, prior to enactment of the RSIA, FRA did consult with State officials in conjunction with a recommendation from DOT's Office of Inspector General that certain States develop highway-rail grade crossing action plans, similar to the plans required by the RSIA and this rule. Thus, FRA believes it is in compliance with Executive Order 13132.

This NPRM will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this NPRM will not have any federalism implications that impose substantial direct compliance costs on State and local governments.

FRA's regulations regarding grade crossing safety do not preempt actions under State law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care established by this part. Provisions of a railroad maintenance, inspection and testing program which exceed the requirements of this part are not included in the Federal standard of care. It is strongly in the interest of railroad safety for railroads to exceed the requirements of Federal law and FRA encourages railroads to do so. A railroad would be discouraged from setting a higher standard for itself if it would be held liable in tort for exceeding the requirements of Federal law, but failing to attain the higher standard set for itself. Section 20106 of Title 49 of the United States Code supports this distinction.

It is a settled principle of statutory construction that, if the statute is clear and unambiguous, it must be applied according to its terms. *Carcieri* v. *Salazar,* 555 U.S.—(2009). Read by itself, Section 20106(a) of Title 49 of the United States Code provides for an FRA rule, order or regulation to preempt state standards of care, but does not expressly state whether anything replaces the preempted standards of care for purposes of tort suits. The focus of that provision is clearly on who regulates railroad safety: The Federal government or the states. It is about improving railroad safety, for which Congress deems nationally uniform standards to be necessary in the great majority of cases. That purpose has collateral consequences for tort law which new Section 20106 subsections (b) and (c) address. New subsection (b)(1) creates three exceptions to the possible consequences flowing from subsection (a). One of those exceptions ((b)(1)(B)) precisely addresses an issue presented in *Lundeen* v. *Canadian Pacific Ry. Co.,* 507 F.Supp.2d 1006 (D. Minn., 2007) that Congress wished to rectify: It allows plaintiffs to sue a railroad in tort for violation of its own plan, rule, or standard that it created pursuant to a regulation or order issued by either of the Secretaries. None of those exceptions covers a plan, rule, or standard that a regulated entity creates for itself in order to produce a higher level of safety than Federal law requires, and such plans, rules, or standards were not at issue in *Lundeen.* The key concept of § 20106(b) is permitting actions under State law seeking

damages for personal injury, death, or property damage to proceed using a Federal standard of care. A plan, rule, or standard that a regulated entity creates pursuant to a Federal regulation logically fits the paradigm of a Federal standard of care—Federal law requires it and determines its adequacy. A plan, rule, or standard, or portions of one, that a regulated entity creates on its own in order to exceed the requirements of Federal law does not fit the paradigm of a Federal standard of care—Federal law does not require it and, past the point at which the requirements of Federal law are satisfied, says nothing about its adequacy. That is why FRA believes section 20106(b)(1)(B) covers the former, but not the latter. The basic purpose of the statute—improving railroad safety—is best served by encouraging regulated entities to do more than the law requires and would be disserved by increasing the potential tort liability of regulated entities that choose to exceed Federal standards, which would discourage them from ever exceeding Federal standards again.

In this manner, Congress adroitly preserved its policy of national uniformity of railroad safety regulation expressed in section 20106(a)(1) and assured plaintiffs in tort cases involving railroads, such as *Lundeen,* of their ability to pursue their cases by clarifying that federal railroad safety regulations preempt the standard of care, not the underlying causes of action in tort. Under this interpretation, all parts of the statute are given meanings that work together effectively and serve the safety purposes of the statute.

Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $141,300,000 or more in any one 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. This NPRM will not result in the expenditure, in the aggregate, of $141,300,000 or more in any one year, and thus preparation of such a statement is not required.

Energy Impact

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

Privacy Act Information

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 (Volume 65, Number 70; Pages 19477–78), or you may visit *http://www.regulations.gov.*

List of Subjects in 49 CFR Part 234

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

The Proposal

In consideration of the foregoing, FRA proposes to amend part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY AND STATE ACTION PLANS

1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107; 28 U.S.C. 2461, note; Public Law 110–432, Div. A, § 202; and 49 CFR 1.49.

2. The heading for part 234 is revised to read as set forth above.

3. Section 234.1 is revised to read as follows:

§ 234.1 Scope.

This part imposes minimum maintenance, inspection, and testing standards for highway-rail grade crossing warning systems. This part also prescribes standards for the reporting of failures of such systems and prescribes minimum actions railroads must take when such warning systems malfunction. This part also requires particular identified States to develop State highway-rail grade crossing action plans. This part does not restrict a railroad or a State from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

4. Section 234.3 is revised to read as follows:

§ 234.3 Application.

With the exception of § 234.11, this part applies to all railroads except:

(a) A railroad that exclusively operates freight trains only on track which is not part of the general railroad system of transportation;

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

(c) A railroad that operates passenger trains only on track inside an installation that is insular; i.e., its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation will not be considered insular if one or more of the following exists on its line:

(1) A public highway-rail crossing that is in use;

(2) An at-grade rail crossing that is in use;

(3) A bridge over a public road or waters used for commercial navigation; or

(4) A common corridor with a railroad, i.e., its operations are within 30 feet of those of any railroad.

5. Section 234.4 is revised to read as follows:

§ 234.4 Preemptive effect.

(a) Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and that does not impose an unreasonable burden on interstate commerce.

(b) This part establishes a Federal standard of care for the maintenance, inspection and testing of grade crossing warning systems. This part does not preempt an action under State law seeking damages for personal injury, death, or property damage alleging that a party has failed to comply with the Federal standard of care established by this part. Provisions of a railroad maintenance, inspection and testing program which exceed the requirements of this part are not included in the Federal standard of care.

6. Section 234.6 is revised to read as follows:

§ 234.6 Penalties.

(a) *Civil Penalty.* Any person (an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor) who violates any requirement of this part, except for any violation of § 234.11 of this part, or causes the violation of any such requirement is subject to a civil penalty of at least $650, but not more than $25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this rule. The railroad is not responsible for compliance with respect to any condition inconsistent with the technical standards set forth in this part where such variance arises as a result of actions beyond the control of the railroad and the railroad could not have prevented the variance through the exercise of due diligence. The foregoing sentence does not excuse any instance of noncompliance resulting from the actions of the railroad's employees, agents, or contractors.

(b) *Criminal Penalty.* Whoever knowingly and willfully makes, causes to be made, or participates in the making of a false entry in reports required to be filed by this part, or files a false report or other document required to be filed by this part, except for any document filed pursuant to § 234.11 of this part, is subject to a $5,000 fine and 2 years imprisonment as prescribed by 49 U.S.C. 522(a) and section 209(e) of the Federal Railroad Safety Act of 1970, as amended (45 U.S.C. 438(e)).

Subpart B—Reports and Plans

7. The title to Subpart B—Reports is revised to read as set forth above.

8. Section 234.11 is added to read as follows:

§ 234.11 State highway-rail grade crossing action plans.

(a) *Purpose.* The purpose of this section is to reduce collisions at highway-rail grade crossings in the ten States that have had the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008. This section does not restrict any other State, or other entity, from adopting a highway-rail grade crossing action plan. This section also does not restrict any of the States required to develop action plans under this section from adopting a highway-rail grade crossing action plan with additional or more stringent requirements not inconsistent with this section.

(b) *Application.* This section applies to the ten States that have had the most highway-rail grade crossing collisions, on average, during the calendar years 2006, 2007, and 2008.

(c) *Action Plans.* (1) The ten identified States shall each develop a State highway-rail grade crossing action plan and submit such a plan to FRA for review and approval not later than [DATE 1 YEAR FROM EFFECTIVE DATE OF FINAL RULE].

(2) A State highway-rail grade crossing action plan shall:

(i) Identify specific solutions for improving safety at crossings, including highway-rail grade crossing closures or grade separations;

(ii) Focus on crossings that have experienced multiple accidents or are at high risk for such accidents; and

(iii) Cover a five-year time period.

(d) *Review and Approval.* (1) State highway-rail grade crossing action plans required under paragraph (c) of this section shall be submitted for FRA review and approval using at least one of the following methods: Mail to the Associate Administrator for Railroad Safety/Chief Safety Officer, U.S. Department of Transportation, Federal Railroad Administration, 1200 New Jersey Ave., SE., W12–140, Washington, DC 20590; or e-mail to *rrs.correspondence@fra.dot.gov.*

(2) FRA will review and approve or disapprove a State highway-rail grade crossing action plan submitted pursuant to paragraph (d) of this section within 60 days of receipt.

(3) If the proposed State highway-rail grade crossing action plan is disapproved, FRA will notify the affected State as to the specific areas in which the proposed plan is deficient. A State shall correct all deficiencies within 30 days following receipt of written notice from FRA.

(4) FRA may condition the awarding of any grants under 49 U.S.C. 20158, 20167, or 22501 to an identified State on the development of such State's highway-rail grade crossing action plan.

Issued in Washington, DC, on November 5, 2009.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

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