DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 225

[Docket No. FRA–2006–26173; Notice No. 3]

RIN 2130–AB82

Miscellaneous Amendments to the Federal Railroad Administration's Accident/Incident Reporting Requirements

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

ACTION: Final rule.

SUMMARY: This final rule revises FRA's existing regulations addressing accident/incident reporting in order to clarify ambiguous regulations and to enhance the quality of information available for railroad casualty analysis. In addition, FRA has revised the FRA Guide for Preparing Accident/Incident Reports (FRA Guide), its accident/incident recording and reporting forms and its Companion Guide: Guidelines for Submitting Accident/Incident Reports by Alternative Methods (Companion Guide).

DATES: The final rule is effective Wednesday, June 1, 2011.

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SUPPLEMENTARY INFORMATION:

I. The FRA Guide and the Companion Guide

In addition to revising its regulations in the Code of Federal Regulations, FRA has revised the FRA Guide. The FRA Guide is posted on FRA's Web site at *http://safetydata.fra.dot.gov/officeofsafety.* Hard copies of the FRA Guide will be available upon request. Information on requesting hard copies of the FRA Guide can be found in § 225.21, "Forms," of this final rule.

FRA has also revised its Companion Guide containing instructions for electronically submitting monthly reports to FRA. The Companion Guide is posted on FRA's Web site at *http://safetydata.fra.dot.gov/officeofsafety.*

II. Background

A. Statutory Authority for the Accident/Incident Reporting Requirements in 49 CFR Part 225 (Part 225)

FRA's accident/incident reporting requirements [1] in Part 225, both as they exist today and as they are amended by this final rule, were issued under the statutory authority of the following three statutes: [2]

- 49 U.S.C. 20901 (formerly, part of the Accident Reports Act);
- 49 U.S.C. 20103(a) (formerly, part of the Federal Railroad Safety Act of 1970); and
- 49 U.S.C. 322(a) (formerly, part of the Department of Transportation Act).

The Accident Reports Act was enacted in 1910,[3] Public Law 165, the Act of May 6, 1910, ch. 208, 36 Stat. 350 (1910). Section 1 of the Accident Reports Act required—

> every common carrier engaged in interstate or foreign commerce by railroad to make to the Interstate Commerce Commission [ICC] * * * a monthly report, under oath, of all collisions, derailments, or other accidents arising from the operation of such railroad under such rules and regulations as may be prescribed by the [ICC,] which report shall state the nature and causes thereof and the circumstances connected therewith * * *.

Emphasis added. In addition, Section 5 of the Accident Reports Act authorized the ICC "to prescribe for such common carriers a method and form for making the reports hereinbefore provided." Together, Sections 1 and 5 of the Accident Reports Act afforded the ICC authority to promulgate regulations to carry out the reporting provisions of the Accident Reports Act.

In 1960, the Accident Reports Act was amended to remove language in Section 1 conferring rulemaking authority on the ICC to require railroads to ("report * * * under such rules and regulations as may be prescribed by the [ICC]") and to add to Section 5 clearer language conferring that rulemaking authority ("The [ICC] is authorized to prescribe such rules and regulations and such forms for making the reports herein before provided as are necessary to implement and effectuate the purpose of this Act."). Public Law 86–762 (September 13, 1960), 74 Stat. 903. In 1966, the Department of Transportation Act transferred the responsibility for prescribing regulations to carry out the Accident Reports Act, as amended, from the ICC to the Secretary of Transportation. Sec. 6(e)(1)(K) of Public Law 89–670 (October 15, 1966), 80 Stat. 939. In addition, the Secretary delegated this responsibility to the Administrator of the Federal Railroad Administration by regulation. 49 CFR 1.49(c)(11). Later, in 1988, the Accident Reports Act was amended so as to expand its applicability from "common carriers engaged in interstate commerce by railroad" to include all "railroads." Sec. 15 of Public Law 100–342 (June 22, 1988), 102 Stat. 633. The same legislation required railroads to include in any of their reports that assigned employee error as a cause of an accident/incident to include, at the employee's option, a statement "explaining any factors the employee alleges contributed to the accident or incident." *Id.* at Sec. 24.

In 1994, the Accident Reports Act, as amended (then codified at 45 U.S.C. 38–43a), along with virtually all of the other Federal railroad safety laws, was repealed, and its provisions were revised, reenacted as positive law, and recodified without substantive change at 49 U.S.C. 20901–20903, Accidents and Incidents, with its penalty provisions in 49 U.S.C. chapter 213, Penalties, Public Law 103–272, 108 Stat. 745 (July 5, 1994). During the 1994 recodification of the rail safety laws, Congress repealed, but did not reenact or recodify the text of Section 5 of the Accident Reports Act, as amended (then codified at 45 U.S.C. 42), which authorized the Secretary "to prescribe such rules and regulations and such forms for making the reports hereinbefore provided as are necessary to implement and effectuate the purposes of [the Accident Reports Act]." Congress concluded that this section was "[un]necessary because of

[1] The discussion under this section (II)(A) concerns the statutory authority for the reporting provisions of Part 225 only, *e.g.,* 49 CFR 225.11 and 225.21, and does not address the statutory authority for the penalty, investigative, or other provisions of Part 225.

[2] This final rule adds a fourth statute to the statutory foundation for the accident/incident reporting requirements in Part 225: 28 U.S.C. 1746, Unsworn declarations under penalty of perjury. Public Law 94–550, sec. 1(a), Oct. 18, 1976, 90 Stat. 2534. Pursuant to that statute, the requirement in 49 U.S.C. 20901 that accident reports be submitted "under oath" (and, therefore, signed and notarized) has been converted into one of two alternative requirements, the second being submission of a signed, unsworn declaration saying that it is being made subject to penalty of perjury.

[3] Federal requirements that railroads report their accidents date back to before 1910, as evidenced by two provisions in the Accident Reports Act as originally enacted. The first section of the Accident Reports Act contained a proviso that relieved carriers "from the duty of reporting accidents in their annual financial and operating reports made to the commission[,]" and Section 6 repealed an accident reporting law enacted in 1901, 'An Act requiring common carriers * * * to make full reports of all accidents to the Interstate Commerce Commission.' Approved March third, nineteen hundred and one * * *"

49 [U.S.C.] 322(a).'' *See* H.R. Rep. No. 103–180, 502, 584 (1993); *reprinted in* 1994 U.S.C.C.A.N. 1319, 1401. Although Public Law 103–272 was not intended to change the substance of the laws as recodified, this is an example of how its repeal of an ''unnecessary'' law apparently changed the statutory basis of a regulation. Of course, recodification did not change any law substantively, so in a sense, Section 5 of the Accident Reports Act survives to the extent that it is legally necessary.

The preamble to this final rule refers to the current, recodified version of what was formerly known as the Accident Reports Act, by its section numbers in title 49 of the U.S. Code. Currently, § 20901 requires, in part, that railroad carriers file with the Secretary of Transportation reports on ''all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier's operations during the month.''

The second major statutory authority for the accident/incident reporting requirements in Part 225 is 49 U.S.C. 20103, formerly § 202 of the Federal Railroad Safety Act of 1970 (FRSA). Public Law 91–458 (October 16, 1970), 84 Stat. 971. Like the Accident Reports Act, the FRSA was repealed in 1994, and its provisions were revised, reenacted as positive law, and recodified without substantive change primarily at 49 U.S.C. chapter 201, with penalty provisions in 49 U.S.C. chapter 213. As amended, 49 U.S.C. 20103(a) provides, in pertinent part, that ''[t]he Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.'' The Secretary also delegated this authority to the Administrator of FRA. 49 CFR 1.49(m). In 1974, FRA reissued its accident reporting regulations under the added authority of the FRSA to cover additional railroads and require reporting of occupational illnesses. 39 FR 43222, December 11, 1974.

The third major statutory authority for the accident/incident reporting requirements in Part 225 is 49 U.S.C. 322(a), which was enacted in 1966, and codified in § 9(e) of the Department of Transportation Act. The statutory provision at 49 U.S.C. 322(a) reads as follows:

> The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.

Under 49 U.S.C. 322(a), an officer of the Department of Transportation may prescribe regulations to carry out the duties of the officer. Section 103(d) of title 49, U.S. Code, provides that the head of the FRA is the Administrator, and the Administrator of FRA is an ''officer of the Department of Transportation,'' within the meaning of 49 U.S.C. 322(a). Section 103(g)(1) of title 49, U.S. Code, provides that ''the Administrator shall carry out—* * * duties and powers related to railroad safety vested in the Secretary by * * * chapters 203–211 of this title, and by chapter 213 of this title for carrying out chapters 203 through 211.'' Consequently, the duty of carrying out 49 U.S.C. chapter 209 is clearly one of the ''duties of the officer,'' within the meaning of 49 U.S.C. 322(a). Accordingly, the FRA Administrator may prescribe regulations to carry out 49 U.S.C. chapter 209.

B. Occupational Safety and Health Act

Although not a statutory authority for the accident/incident reporting requirements of Part 225, the Occupational Safety and Health Act (OSH Act), which Congress enacted in 1970, has shaped these requirements. Public Law 91–596, codified as amended at 29 U.S.C. 651 *et seq.* While the OSH Act gives the Secretary of Labor a broad, general authority to regulate working conditions that affect the occupational safety and health of employees, it also recognized the existence of similar authority in other Federal agencies. Section 4(b)(1) of the OSH Act, codified at 29 U.S.C. 653(b)(1), provides that the OSH Act shall not apply to working conditions as to which another Federal agency exercises statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Because FRA exercises statutory authority to prescribe and enforce standards and regulations for all areas of railroad safety under 49 U.S.C. chapter 201, OSHA's jurisdiction may be preempted by FRA under section 4(b)(1) of the OSH Act with regards to certain matters related to railroad safety. *See* Policy Statement asserting FRA jurisdiction over matters involving the safety of railroad operations, 43 FR 10584, March 14, 1978.

With respect to employee injury and illness recordkeeping, however, OSHA's Occupational Safety and Health Review Commission ruled that the railroad industry must comply with OSHA requirements and must afford the Secretary of Labor's representatives access to these records. *Secretary of Labor* v. *Conrail* (OSHRC Docket No. 80–3495, 1982). In doing so, the Commission indicated that employee injury and illness recordkeeping does not come within the purview of section 4(b)(1) of the OSH Act and, therefore, OSHA's jurisdiction has not been displaced by FRA's employee injury and illness recordkeeping and reporting regulations. Nevertheless, the Commission did state, ''[t]his does not mean that railroad industry employers must use the OSHA form, No. 200, mentioned in section [29 CFR] 1904.2(a). Section 1904.2(a) allows an employer to maintain 'an equivalent which is as readable and comprehensible [as the OSHA 200 form] to a person not familiar with it.' '' [4] Under OSHA's current regulations, 49 CFR 1904.3 states that ''[i]f you create records to comply with another government agency's injury and illness recordkeeping requirements, OSHA will consider those records as meeting OSHA's Part 1904 recordkeeping requirements if OSHA accepts the other agency's records under a memorandum of understanding with that agency, or if the other agency's records contain the same information as this Part 1904 requires you to record.'' Accordingly, because FRA's employee injury and illness recordkeeping and reporting requirements employ equivalent standards to those promulgated by OSHA, OSHA does not require railroad carriers to maintain OSHA records in addition to FRA records. Rather, railroad carriers are only required to report employee injuries and illnesses to FRA in accordance with FRA's regulations. FRA makes all railroad employee injury and illness data available to OSHA for use in its complementary program of regulation, and provides this data to the Bureau of Labor Statistics (BLS) each year for inclusion in the Department of Labor's national occupational injury and illness database.

C. Overview of Part 225 and Recent Amendments

Part 225 contains a series of specific accident/incident recording and reporting requirements. The purpose of FRA's accident/incident recordkeeping and reporting regulations is ''to provide the Federal Railroad Administration with accurate information concerning the hazards and risks that exist on the Nation's railroads. FRA needs this information to effectively carry out its statutory responsibilities under 49 U.S.C. chapters 201–213. FRA also uses this information for determining

[4] It should be noted that the OSHA 200 form has been subsequently renamed as the OSHA 300 form.

comparative trends of railroad safety and to develop hazard elimination and risk reduction programs that focus on preventing railroad injuries and accidents.'' 49 CFR 225.1. Part 225's central provision requires that each railroad subject to Part 225 submit to FRA monthly reports of all accidents and incidents that meet FRA's reporting criteria. 49 CFR 225.11. Railroad accidents/incidents are divided into three groups, each of which corresponds to the type of reporting form that a railroad must file with FRA: (1) Highway-rail grade crossing accidents/incidents; (2) rail equipment accidents/incidents; and (3) deaths, injuries and occupational illnesses. *See* 49 CFR 225.19.

In 1996, FRA published extensive amendments to its accident/incident reporting regulations. 61 FR 30940, June 18, 1996; 61 FR 67477, December 23, 1996. This was the first major revision of the accident/incident reporting requirements since 1974. The primary purpose of the revision was to increase the accuracy, completeness, and utility of FRA's accident database and to clarify certain definitions and regulatory requirements. Among other things, these amendments required railroads to adopt and comply with an Internal Control Plan (ICP) to ensure accurate reporting of accidents and incidents.

In 2003, FRA again published extensive amendments to its accident/incident reporting regulations (FRA's 2003 Final Rule). 68 FR 10107–10140, March 3, 2003. The primary purpose of these revisions was to conform FRA's accident/incident reporting requirements to OSHA's newly revised occupational injury and illness recording and reporting requirements. 66 FR 5916–6135, January 19, 2001 (codified at 29 CFR Parts 1904 and 1952) (OSHA's 2001 Final Rule). FRA's 2003 Final Rule also addressed other issues and provided for an alternative method of recording claimed occupational illnesses with the advent of Form FRA F 6180.107, ''Alternative Record for Illness Claimed to be Work-Related.''

III. Proceedings to Date

On September 9, 2008, FRA published a Notice of Proposed Rulemaking (NPRM), which proposed miscellaneous amendments to FRA's accident/incident reporting regulations in order to clarify ambiguous regulations and to enhance the quality of information available for railroad casualty analysis. *See* 73 FR 52496. The NPRM also proposed revisions to the 2003 FRA Guide and FRA's Accident/Incident recording and reporting forms.

The NPRM further requested comments and suggestions on four issues of concern. First, FRA requested comments and suggestions for any additional information that might be gathered on Form FRA F 6180.57, ''Highway-Rail Grade Crossing Accident/Incident Report,'' that would be useful in determining how and why highway-rail grade crossing accidents/incidents occur. Second, FRA requested comments and suggestions on whether FRA should require railroads to complete the longitude and latitude blocks on Form FRA F 6180.55a, ''Railroad Injury and Illness Summary (Continuation Sheet)'' (blocks 5s and 5t), for reportable trespasser casualties only, and on Form FRA F 6180.54, ''Rail Equipment Accident/Incident Report'' (blocks 50 and 51). Third, FRA requested comments and suggestions on whether FRA should change the method by which telephonic reports of accidents/incidents, as required by § 225.9, are made to FRA. Fourth, FRA requested comments and suggestions on whether FRA should require railroads to report to FRA on Form FRA F 6180.55a suicides and attempted suicides, otherwise referred to as ''suicide data,'' and on concerns regarding State access to such reports.

On September 10, 2008, during the 36th Railroad Safety Advisory Committee (RSAC) meeting, RSAC Task No. 2008–02 was presented for acceptance. The task offered to the RSAC for consideration was to review comments received on FRA's NPRM and would have allowed the RSAC to make recommendations for the content of the final rule. The task was withdrawn at the meeting without RSAC acceptance.

Following publication of the NPRM in the **Federal Register**, FRA held a public hearing in Washington, DC on December 18, 2008, and extended the comment period for an additional thirty (30) days following the hearing. The hearing enabled the exchange of information regarding FRA's proposed amendments, and allowed the public to articulate their issues and concerns regarding the NPRM, so that such concerns could be addressed in the final rule. The hearing was attended by a number of railroads, organizations representing railroads, and labor organizations. FRA received oral and written testimony at the hearing as well as written comments during the extended comment period. A copy of the hearing transcript was placed in Docket No. FRA–2006–26173 on *http://www.regulations.gov.* During the initial and extended comment period, FRA received comments and heard testimony from the following organizations, in addition to comments from individuals, listed in alphabetical order:

- American Association for Justice (AAJ);
- Association for American Railroads (AAR);
- American Train Dispatchers Association (ATDA);
- BNSF Railway Company (BNSF);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalman (BRS);
- California Public Utilities Commission (CPUC);
- U.S. Department of Labor (DOL);
- Illinois Commerce Commission/Transportation Bureau/Rail Safety Section (ICC);
- Kansas City Southern Railway Company (KCS);
- Metro-North Commuter Railroad Company (MNCW);
- National Railroad Passenger Corporation (Amtrak);
- New York State Metropolitan Transportation Authority (NYSMT);
- NJ Transit Rail Operations (NJT);
- Norfolk Southern Corporation (NS);
- Southeastern Pennsylvania Transportation Authority (SPTA);
- Union Pacific Railroad Company (UP); and
- United Transportation Union (UTU).

As an initial matter, when developing this final rule, FRA carefully considered all of the comments, information, data, and proposals submitted to Docket No. FRA–2006–26173 and discussed during the hearing. In addition, FRA's extensive knowledge and experience with enforcing the existing accident/incident reporting regulations was also relied upon when developing this final rule. FRA addresses the comments in the Section-by-Section Analysis of this final rule and elsewhere as appropriate.

One such comment to the NPRM stated that FRA should have used an RSAC working group for this rulemaking. FRA, however, is not required to engage the RSAC in formulating regulations. Here, as discussed above, FRA held a hearing and provided two comment periods during which interested parties had opportunities to comment on the NPRM.

IV. Section-by-Section Analysis

Technical Amendment

Throughout the rule text, this final rule updates the agency's address and other mailing addresses, when appropriate, to reflect FRA's relocation to the new U.S. Department of Transportation headquarters building. This revision affects §§ 225.7(a), 225.11(b), 225.12(g)(3), and the introductory paragraph of § 225.21. This change is also reflected in the FRA

Guide, the accident/incident reporting and recording forms, and the Companion Guide.

§ 225.1 Purpose.

The final rule removes the preemption language dealing with part 225 from this section. FRA believes that this language is unnecessary because 49 U.S.C. 20106 sufficiently addresses the preemptive effect of FRA's regulations. Providing a separate Federal regulatory provision concerning the regulation's preemptive effect is duplicative and unnecessary.

§ 225.3 Applicability.

In this section, the final rule makes a technical amendment to the introductory text of paragraph (b) with respect to that paragraph's reference to FRA's required ICP elements. Currently, paragraph (b) refers only to ICP elements 1 through 10. The final rule revises the paragraph to include element number 11 (added in FRA's 2003 Final Rule), which requires railroads to include in their ICPs a statement that specifies the name, title, and address of the custodian of the railroad's Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related" records and all supporting documentation, as well as the location of such documents. *See* 68 FR 10107, 10139, March 3, 2003.

§ 225.5 Definitions.

The final rule amends paragraph (1) of the definition of "Accident/incident" to clarify the definition and to conform to the FRA Guide. In the NPRM, FRA set forth to clarify the definition of accident/incident with respect to impacts at highway-rail grade crossings. Commenters generally indicated that further clarification was necessary regarding under what circumstances sidewalks and pathways are considered to be part of a highway-rail grade crossing site.

In response to these comments, FRA determined that the proposed definition required revision. As such, the final rule provides that "Accident/incident" means, in part, any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing. The final rule, elsewhere in § 225.5, defines the term "highway-rail grade crossing" to mean a location where a public highway, road, street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade, or a location where a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, street, or a private roadway, crosses one or more railroad tracks at grade. The definition of "highway-rail grade crossing" further provides that the term "sidewalk" means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that portion of a street that is paved or improved and intended for use by pedestrians. The FRA Guide provides a diagram illustrating the definition of the term sidewalk. *See* FRA Guide, Chapter 2. In addition, the final rule provides that the term "highway user" may include an automobile, bus, truck, motorcycle, bicycle, farm vehicle, pedestrian, or any other mode of surface transportation motorized and un-motorized.

FRA does not believe that this clarifying amendment increases the burden on railroads because it is consistent with common industry practice as well as FRA's long-standing policy. Moreover, even if reporting accidents at such pathways was not standard industry practice, any increased burden would be nominal. Based on the U.S. DOT National Highway-Rail Crossing Inventory, FRA estimates that there are approximately 2,000 grade crossings in the United States that are not associated with highways, roads, streets, or private roadways and that very few highway-rail grade crossing accidents/incidents occur at these locations each year. Accordingly, even if this did place a new burden on railroads to report accidents/incidents not previously reported, the burden would be insignificant in light of the small number of additional reports that would be required.

The final rule also clarifies that sidewalks that may be used to cross railroad tracks at grade are considered to be part of (*i.e.,* associated with) the highway-rail grade crossing. The definition of sidewalk included in the final rule clarifies which sidewalks are considered associated with the crossing. FRA does not believe this clarification will result in any change to current railroad reporting practices. In addition, the definition of the term "sidewalk" is based on the definition of the term as articulated in the 2009 edition of the Federal Highway Administration's Manual on Uniform Traffic Control Devices. The FRA Guide includes an illustrative diagram to help clarify the meaning of the term "sidewalk." *See* FRA Guide, Chapter 2.

A comment to the NPRM suggested that FRA use the term "road user" rather than the term "highway user." The final rule does not adopt this suggestion in order to maintain consistency between the terms "highway user" and "highway-rail grade crossing." A comment also sought clarification that there are no exceptions to reporting collisions between on-track equipment and highway users. FRA believes that the final rule is clear that any impact between a highway user and on-track equipment at a highway-rail grade crossing qualifies as a highway-rail grade crossing accident/incident and that further clarification is not required. A comment also recommended that impacts at highway-rail grade crossings be referred to as "train-vehicle collisions," rather than "accidents/incidents." The final rule does not adopt this suggestion because such an amendment is not consistent with the historical use of such terms.

The final rule also amends paragraph (3) of the definition of "Accident/incident" to conform to the revised language in § 225.19(d) and to reference, rather than explicitly list, the general reporting criteria set forth in § 225.19(d). *See* Section-by-Section Analysis for § 225.19(d).

In the NPRM, FRA proposed amending the definition of "Accountable injury or illness" to mean any abnormal condition or disorder of a railroad employee that manifests *within* the work environment and causes or requires a railroad employee to be examined or treated by a qualified health care professional, but does not meet the general reporting criteria listed in § 225.19(d)(1) through (d)(6) regardless of whether the condition or disorder is discernably caused by an event or exposure in the work environment.

The final rule amends the definition of "Accountable injury or illness" to conform to the amended definition of "injury or illness;" to eliminate redundancy by removing the word "activity" from the phrase "by an event, exposure, or activity in the work environment" as the amended definition of "event or exposure" in the final rule includes activities; to eliminate potential underreporting of work-related injuries and illnesses; to ensure that potentially reportable injuries and illnesses are documented, tracked, and evaluated for reporting and auditing purposes; and to delete the phrase "not otherwise reportable" due to its ambiguity. *See* Section-by-Section Analysis for § 225.19(d), "Primary groups of accidents/incidents; Death, injury and occupational illness." The final rule amends the definition of "Accountable injury or illness" to mean

"any abnormal condition or disorder of a railroad employee that causes or requires the railroad employee to be examined or treated by a qualified health care professional, regardless of whether or not it meets the general reporting criteria listed in § 225.19(d)(1) through (d)(6), and the railroad employee claims that, or the railroad otherwise has knowledge that, an event or exposure arising from the operation of the railroad is a discernable cause of the abnormal condition or disorder."

The language proposed in the NPRM specified that an accountable injury or illness is one that "does not meet the general reporting criteria." The final rule replaced this with "regardless of whether or not it meets the general reporting criteria" because an injury or illness may eventually become reportable or the railroad may not have enough information at the time to determine whether the injury or illness is reportable. These are clarifications and do not pose any change to FRA's accident/incident recording or reporting requirements.

The purpose of Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," is to create an initial record of, and audit trail for, each potentially reportable injury or illness. As such, under the previous recording requirements, railroads were required to complete the Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," for each accountable and reportable injury or illness within seven (7) working days after first becoming aware of the accountable or reportable injury or illness. As a result, under FRA's 2003 Final Rule's definition of accountable and reportable injury and illness, a railroad had to make an initial determination with regard to the work-relatedness of an injury or illness within seven working days. Once a railroad determined that an employee injury or illness was not work-related, the railroad was not obligated to create any record or report of the casualty.

In many cases, injuries and illnesses, and/or the signs and symptoms thereof, manifest in the work environment without the cause(s) being readily apparent. Therefore, a railroad, during its initial seven day investigation, may have determined that an injury or illness was not work-related when additional investigation and time would have shown that the injury or illness was in fact work-related. Consequently, FRA is concerned that some railroads are prematurely attributing the cause of an injury or illness solely to a non-work-related event or exposure occurring outside the work environment. FRA was similarly concerned that some railroads were not investigating pertinent information about employee injuries and illnesses to make an accurate work-relatedness determination. As a result, FRA believes that some railroads may have under-reported employee injuries and illnesses, and, because a Form FRA F 6180.98 was not completed to initially record the injury or illness, no audit trail was created. In such circumstances, FRA and the railroads were left unaware of the potentially reportable or accountable injury. Moreover, by only requiring a record for those casualties that were ultimately determined to be work-related within the initial seven days period, FRA was prevented from later evaluating the reportability of the injury or illness in order to determine whether the reporting officer made an appropriate reporting decision or whether the railroad complied with its duty to investigate the injury or illness.

In consideration of the comments and FRA's safety mission, the final rule contains a revised definition. The definition contained in the final rule triggers the railroads' responsibility to create a Form FRA F 6180.98 for (*i.e.,* an accountable injury or illness) any abnormal condition or disorder of a railroad employee that causes or requires the railroad employee to be examined or treated by a qualified health care professional regardless of whether or not it meets the general reporting criteria in § 225.19(d), and the employee claims that, or the railroad otherwise has knowledge that, the injury or illness is work-related. Therefore, the definition in the final rule eliminates the requirement that a railroad record all injuries or illnesses based on manifestation regardless of cause. While railroads are still required to complete the Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," for each accountable and reportable injury or illness within seven working days after first becoming aware of the accountable or reportable injury or illness, the revised definition of accountable injury/illness will alleviate the railroad's need to make a final decision with regard to work-relatedness when an employee claims or suspects that the injury or illness is in fact work-related and will ensure that a record of each potentially reportable injury or illness is created. *See* Section-by-Section Analysis of § 225.25 for additional information. This approach helps to ensure that railroads record and thoroughly investigate injuries and illnesses where the employee claims that an event or exposure in the work environment is a discernable cause of the employee's injury or illness but additional investigation is necessary. This approach creates an audit trail of potentially work-related employee injuries and illnesses, and, because the railroad need not make a final determination regarding work relatedness within seven days, provides additional time for railroads to complete the work-related analysis. Moreover, this approach allows FRA to use the audit trail to better understand railroads' reporting processes and their application of the applicable regulations.

FRA received numerous comments addressing the proposed definition of "Accountable injury or illness." Because of the language adopted in the final rule, a majority of those comments are no longer applicable. At the hearing and in the written comments, several railroads and organizations representing labor and railroads asserted that FRA's reporting requirements must be based upon work-relatedness and, therefore, the proposed amendment was outside of FRA's authority. While FRA disagrees with this assertion, this issue is no longer relevant. FRA has been tasked with and given the authority to prescribe regulations that "promote safety in every area of railroad operations and reduce railroad–related accidents and incidents." 49 U.S.C. 20102. Moreover, FRA has the authority to investigate "an accident or incident resulting in serious injury to an individual or to railroad property." *Id.* As such, the proposed changes were well within FRA's authority as they were meant to improve FRA's safety data and to allow FRA to audit railroad reporting decisions. Finally, although FRA makes every effort to maintain consistent reporting requirements with those of OSHA, FRA's accident/incident recording requirements are based solely on FRA's program needs and purposes, and as such may differ from OSHA's requirements to any extent FRA believes is necessary.

Comments by NJT, UP, and AAR, among others, asserted that the proposed amendments could increase the misclassification of data by capturing too much information. As an initial matter, these comments concerned the language proposed in the NPRM. Regardless, with respect to the language in the final rule, railroads should already be reviewing all employee claimed or suspected work-related injuries and illnesses. FRA is simply requiring that the railroad document these suspected work-related injuries.

Many comments also stated that the proposed changes are not connected to

identifying safety hazards and that the previous reporting scheme did not result in underreporting. As explained above, the prior definition created an inadequate audit trail. In addition, FRA believes that the prior reporting system did result in underreporting due to the difficulties related to making a final work-relatedness determination within seven days for certain injuries and illnesses. Also, prior to this final rule, when a railroad made an initial incorrect or premature recording decision that an injury or illness was not recordable, the reporting system did not ensure that the railroad would catch the problem at a later time. Now, with the clarification that when an employee claims that, or railroad otherwise has knowledge that, an injury or illness is work-related, a railroad will be required to record such injuries and illnesses. In addition, the final rule improves the audit trail created by the railroads and better enables FRA to review reporting decisions and to identify reporting problems.

Other comments suggested that the current reporting scheme captures all of the necessary data. Specifically, AAR argued that there are sufficient tools currently in place, such as the ICP, to identify underreporting. UP argued that it is using a reliable review process that allows it to identify where additional information is required so that it is making accurate reporting decisions. The ICP requires the railroad to audit its own reporting and make appropriate changes in its reporting system to improve the quality of reporting. In the preamble of the June 18, 1996 regulation, FRA challenged the railroads to develop a Total Quality Management (TQM) system to have zero defects in reporting. The final rule is consistent with the purpose of the ICP, which is to have complete and accurate reporting. (49 CFR 225.33(a)(1)). FRA has found that the current tools do not always capture injuries or illnesses where the cause of the injury or illness is not readily apparent. The previous ICP did not create an audit trail for a situation in which a railroad determined that the injury or illness is not work-related, therefore, FRA and the railroads were hindered in reviewing and auditing the initial reporting decisions. AAR stated in post-hearing comments that disparities in reporting between railroads is not a sign of underreporting. However, without making an initial record and monitoring injuries and illnesses, it is difficult for the railroads or FRA to completely understand or explain the disparities in reporting. The changes in the final rule will allow FRA to review the railroad's decision making process to better understand those disparities and to better understand which safety measures are effective in preventing certain types of injuries and illnesses.

Commenters also argued that the proposed amendments were overly burdensome, suggesting that railroads would have to record every minor injury or illness, and that they may somehow violate the Americans with Disabilities Act (ADA), as railroads would be forced to follow up on and collect non-work-related medical information. Again, these comments relate to the proposed language in the NPRM, thus, they are not entirely applicable to the language adopted in the final rule. The final rule simply requires railroads to make a record of each injury or illness that the employee suspects or claims, or the railroad otherwise has knowledge that, is work-related. And, as noted, railroads should already be investigating these potentially work-related injuries and illnesses. FRA is simply asking the railroads to document their investigation of all potentially work-related injuries and illnesses where the employee claims or suspects the casualty is work-related, rather than just those that are ultimately determined to be work-related. During the hearing, in response to allegations that the amendment would result in violations of privacy laws, FRA asked that the railroads submit additional comments explaining how the amendment would force railroads to violate privacy laws. AAR stated that the proposed language would force employers to request personal information without providing any safety benefit. As explained above, the changes in the final rule are aimed at improving safety in the rail industry and justify requesting sensitive information, particularly where the employee suspects or claims, or the railroad knows, that the injury or illness is work-related. Moreover, the definition in this final rule does not expand the scope of the injuries or illnesses to be investigated under FRA's 2003 Final Rule but simply creates a recordkeeping requirement.

Several commenters stated that the meaning of the terms "manifests" and "abnormal" were vague. As an initial matter, the final rule does not include the term "manifests." In addition, FRA's use of the term "abnormal" is clear, and is consistent with OSHA's language.

Finally, several commenters suggested that FRA should review railroads' reporting and recording decisions based on whether or not a decision is reasonable. AAR stated that employers are in the best position to determine whether an injury or illness is work-related. Pursuant to § 225.17, "Doubtful cases," FRA cannot delegate its authority to decide matters of judgment when facts are in dispute. FRA must be able to ensure that its accident/incident data is complete and accurate. Consequently, the final reporting decision is FRA's. AAR also stated that if OSHA disagrees with an employer's decision, OSHA has the burden of proving that the injury or illness was work-related. Consistent with OSHA, the FRA Guide explains that, once an employer determines that an injury or illness is not reportable "and FRA subsequently issues a citation for failure to report, the Federal Government would have the burden of proving that the injury or illness was work-related." *See* FRA Guide. To meet its burden, FRA must show that it is more likely than not that an event or exposure arising from the operation of the railroad was a discernable cause of the injury or illness or an event or exposure was a discernable cause of the significant aggravation of a pre-existing injury or illness. Except with respect to occupational illnesses, FRA's 2003 Final Rule states that "it is the railroad's responsibility to determine whether an illness is work-related," meaning that "FRA's role will be to determine whether the reporting officer's determination was reasonable." FRA emphasizes, this language refers to only occupational illnesses and FRA retained the ability to present evidence that the railroad's decision was in fact not reasonable. 68 FR 10119, March 3, 2003.

In the NPRM, FRA proposed amending the definition of "Accountable rail equipment accident/incident" to mean "a collision, derailment, fire, explosion, act of God, or other event involving the operation of railroad on-track equipment (standing or moving) that does not result in reportable damages greater than the current reporting threshold to railroad on-track equipment, signals, track, track structures, and roadbed." The final rule defines "Accountable rail equipment accident/incident" to mean "(1) any derailment regardless of whether or not it causes any damage or (2) any collision, highway-rail grade crossing accident/incident, obstruction accident, other impact, fire or violent rupture, explosion-detonation, act of God, or other accident/incident involving the operation of railroad on-track equipment (standing or moving) that results in damage to the railroad on-track equipment (standing or moving), signals, track, track structures or roadbed and that damage impairs the

functioning or safety of the railroad on-track equipment (standing or moving), signals, track, track structures or roadbed."

Under the definition contained in FRA's 2003 Final Rule, generally, an accountable rail equipment accident/incident meant an incident that resulted in damage below the reporting threshold and that, if not attended to, would disrupt railroad service. FRA has found through its audits and enforcement tools that the term "disruption of service" has not been consistently understood or uniformly applied throughout the railroad industry. Moreover, FRA found that the previous definition of accountable rail equipment accident/incident failed to adequately capture the accidents and incidents FRA originally intended and currently requires to be recorded and/or reported for data analysis and safety purposes. Specifically, FRA originally created the Form FRA F 6180.97 to establish a means by which railroads could record and FRA could audit railroad reporting decisions with regard to the reporting of railroad accidents/incidents on Form FRA F 6180.54. FRA has expanded its use of the Form FRA F 6180.97 to identify safety hazards in yards and terminals, which has benefited FRA's safety efforts, as those incidents are precursors for reportable accidents and incidents.

Based upon FRA's thorough review and consideration of the comments and FRA's goals of creating an audit trail, applying a uniform and simpler standard and capturing data that will allow it to identify and eliminate safety hazards, FRA believes that the language adopted in the final rule is more appropriate than the language proposed in the NPRM. FRA received numerous comments addressing the proposed amendments to the definition of "Accountable rail equipment accident/incident" and, based upon the language adopted in the final rule, a majority of those comments are no longer applicable.

FRA received comments that the proposed definition would create a substantial burden on the railroads as it would require them to record every minor incident regardless of the amount of damage and the connection to safety. The final rule does not require railroads to report or record damage that is the result of normal wear and tear. Rather, as in FRA's 2003 Final Rule, this final rule only classifies an accident/incident as an "accountable rail equipment accident/incident" when it results from a derailment, collision, highway-rail grade crossing accident/incident, obstruction accident, other impact, fire or violent rupture, explosion-detonation, act of God, or other accident/incident involving the operation of railroad on-track equipment (standing or moving). FRA intends to use the information captured to learn about precursors to reportable accidents/incidents and to improve safety. The final rule clarifies that, with the exception of derailments, an incident must result in damage and that damage must impair the functioning or safety of the railroad on-track equipment (standing or moving), signals, track, track structures or roadbed. Consequently, FRA is not requiring the railroads to record minor incidents that result from normal wear and tear. Consistent with FRA's 2003 Final Rule, FRA believes it is necessary to record every derailment as such information will provide greater insight into their causes and will prevent future reoccurrences, including those that may result in hazardous material spills, significant damage, and/or casualties. Finally, the definition adopted in the final rule, which eliminates the disruption of service criteria, creates a clear reporting standard that will allow for easier and more consistent enforcement and compliance.

SEPTA suggested, in one comment, that FRA retain the disruption of service criteria. FRA did not implement this suggestion. As discussed above, the disruption of service criteria does not capture all of the data FRA needs to ensure safety. Moreover, FRA has found that the disruption of service criteria has not been uniformly applied. FRA believes that the language adopted in the final rule is more appropriate and not overly burdensome.

In addition, several commenters suggested that the proposed definition was unclear and that it was unclear what information FRA was attempting to capture. FRA believes that the language adopted in this final rule, however, is clear and will allow for the uniform application of the standard.

The final rule includes a definition for "Discernable cause." In order to clarify the meaning of this term and to ensure consistency with OSHA's reporting requirements, the final rule defines "Discernable cause" in § 225.5 to mean, "a causal factor capable of being recognized by the senses or the understanding." *See also, Webster's Third New International Dictionary* (1961); *Webster's Third New International Dictionary, Unabridged* (1971). The definition further provides that "[a]n event or exposure arising from the operation of a railroad is a discernable cause of (*i.e.,* discernably caused) an injury or illness if, considering the circumstances, it is more likely than not that the event or exposure is a cause of the injury or illness. The event or exposure arising from the operation of a railroad need not be a sole, predominant or significant cause of the injury or illness, so long as it is a cause (*i.e.,* a contributing factor)."

FRA's accident/incident reporting regulations concerning railroad occupational casualties are maintained, to the extent practicable, in general conformity with OSHA's recordkeeping and reporting regulations, in order to permit comparability of data on occupational casualties between various industries, to allow integration of railroad industry data into national statistical databases, and to improve the quality of data available for analysis of casualties in railroad accidents/incidents.[5] Moreover, maintaining such compatibility allows railroads to report occupational casualties only to FRA, rather than to OSHA and to FRA. *See* 29 CFR 1904.3.

With respect to employee injury and illness recording, OSHA's 2001 Final Rule, states that "each employer * * * must record each fatality, injury and illness that is work-related; and is a new case; and meets one or more of the general recording criteria * * * or the application to specific cases." 66 FR 5916, 5945, January 19, 2001, codified at 29 CFR 1904.4(a). OSHA's 2001 Final Rule goes on to state that "[employers] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing injury or illness," and that "[w]ork-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in [29 CFR] 1904.5(b)(2) specifically applies." 66 FR 5916, 5946, January 19, 2001, codified at 29 CFR 1904.5(a).

After OSHA's 2001 Final Rule was published, the National Association of Manufacturers (NAM) filed a legal challenge to the final rule, with respect to (among other things) the final rule's presumption of work-relatedness. On November 16, 2001, OSHA and NAM entered into a settlement agreement to resolve NAM's legal challenge. The parties then entered into a revised

[5] It should be noted that under OSHA's regulations, the term "recording" is used. Under FRA's regulations and the FRA Guide, the term "reporting" is used. The OSHA system requires recording into the OSHA 300 Log whereas FRA has always used the term "reporting" in its regulations and in the FRA Guide because the Accident Reports Act of 1910, as amended, requires "a railroad carrier [to] file a report * * * on all accidents and incidents * * *" 49 U.S.C. 20901.

settlement agreement on November 29, 2001. The revised settlement agreement was published in the Federal Register at 66 FR 66943, December 27, 2001. As part of the NAM–OSHA settlement, the parties agreed to the following:

Section 1904.5(a) states that "[the employer] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition. Work relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment * * *" Under this language, a case is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to [sic] pre-existing condition. The work event or exposure need only be one of the discernable causes; it need not be the sole or predominant cause.

Section 1904.5(b)(2) states that a case is not recordable if it "involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment." This language is intended as a restatement of the principle expressed in 1904.5(a), described above. Regardless of where signs or symptoms surface, a case is recordable only if a work event or exposure is a discernable cause of the injury or illness or of a significant aggravation to a pre-existing condition.

Section 1904.5(b)(3) states that if it is not obvious whether the precipitating event or exposure occurred in the work environment or elsewhere, the employer "must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." This means that the employer must make a determination whether it is more likely than not that work events or exposures were a cause of the injury or illness, or a significant aggravation to a pre-existing condition. If the employer decides the case is not work-related, and OSHA subsequently issues a citation for failure to record, the Government would have the burden of proving that the injury or illness was work-related."

In 2003, FRA revised its accident/incident reporting regulations to conform, to the extent practicable, to OSHA's revised requirements. *See* 68 FR 10108–10140, March 3, 2003. In doing so, FRA took into account the NAM–OSHA settlement agreement, in particular the agreement's reference to the term "discernable," to qualify or describe cause. FRA included the phrase "discernable cause" in its definitions of "Accident/incident," "Accountable injury or illness," and "Occupational illness" in § 225.5, and added the phrase to its reporting requirement for "Deaths, injuries and occupational illnesses" at § 225.19(d). While FRA did discuss the meaning of "discernable cause" in the preamble of FRA's 2003 Final Rule, *see* 68 FR 10108, 10127, March 3, 2003, the agency did not explicitly define the term "Discernable cause" in the rule text.

On January 15, 2008, FRA received a letter from the DOL's Office of the Solicitor (OSHA Letter) confirming FRA's understanding and application of the NAM–OSHA settlement agreement and OSHA's recordkeeping requirements with regard to "work-relatedness," in addition to providing further clarification on particular points of law. In the OSHA Letter, OSHA stated that "'[d]iscernable' is used in the ordinary sense; that is, capable of being recognized by the senses or the understanding." OSHA Letter at 3. OSHA's definition came from Webster's Third International Dictionary. The OSHA Letter goes on to state that an event or exposure is a discernable cause if, "considering the circumstances, it is more likely than not that the event or exposure is a cause of the injury or illness." *Id.* FRA submitted the OSHA Letter to Docket Number FRA 2006–26173 on December 10, 2008.

FRA received several comments from the railroads and other organizations regarding the proposed definition of discernable cause. Many comments stated that the proposed definition was inconsistent with OSHA's reporting requirements. As explained above, FRA adopted a definition that is virtually identical to and consistent with OSHA's definition to ensure that railroads need to report only to one agency and that there is consistent reporting across industries. One comment suggested that OSHA requires that the cause be distinguishable from other causes, and that FRA's definition is inconsistent. Although OSHA requires that an event or exposure be a tangible cause, it does not require that the event or exposure be the main or predominate cause of the injury or illness. In addition, neither OSHA nor FRA require that the railroad calculate the exact amount of cause a particular event or exposure played in the subsequent injury or illness, only that it be a cause. Moreover, like OSHA, where it is difficult to determine whether the event or exposure is a cause, FRA requires that the employer consider the circumstances surrounding the event or exposure to determine whether it is more likely than not a cause.

Other comments suggested requiring that the event or exposure in the work environment be the predominant or main cause to ease the reporting burden and to simplify the reporting scheme. However, this suggestion would make the definition inconsistent with OSHA. In the OSHA Letter, OSHA stated, with regards to "causation," that "the employer need not weigh the relative contributions of occupational and non-occupational factors to the injury or quantify the extent of the occupational contributions." *Id.* As such, "discernable" in this context does not mean obvious. In addition, requiring that the event or exposure be the predominant or main cause would exclude certain injuries and illnesses, and would be difficult to measure and enforce.

Some comments requested that medical evidence factor into the causation decision. Consistent with OSHA, FRA recognizes that when causation is not obvious, that "consultation with a health care professional" may play a part in the reportability determination. *Id.* However, the final reporting decision is made by a railroad's reporting officer and the responsibility cannot be delegated to another individual. Railroads also asked what weight FRA gives to medical evidence compared to other types of evidence. Again, FRA, like OSHA, acknowledges that medical consultation may be a factor the railroad reporting officer considers, but the reporting officer may not delegate the reporting decision to a health care professional. As stated in the definition, "[i]f it is unclear whether the work event was a cause of the injury, the employer must evaluate the employee's work duties and environment and decide whether it is more likely than not that work was a cause." *Id.* Thus, an employer is responsible for considering all of the relevant evidence obtained through its inquiry when making a reporting decision. When reviewing the railroad's reporting decision, FRA considers various factors when giving weight to a health care professional's opinion, including, but not limited to, whether the health care professional clearly documented his or her findings, whether the conclusion is supported by evidence, and whether the health care professional provided a medical assessment or, instead, a conclusory statement.

Finally, commenters asserted that FRA "always" takes employees at their word and, therefore, railroads are not truly free to consider contradictory medical evidence. However, that is not the case. As stated in § 225.17, "Doubtful cases," FRA has the authority to resolve factual disputes. During its audit, FRA reviews the basis for a railroad's reporting decision, in addition to the "investigatory materials,

including, but not limited to, the following: The initial report filed by the affected person, witness statements, transcripts of hearings, medical records, time and attendance records, and the purpose of payouts made in connection with the accident/incident." *See* FRA Guide, Chapter 1. Moreover, FRA conducts additional investigation and consults with its own health care professional when appropriate. At the conclusion of its investigation, FRA will review the railroad's reporting decision and all of the associated evidence to determine whether it is more likely than not that an event or exposure arising from the operation of the railroad is a discernable cause of the injury.

Commenters suggested using an evidence-based approach to determine causation. During his testimony, Dr. M. Hadler commented that individuals often have difficultly recognizing what caused their injuries and tend to attribute cause to the environment they are in at the time their pain becomes unbearable. Consequently, Dr. Hadler suggested using a more scientific approach (such as a pain diary) to determine causation. Additionally, KCS and UP suggested that FRA use the National Institute for Occupational Safety and Health's (NIOSH) approach to determine causation. FRA, however, has chosen to adopt OSHA's language and method of determining causation so that railroads may report injuries and illnesses to only one agency, FRA. If FRA adopted the NIOSH approach then railroads would be responsible for reporting employee injuries and illnesses separately to both OSHA and FRA. FRA collection of employee injuries and illnesses must be consistent with OSHA's system to make a reliable national database. Failure to be consistent with OSHA would trigger dual reporting requirements for railroads (to OSHA and to FRA). UP supported adopting the NIOSH approach because it believes that each person shows injuries and illnesses differently. Thus, UP and KCS would like an approach that considers the unique factors for each person. Under FRA's approach, a railroad should conduct an inquiry into any potentially reportable or accountable injury or illness. At the conclusion of its investigation, the railroad must decide whether, considering the circumstances, it is *more likely than not* that an event or exposure arising from the operation of the railroad is a discernable cause of an injury or illness. Consequently, under this approach, a railroad may consider the various unique factors associated with each employee's potentially reportable or accountable injury or illness, including but not limited to an employee's medical and work history, in addition to an employee's statements regarding his or her injury or illness.

Commenters also suggested that the definition of discernable cause is too broad. Specifically, commenters suggested that the definition requires railroads to collect information that is not relevant to occupational safety and will result in over-reporting. Again, the definition of discernable cause is consistent with FRA's longstanding policy and with OSHA's interpretation. As a result, the definition will not change railroad reporting responsibilities and, in fact, will ease the reporting burden (as railroads have to report to only one agency). Like OSHA, FRA does not require that the cause be occupational in nature. *See also* Section-by-Section Analysis for § 225.5, "Definitions—Work-related." Also, the definition is appropriate as it allows FRA to identify injuries and illnesses for which events or exposures arising from the operation of the railroad play a role, and it is not overly broad as the injuries and illnesses must also meet one of the reporting criteria. In addition to the benefits of collecting uniform data across industries, FRA is not collecting information regarding minor injuries with no safety impact as an event or exposure arising from the operation of the railroad must be a discernable cause and the injury or illness must be severe enough to meet one of the reporting criteria.

Commenters also stated that the definition of discernable cause is vague and fails to provide clear guidance to railroads. Specifically, one comment stated that the dictionary definition was uninformative. As explained above, the cause need not be the sole or predominant cause, rather it must be a contributing factor. If it is not clear whether the event or exposure was a discernable cause, the employer must consider the surrounding circumstances to determine reportability. FRA believes that the definition and standard are clear. Moreover, when a railroad is unsure about the reportability of an injury or illness, FRA recommends that a railroad make a report or utilize FRA's "claimed but not admitted" process as described in 49 CFR 225.17(c).

Commenters suggested that FRA is creating a geographic presumption and, therefore, the definition is inconsistent with OSHA. Moreover, commenters want to limit the cause to just those injuries that are occupational in nature (*i.e.,* related to performing job-related activities). *See* Section-by-Section Analysis for § 225.5, "Definitions—Event or exposure arising from the operation of the railroad" and "Definition Work related." For employees, consistent with OSHA, the final rule requires that an event or exposure in the work environment be a discernable cause of the injury or illness. Therefore, FRA is still requiring causation and, as such, an injury or illness is not work-related simply because signs or symptoms arise in the work environment. For non-employees, FRA requires that an event or exposure arising from the operations of the railroad be a discernable cause of the casualty, and, as such, FRA did not create a geographic presumption. Although the railroads would like to limit reportable injuries and illnesses to those caused by events and exposure that are uniquely occupational, consistent with OSHA, FRA simply requires for employees that an event or exposure arising from the operation of the railroad be a discernable cause of the injury or illness. *See* Section-by-Section Analysis for § 225.5, "Definition—Work related."

Finally, commenters suggest that employers, and not FRA, are in the best position to determine causation. Consistent with OSHA, for purposes of § 225.11, FRA is not reviewing a railroad's reporting decision to determine whether it was reasonable (except in the case of occupational illness (*See* FRA's 2003 Final Rule)); rather, FRA is determining whether an injury or illness is reportable.

The final rule defines an "Event or exposure" as an "incident, activity, or occurrence." FRA included the definition to clarify that event or exposure is a term that is to be broadly interpreted and to eliminate redundant language in the rule text.

Many of the comments that FRA received suggested that normal body movements such as walking or sneezing do not constitute an event or exposure. However, consistent with OSHA, FRA considers "normal body movements" to be events within the definition. *See* OSHA Letter at 3. Such normal body movement cases are only reportable if they arise from the operation of the railroad and cause or contribute to the injury or illness. *See* Section-by-Section Analysis for § 225.5, "Definition—Work related" and "Definition—Discernable cause." Consistent with OSHA's requirements, FRA does not require that the event or exposure be an "obvious cause" of the injury or illness, or be occupational in nature and, therefore, normal body movements may result in reportable injuries or illnesses.

The final rule amends and restructures the definition of "Event or exposure arising from the operation of a railroad" to clarify its meaning. The term "event or exposure arising from the operation of a railroad" and its definition were added in FRA's 2003 Final Rule to more narrowly tailor what types of accidents/incidents were considered to "arise from the operation of a railroad" and were, therefore, potentially reportable. 68 FR 10108, 10115–16, March 3, 2003.

FRA's 2003 Final Rule's definition consisted of three-tiers that addressed the different classifications of persons on and off railroad property. The first tier defined "event or exposure arising from the operation of a railroad" broadly "with respect to any person on property owned, leased, or maintained by the railroad, an activity of the railroad that is related to its rail transportation business or an exposure related to the activity." The final rule revises this first tier of the definition by changing "any person" to "a person who is not an employee of the railroad." This amendment is consistent with the intent of FRA's 2003 Final Rule:

> FRA developed a compromise position, proposing that railroads not be required to report deaths or injuries to persons who are not railroad employees that occur while off railroad property unless they result from a train accident, a train incident, a highway-rail grade crossing accident/incident, or a release of a hazardous material or other dangerous commodity related to the railroad's rail transportation business.

68 FR 10108, 10109, March 3, 2003. The revision clarifies that the definition was intended to apply only to persons who are not railroad employees. The final rule also removes the phrase "an activity of the railroad" such that tier one of the definition concerns an event or exposure that is related to the performance of the railroad's rail transportation business. The final rule also removes the reference to "activity" since the definition of "event or exposure" in the final rule includes "activity." The final rule also revises the language proposed in the NPRM to clarify that the newly consolidated tier one subpart (i) deals with a person who is not an employee and is on railroad property, rather than an event or exposure occurring on property. FRA believes this clarifying language is consistent with the intent of FRA's 2003 Final Rule. As this change is consistent with current industry reporting practices and the language in the FRA's 2003 Final Rule, the amendment to the final rule should have no impact on reporting practices and, in fact, is more consistent with current practices than the language proposed in the NPRM.

The second tier also defined "event or exposure arising from the operation of a railroad" broadly, but "with respect to an employee of the railroad (whether on or off property owned, leased or maintained by the railroad), an activity of the railroad that is related to the performance of its rail transportation business or an exposure related to that activity." The final rule clarifies this paragraph by revising the definition to state "with respect to a person who is an employee of a railroad, an event or exposure that is work-related." This amendment removes the phrase "an activity of the railroad," since the definition of "event or exposure" in the final rule includes "activity." The final rule also removes the phrase "(whether on or off property owned, leased, or maintained by the railroad)" and the phrase "that is related to the performance of the railroad's rail transportation business * * *" because the term "work-related" encompasses both of those requirements.

The third tier defined "Event or exposure arising from the operation of a railroad" narrowly with respect to a person who is neither on the railroad's property nor an employee of the railroad, to include only certain enumerated events or exposures, *i.e.,* a train accident, a train incident, or a highway-rail crossing accident/incident involving the railroad; or a release of hazardous material from a railcar in the railroad's possession or a release of another dangerous commodity if the release is related to the railroad's rail transportation business. *68 FR 10108, 10116, March 3, 2003.* The final rule revises the language proposed in the NPRM to clarify that the new consolidated tier one subpart (ii) deals with a person who is not an employee and is not on railroad property, rather than an event or exposure not occurring on property. FRA believes this clarifying language is consistent with the intent of FRA's 2003 Final Rule. As this change is consistent with current industry reporting practices and the language in FRA's 2003 Final Rule, the amendment to this final rule should have no impact on reporting practices and, in fact, is more consistent with current industry practices than the language proposed in the NPRM.

The final rule consolidates tier one, tier two, and tier three of the definition into two tiers so that tier one is applicable to non-employees and tier two is applicable to employees. The amendments and restructuring are clarifying measures and do not change the meaning of the definition. The definition continues to mean, consistent with FRA's 2003 Final Rule, "that a railroad would not have to report to FRA the death of or injury to an employee of a contractor to the railroad who is off railroad property (or deaths or injuries to any person who is not a railroad employee) unless the death or injury results from a train accident, train incident, or highway-rail grade crossing accident involving the railroad; or from a release of a hazardous material or some other dangerous commodity in the course of the railroad's rail transportation business. In addition, FRA would require railroads to report work related illnesses only of railroad employees and under no circumstances the illness of employees of a railroad contractor." *68 FR 10108, 10116, March 3, 2003.*

The final rule amends the language proposed in the NPRM in the first tier by clarifying that a person who is not an employee is considered to be on railroad property when they are on property that the railroad operates over (*e.g.,* operating rights), in addition to property owned, leased, or maintained by the railroad. FRA does not believe that this clarifying amendment increases the burden on railroads because it is consistent with common industry practice as well as FRA's long-standing policy. Any burden created by this amendment would be nominal, as a majority of these incidents would have been captured elsewhere under the prior definition.

The final rule also amends the language proposed in the NPRM in the first tier (ii)(A) by removing "highway-rail grade crossing accident or incident" from the list of accidents/incidents considered to be "events or exposures arising from the operation of the railroad" when a non-employee is off railroad property. FRA is removing highway-rail grade crossing accident or incident from the list of off property accidents/incidents because it is repetitive, as those types of accidents and incidents are already captured under train accident and train incident. FRA also added the term "non-train incident." Non-train incident is defined as an "event that results in a reportable casualty, but does not involve the movement of on-track equipment nor cause reportable damage above the threshold established for train accidents." *See* § 225.5, "Definitions—Non train incident." FRA included "non-train incident" to make the definition consistent with FRA's 2003 Final Rule and the 2003 FRA Guide. In the 2003 FRA Guide, non-train incidents were included in the list of accidents/incidents. This amendment

simply clarifies that FRA wants to retain the non-train incidents events captured under the prior rule and it was inadvertently removed in the NPRM. FRA does not believe that this clarifying amendment increases the burden on railroads because it is consistent with the FRA's 2003 Final Rule, the 2003 FRA Guide, common industry practice, as well as FRA's long-standing policy.

Amtrak's comments suggested that FRA's definition creates a geographic presumption of work-relatedness. However, for an injury or illness to be reportable, an event or exposure arising from the operation of the railroad must be a discernable cause. As such, it is not enough that the signs or symptoms of an injury or illness arose in the work environment. *See* Section-by-Section Analysis for § 225.5, "Definition—Work related."

The final rule makes a technical amendment to the definition of "General reporting criteria" to include criteria number [225.19(d)] (6), "Illness or injury that meets the application of any of the [enumerated] specific case criteria," which was inadvertently omitted in FRA's 2003 Final Rule.

The final rule also revises the definition of "Highway-rail grade crossing" to mean a location where a public highway, road, street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade, or a location where a pathway explicitly authorized by a public authority or railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks at grade. The definition further provides that the term "sidewalk" means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that portion of a street that is paved or improved and intended for use by pedestrians.

Although this revision was not expressly addressed in the NPRM, it is consistent with FRA's long-standing practice as well as the Railroad Safety Improvement Act of 2008 (the "RSIA"). Specifically, sections 2 and 204 of the RSIA define "crossing" to include such pathway crossings. Furthermore, section 209 of the RSIA requires that FRA audit railroads to ensure that all grade crossing collisions and fatalities are properly reported. Thus, FRA's audits must review railroad records to ensure that crossings, including such pathway crossing accidents/incidents, are reported. The final rule's definition makes FRA's regulations consistent with the RSIA's requirements and enables accurate auditing and reporting. Moreover, FRA proposed revisions to the definition of "Accident/Incident" with respect to impacts at highway-rail grade crossings, and received comments on the proposal. FRA's responses to those comments are discussed above.

The final rule defines "Injury or illness" to mean an "abnormal condition or disorder," (this is consistent with OSHA's definition at 29 CFR 1904.46). FRA is adding the definition to provide examples of injuries and illnesses and to clarify that pain is an injury or illness when it is sufficiently severe to meet the general reporting criteria listed in § 225.19(d)(1) through (d)(6). *See* OSHA's Final Rule, 66 FR 5916, 6080, January 19, 2001. The final rule also amends the definition to clarify that a musculoskeletal disorder (MSD) is an injury or illness. *See* OSHA's Final Rule, 66 FR 5916, 6017, January 19, 2001 and 68 FR 38601, 38602, June 30, 2003. The addition of the definition is not a substantive change to FRA's current accident/incident recording and reporting requirements. Rather, the final rule added the definition in an effort to eliminate confusion as to what constitutes an injury or illness. FRA also wishes to emphasize that injuries and illnesses are reportable only if they are new cases discernably caused or significantly aggravated by an event or exposure arising from the operation of a railroad, that meet one or more of the general reporting criteria.

In response to the NPRM, FRA received comments that asserted that the proposed definition was not consistent with OSHA because pain and MSDs are not injuries or illnesses. However, in the OSHA Letter, OSHA confirmed FRA's understanding that "pain is an injury or illness * * * when it is sufficiently severe to meet the general reporting criteria" and that the MSDs are injuries and illnesses as they constitute "abnormal conditions." OSHA Letter at 4.

Commenters also stated that the proposed definition is overly broad and would require the railroads to report minor injuries and illnesses. Because the injury or illness must still meet the general reporting criteria, FRA will not be capturing minor injuries and illnesses. Moreover, these amendments are clarifications and do not alter the railroads' current responsibilities. FRA uses all of this information, including information about MSDs and lower back pain, to identify health and safety risks arising from railroad operations.

Other commenters suggested that the experience of pain in the work environment should not be considered an injury as the person might simply be experiencing pain as the result of an injury or illness that was caused by an event or exposure not arising from the operation of the railroad. UP argued, for example, that a person may experience pain simply as a result of age or psychological reasons. The final rule does not require railroads to report injuries or illnesses that are not caused by an event or exposure in the work environment. Thus, signs or symptoms of a prior injury or illness that simply manifest within the work environment or on property owned, leased, operated over or maintained by railroad, are not reportable. Pain is only reportable when an event or exposure arising from the operation of the railroad is a discernable cause of that pain or significantly aggravated that pain and it meets the general reporting criteria.

Several commenters stated that the term "abnormal condition" is not clear. This terminology is consistent with OSHA's requirements. Moreover, FRA believes that the term is, in fact, clear and requires railroads to report adverse medical conditions caused by events or exposures arising from the operation of the railroad. This definition, in addition to the examples, provides sufficient guidance for railroads to properly identify reportable injuries and illnesses. UP stated that the definition was vague and unclear, and, as a result, UP suggested a definition based upon diagnostic criteria. An injury or illness that is simply the result of events or exposures outside of the work environment is not reportable. Thus, an injury that is simply the result of the aging process is not reportable. Moreover, an injury or illness must be caused by an event or exposure arising from the operation of the railroad. Thus, if an event or exposure arising from the operation of the railroad significantly aggravated a preexisting condition or if the person is more susceptible to an injury or illness discernably caused by an event or exposure arising from the operation of the railroad due to age, then the injury or illness is reportable. As the workforce ages, FRA is interested in learning more about the impact on these demographics and work place safety. As such, FRA believes that the definition contained in the final rule is appropriate.

The final rule amends the definition of "New case" to apply to all persons rather than only to employees. Correspondingly, the final rule replaces the phrase "in the work environment" with "arising from the operation of a railroad," because the term "work environment" applies only to

employees. This revision is consistent with the statutory requirement that railroads report to FRA "all accidents and incidents resulting in injury or death to an individual * * * arising from the carrier's operations during the month," not just accidents and incidents resulting in injury or death to railroad employees. *See* 49 U.S.C. 20901. FRA believes that this amendment does not affect the reporting requirements. The final rule also includes the descriptor "discernably" before the word "caused" in order to maintain consistency within part 225.

Commenters to the NPRM stated that the amendments to the definition of "New case" inappropriately expanded the definition to apply to all persons and, in so doing, would create significant costs and reporting burdens. While the amendments do expand "New case" to address persons beyond employees, the changes are meant to make the definition consistent with the statutory requirement that railroads report casualties to all persons. 49 U.S.C. 20901. Moreover, expanding the term "New case" to address casualties to non-employees should not create significant additional burdens as the revision is meant to provide guidance to the railroads about when a new record or report must be created and when the railroads should only update a previously created record or report for an "existing case." As such, railroads need only make a new record or report when it is a "new case" and may simply update a record or report for an "existing case."

The final rule also amends the definition of "Qualified health care professional" by removing the otolaryngologist example (which had stated: "[f]or example, an otolaryngologist is qualified to diagnose a case of noise induced hearing loss and identify potential causal factors, but may not be qualified to diagnose a case of repetitive motion injuries."). The final rule removes this example in order to clarify that physicians are not limited by their specialty and may diagnosis conditions while operating within the scope of their license, registration, or certification. As such, as a licensed physician, an otolaryngologist may diagnose conditions other than those related to the ear, nose, and throat. A comment to the NPRM stated that the example should not be removed, that doctors should not be able to diagnosis conditions outside of their specialty, and that the example should be amended from referencing "repetitive motion injuries" to "work-related musculoskeletal disorders." As noted, the final rule clarifies that physicians may diagnose conditions outside of their specialty while operating within the scope of their license, registration, or certification. This position is consistent with the current rule; however, the otolaryngologist example created confusion (which is why it was removed).

The final rule revises the definition of "Railroad." Currently, part 225 defines "railroad" as "a person providing railroad transportation." In order to attain better consistency with Congress' 1994 revisions to 49 U.S.C. 20102, the final rule defines "railroad" to mean "a railroad carrier," and adds a definition to § 225.5 for "railroad carrier" to mean a "person providing railroad transportation." Congress added the term "Railroad carrier" to 49 U.S.C. 20102 in 1994 (Pub. L. 103–272, 108 Stat 745), as part of a larger effort "[t]o restate the laws related to transportation in one comprehensive title" and "attain uniformity [of language] within the title." *See* House Report No. 103–180 at 3, reprinted in 1994 U.S.C.C.A.N. 818, 820. Specifically, Congress defined "railroad carrier" at 49 U.S.C. 20102 (2) as a "person providing railroad transportation," in order to "distinguish between railroad transportation and the entity providing railroad transportation." *See* House Report No. 103–180 at 79, reprinted in 1994 U.S.C.C.A.N. 818, 898. FRA's definition of "railroad transportation" remains unchanged.

The final rule adds a definition for "Significant aggravation of a pre-existing injury or illness." This definition is consistent with both OSHA's definition as set forth at 29 CFR 1904.5(b)(4) and the current version (effective May 1, 2003) of the FRA Guide. FRA has added this definition to § 225.5 for clarification and ease of reference.

The final rule further clarifies that the provisions concerning days away from work and restricted duty only relate to railroad employees. This clarifying amendment was made in response to a comment requesting additional clarification about whether these provisions apply to "any person." This amendment is consistent with the reporting criteria found in § 225.19 and will not create any additional burden on the railroads.

Commenters stated that the definition for "Significant aggravation of a pre-existing injury or illness" is not consistent with the OSHA definition. Specifically, Amtrak argued that FRA's definition is different than OSHA's because it contains the term "discernable cause." However, FRA included this language for clarity and the definition is, in fact, consistent with OSHA's language. Pursuant to the OSHA–NAM Agreement, a case "is presumed work-related if, and only if, an event or exposure in the work environment is a discernable cause of the injury or illness or of a significant aggravation to [sic] preexisting condition."

Amtrak further argued that FRA's removal of "occupational" preceding the phrase "event or exposure" is also inconsistent with OSHA. This revision is consistent with the statutory requirement that railroads report to FRA "all accidents and incidents resulting in injury or death to an individual arising from the carrier's operations during the month," not just accidents and incidents resulting in injury or death to railroad employees. *See* 49 U.S.C. 20901. While OSHA only captures information relating to employees, FRA collects and uses information for various classifications of persons. As such, FRA requires railroads to submit information relating to non-employee injuries and illnesses that arise from the operation of the railroad.

The final rule also adds a definition for "Suicide data." Consistent with FRA's decision to remove suicide and attempted suicide from its current § 225.15 reporting exceptions (*see* Section-by-Section Analysis for 225.15, "Accidents/Incident not to be reported"), and to begin collecting suicide related data, FRA is adding to § 225.5 a definition for "Suicide data." In the NPRM, FRA proposed that "Suicide data" mean data regarding the death of an individual due to that individual's commission of suicide as determined by a coroner or other public authority; or injury to an individual due to that individual's attempted commission of suicide as determined by a public authority.

The final rule revises the definition of "Suicide data" to mean "data regarding the death of an individual due to the individual's commission of suicide as determined by a coroner, public police officer or other public authority; or injury to an individual due to that individual's attempted commission of suicide as determined by a public police officer or other public authority." The FRA Guide explains that a "public authority" is a Federal, State or local government entity, such as a public health department, that has the legal authority to declare a fatality a suicide or a casualty to a person as an attempted suicide. Moreover, the FRA Guide provides for what documentation a railroad is required to have to show that a person committed suicide or attempted to commit suicide. *See*

Section-by-Section Analysis for § 225.41, "Suicide data."

FRA emphasizes that only the information about the death of, or injury to, the individual who committed the suicidal act is considered to be suicide data. Thus, information about the death of, or injury to, any other person caused by another person's commission of a suicidal act is not suicide data. FRA will not report suicide data to OSHA. FRA will not include suicide data (as defined in § 225.5) in its periodic summaries of data on the number of injuries and illnesses associated with railroad operations. FRA will maintain suicide data in a database that is not publicly accessible. Accordingly, suicide data will not be available on FRA's Web site for individual reports or downloads, however, suicide data will be available to the public in aggregate format on FRA's Web site and via requests under the Freedom of Information Act. *See* § 225.41, "Suicide data." FRA inspectors and State agencies participating in investigative activities under part 212 will have access to the individual records and reports. *See* § 225.31. States also can obtain individual reports directly from the railroads pursuant to § 225.1.

Commenters requested that FRA clarify what is considered a public authority. As explained above, a "public authority" is a Federal, State or local government entity, such as a public health department, that has the legal authority to declare a fatality a suicide or a casualty to a person an attempted suicide. MTA asked whether public authority would include "a railroad police department or other State or local police department." FRA does not consider a railroad police officer a public authority within the meaning of those terms. Another commenter suggested using the phrase "appropriately qualified public authority" to define public authority. FRA believes that the revised definition provides sufficient clarity as to what is considered a public authority.

Commenters also suggested that collecting this information (*e.g.,* a coroner's report) is time consuming and that FRA should consider this fact when requiring that a railroad complete the relevant forms within a specific period of time. FRA acknowledges that it may take additional time to confirm cause of death. As explained, FRA needs this information to prevent future casualties and to improve rail safety. However, after acquiring knowledge that a reportable injury or illness occurred, a railroad must create a Form FRA F 6180.55a for reportable injury and illness within thirty days after the expiration of the month during which the accidents/incidents occurred. As such, a railroad may submit the report as a fatality if a final determination with regard to cause of death has not yet been reached and, at a later time, update and amend the record or report once the railroad is able to confirm cause of death. If a railroad is unable to confirm whether an individual committed suicide at the end of the investigative period, the deceased should be listed as the applicable type person (*e.g.,* trespasser, non-trespasser). FRA allows railroads to accept verbal confirmation of an attempted suicide or suicide from a public authority, so long as the railroad documents in writing the specifics of the conversation and creates the required audit trail, as explained in the FRA Guide, rather than requiring written confirmation from the public police officer, coroner or other public authority. *See* Section-by-Section Analysis for § 225.41, "Suicide data."

The final rule revises the definition of "Work environment" to explain that the work environment means the establishment and other locations where one or more railroad employees are working or are present as a condition of employment. This revision provides additional clarity and better conforms FRA's definition with OSHA's definition at 29 CFR 1904.5(b)(1).

The final rule revises the definition of "Work-related" by removing the words "incident, activity, or the like" and replacing them with "event or exposure" because the definition of "event or exposure" in this section encompasses those terms. The definition explains that an injury or illness is presumed work-related if an event or exposure in the work environment is a discernable cause of the resulting condition or a discernable cause of a significant aggravation to a pre-existing injury or illness. The causal event need not be peculiarly occupational in nature so long as it occurs in the work environment, and is a discernable cause (*i.e.,* contributory factor). Further, the final rule states that if an injury or illness is within the presumption, the employer can rebut the work-relatedness only by showing that the case falls within an exception listed in 49 CFR 225.15. This presumption is consistent with the NAM–OSHA settlement agreement, 66 FR 66943, December 27, 2001, and with OSHA's regulations which require that "[employers] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." 29 CFR 1904.5(a). That regulation goes on to explain that "[w]ork-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in [29 CFR] 1904.5(b) specifically applies." *Id.* at 29 CFR 1904.5(b)(2), OSHA also sets forth nine exceptions to its injury and illness reporting requirements. The final rule sets forth all FRA accident/incident reporting exceptions in § 225.15. *See* Section-by-Section Analysis for § 225.15, "Accidents/Incident not to be reported."

In addition, in cases where it is not obvious whether a precipitating event or exposure occurred in the work environment, the employer must evaluate the employee's work duties and environment to decide whether it is more likely than not that an event or exposure in the work environment contributed to the employee's injury or illness. FRA's requirement is consistent with the NAM–OSHA settlement agreement and OSHA's regulations at 29 CFR 1904.5(b)(3), in which OSHA addresses how an employer should handle a case if it is not obvious whether the precipitating event or exposure occurred in the work environment, stating "in these situations, [the employer] must evaluate the employee's work duties and environment to decide whether or not one or more events or exposures in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition."

FRA also wishes to clarify that an event or exposure that occurs in the work environment need not have a clear connection to a specific work activity, condition, or substance that is peculiar to the railroad transportation business in order be an "event or exposure arising from the operation of a railroad." Examples of events or exposures arising from the operation of a railroad include an employee tripping for no apparent reason while walking across a level floor; an employee being sexually assaulted by a co-worker; or an employee being injured by an act of violence perpetrated by one co-worker against a third party. *See* OSHA's 2001 Rule, 66 FR 5916, 5946, January 19, 2001. In such cases, the employee's job-related tasks and exposures did not create or contribute to the risk that an injury or illness would occur. *Id.* Rather, these activities are events or exposures arising from the operation of a railroad because they occurred in the work environment. Likewise, normal body movements (*e.g.,* walking, climbing a staircase, bending, sneezing) engaged in

by an employee at the time of injury are also events arising from the operation of a railroad, even if the body movement is not related to the employee's job-related tasks. *See* 66 FR 5916, 5957–5958, January 19, 2001. Correspondingly, events or exposures involving contractors or volunteers, that occur on property owned, leased, operated over or maintained by the railroad, also arise from the operation of a railroad, even if they do not have a clear connection to a specific work activity, condition, or substance that is peculiar to the railroad transportation business.

UP contests the work-relatedness presumption. However, the final rule specifically adopts a presumption of work-relatedness that is identical to OSHA's presumption to provide uniformity in reporting requirements between OSHA and FRA and amongst railroads. Moreover, this allows railroads to report to one agency, FRA. In addition, uniform reporting requirements allow for comparing safety trends across industries and among railroads.

UP also suggests that a method/evidence-based approach should be employed. UP proposes that an injury or illness is considered work-related if "1. The medical findings of disease or injury are compatible with the effects of a disease-producing agent or an injury producing event to which the worker has been exposed; 2. Sufficient exposure is present in the worker's occupational environment to have caused the disease; and 3. The weight of the evidence supports the disease as having occupational rather than non-occupational origin." Alternatively, BNSF suggested using the NIOSH approach when causation is not obvious. As explained above, under part 225, the railroad must decide whether, considering the circumstances, it is more likely than not that an event or exposure arising from the operation of the railroad is a discernable cause of an injury or illness. If an event or exposure is a discernable cause, then the injury or illness is presumed to be work-related. Under this approach, a railroad may consider the various unique factors associated with each employee's potentially work-related injury or illness, including, but not limited to, an employee's medical and work history, in addition to an employee's statements regarding his or her injury or illness.

Other commenters stated that the definition creates a geographic presumption because experiencing pain in the work environment is sufficient to make an injury or illness work-related and reportable. Contrary to this assertion, the final rule does not create a "geographic presumption," as the event or exposure arising from the operation of the railroad must be a cause of the injury or illness; and, therefore, the manifestation of a sign or symptom in the work environment, by itself, does not make an injury work-related. Similarly, comments stated that the definition is so broad that everything is work-related. Again, an injury or illness is not work-related unless an event or exposure arising from the work environment is a discernable cause, and it meets one of the general reporting criteria. Moreover, FRA's definition of work-relatedness is consistent with OSHA's definition and enables OSHA and FRA to compare safety trends across industries.

Commenters stated that FRA should collect information about only injuries and illnesses caused by "occupational" events or exposures. UP claimed that, when railroads are required to report injuries or illnesses that result from non-occupational events, that data will not improve railroad safety. Commenters also stated that FRA is not collecting data about the hazards and risks actually associated with the railroad industry. For employee injuries and illnesses, OSHA does not require that the event or exposure be occupational in nature. Again, adopting OSHA's approach allows the railroads to report to one agency, FRA, and, so long as FRA maintains reporting requirements consistent with those of OSHA, FRA's regulations also allow for comparing safety trends between industries. Finally, FRA uses the information regarding injuries and illnesses that are not solely occupational in nature to improve safety and to more fully understand injuries and illnesses in the work environment.

§ 225.6 Consolidated Reporting

The final rule adds § 225.6, which provides an option for consolidated railroad accident/incident reporting for certain integrated railroad systems.

Section 20901 of title 49 of the United States Code requires that each "railroad carrier" submit to FRA a monthly report of its accidents/incidents. A "railroad carrier" is defined by 49 U.S.C. 20102 as a "person providing railroad transportation, except that, upon petition by a group of commonly controlled railroad carriers that the Secretary determines is operating within the United States as a single, integrated rail system, the Secretary may by order treat the group of railroad carriers as a single railroad carrier for purposes of one or more provisions of part A, subtitle V of this title and implementing regulations and order, subject to any appropriate conditions that the Secretary may impose." "Person," as defined by 1 U.S.C. 1, "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

The final rule provides that a parent corporation may request in writing that FRA treat its commonly controlled railroad carriers, which operate as a single, seamless, integrated United States rail system, as a single railroad carrier for purposes of part 225 compliance. The written request must provide a list of the subsidiary railroads controlled by the parent corporation and an explanation as to how the subsidiary railroads operate as a single, seamless, integrated United States railroad system. If FRA grants such a request, the parent corporation must enter into a written agreement with FRA specifying which subsidiaries are included in its railroad system, consenting to assume responsibility for compliance with part 225 for all named subsidiaries making up the system, and consenting to guarantee any liabilities owed to the United States government that are incurred by its named subsidiaries for violating part 225. Any change in the subsidiaries making up such a railroad system will require immediate notification to FRA and the execution of an amended agreement. In addition, executed agreements will be published in the docket.

FRA's final rule is consistent with the Surface Transportation Board's (STB) decision in Ex Parte No. 634 (Proposal to Require Consolidated Reporting by Commonly Controlled Railroads) (November 7, 2001). In this decision, STB required that each group of railroads that operate as a single, integrated United States rail system whose cumulative operating revenues meet the Class I threshold, submit consolidated annual financial reports that combine the operations of all their commonly controlled railroads that operate as an integrated rail system within the United States.

Commenters to the NPRM suggested that this revision will dilute reporting, and make it more difficult to compare trends and to identify problems. However, FRA believes that this revision will, in fact, enable the agency to gather more meaningful and accurate data. One comment also sought additional clarification on who can use consolidated reporting. Again, as discussed, a parent corporation may request consolidated reporting where its commonly controlled railroad carriers operate as a single, seamless, integrated

United States rail system. In addition, the STB decision, referenced above, provides further clarification.

§ 225.9 Telephonic Reports of Certain Accidents/Incidents and Other Events

The final rule amends the accident/incident telephonic reporting requirements related to fatalities that occur at highway-rail grade crossings as a result of train accidents or train incidents. FRA had required railroads to report immediately to the National Response Center (NRC), via telephone, "a fatality at a highway-rail grade crossing as a result of a train accident or train incident." 49 CFR 225.9(a)(2)(iii). FRA has found that confusion exists as to the applicability of this requirement when death does not occur at the scene of the accident/incident, but occurs several hours or days later, after the fatally injured person is taken to the hospital for treatment.

As a result, the final rule revises the telephonic reporting requirement for highway-rail grade crossing fatalities to require telephonic reporting only if death occurs within 24 hours of the accident/incident. This revision is consistent with the Department of Transportation, Office of Inspector General's November 28, 2005 recommendation (Report No. MH–2006–016), which recommended that FRA amend § 225.9 to clarify the reporting requirements and to include criteria requiring railroads to report to NRC any death at a highway-rail grade crossing, only if death occurs within 24 hours of the accident/incident.

The final rule also makes a technical amendment to paragraph (a)(2)(iv) by adding the words "or more" after $150,000, to clarify that the telephonic reporting requirement is triggered when a train accident results in damage of $150,000 or more to railroad and non-railroad property.

In the NPRM, FRA requested comments and suggestions on four issues of concern. One of these issues was § 225.9 telephonic reporting. Specifically, the NPRM noted that FRA was considering changing the method by which telephonic reports of accidents/incidents, as required by § 225.9, are made. Under FRA's current regulations, railroads are required to telephonically report certain accidents/incidents to the NRC, who in turn provides notification of the accidents/incidents to FRA. The NPRM indicated that FRA was reviewing whether it would be preferable for railroads to report these accidents/incidents directly to FRA via electronic transmission, and invited comments and suggestions on the issue.

FRA received comments that were generally in favor of reporting such accidents/incidents directly to FRA via electronic transmission. One comment suggested that certain data should be collected, including railroad contact information closely associated with the accident/incident, train equipment identification, and hazardous materials identification. Another comment suggested that railroads should immediately report any type of railroad related fatality, including trespasser fatalities and suicides. After reviewing the issue and the comments, no changes are being made relating to direct reporting because FRA does not currently have the infrastructure to adequately address such reporting. However, FRA will take these comments into consideration in any further evaluation concerning direct reporting.

A commenter suggested that the immediate notification of such fatalities is not necessary because such data is captured in the monthly report submitted to FRA. FRA believes, however, that immediate reporting is necessary so that FRA has the opportunity to physically investigate the accident/incident before the scene is cleared. Such reporting ultimately results in the creation of more accurate data. A comment to the NPRM also suggested that a railroad cannot easily determine whether there has been a fatality if the individual does not die at the scene of the accident/incident. FRA believes that railroads must take reasonable steps to learn whether a fatality occurred within 24 hours of the highway-rail grade crossing accident/incident. Under the current regulation at § 225.9, there is no such time limit. As such, the final rule lessens the burden on the railroads to follow-up on such accidents/incidents under § 225.9 by only requiring railroads to report if a fatality occurs within 24 hours. As discussed, this final rule is consistent with the Department of Transportation, Office of Inspector General's November 28, 2005 recommendation (Report No. MH–2006–016). A comment to the NPRM also suggested that such reports be made electronically, rather than telephonically, to allow for greater efficiency and accuracy. FRA does not currently have the infrastructure to accommodate this suggestion. FRA does, however, currently receive electronic updates after the initial report to the NRC, which ensures that FRA has all of the relevant information. Lastly, a comment to the NPRM suggested that "horrible injuries" should also be reported under § 225.9. The final rule does not adopt this suggestion because the phrase "horrible injuries" is vague, would be difficult to enforce, and FRA Form F 6180.55a captures information relating to the nature of the injury.

The final rule also revises the Telephonic Reporting Chart contained in the FRA Guide, Appendix M in order to make it consistent with the final rule text as the chart contained in the 2003 Final Rule was not consistent with the regulatory text. These amendments are clarifying in nature, and will impose no additional burden on railroads. *See* FRA Guide for additional information.

§ 225.11 Reporting of Accidents/Incidents

In this section, the final rule lists each primary accident/incident group described in § 225.19 (*i.e.,* Highway-rail grade crossing; Rail equipment; and Death, injury and occupational illness) by subsection. By identifying each group of accidents/incidents with a different subsection, FRA will be better able to access data and differentiate among data elements. For example, currently, if FRA issues a violation against a railroad for alleged non-compliance with § 225.11, FRA's case tracking database captures this as a violation of § 225.11. With such limited information, FRA is unable to easily identify what type of reporting non-compliance is alleged (*e.g.,* failure to report a highway-rail grade crossing accident/incident; failure to report a rail equipment accident/incident or failure to report an accident/incident involving a death, injury or occupational illness). This final rule provides FRA with better and more useful data, while also providing quicker access to such data.

The final rule also updates this section to reflect the revised provisions in § 225.37 regarding filing accident/incident reports with FRA via optical media (CD–ROM) and electronically via the Internet.

§ 225.15 Accidents/Incidents Not To Be Reported

In this section, § 225.15 is revised to include a comprehensive list of injury/illness and rail equipment accident/incident reporting exceptions (formerly listed partially in § 225.15 and in the 2003 FRA Guide). As discussed in the Section-by-Section Analysis of § 225.5, "Definitions" with respect to the definition of "Work-relatedness," OSHA's regulations require that "[employers] must consider an injury or illness to be work-related if an event or exposure in the work environment either caused or contributed to the resulting condition or significantly aggravated a pre-existing condition." 29

CFR 1904.5(a). OSHA's regulation goes on to explain that "[w]ork-relatedness is presumed for injuries and illnesses resulting from events or exposures occurring in the work environment, unless an exception in [29 CFR] 1904.5(b) specifically applies." 29 CFR 1904.5(a). FRA established certain reporting exceptions in § 225.15 in FRA's 2003 Final Rule and also adopted OSHA's reporting exceptions in the 2003 FRA Guide.

FRA's list of exceptions in this final rule includes both the FRA created exceptions and the exceptions set forth by OSHA at 29 CFR 1904.5(b) as adopted by FRA. FRA reviewed the applicability of each injury and illness reporting exception as related to the class of injured person, and incorporates this information into the final rule text.

In making this revision, FRA leaves paragraph (a) substantively unchanged.

In paragraph (b), FRA addresses reporting exceptions for Worker on Duty—Employee (Class A) injuries and illnesses. Paragraph (b) retains the current paragraph (b)(1) reporting exception relating to injuries and illnesses occurring in living quarters. The final rule also adds additional reporting exceptions applicable to Worker on Duty—Employee (Class A) (paragraphs (b)(2) through (b)(3)). The final rule also revises the NPRM language to clarify that these exceptions do not affect a railroad's obligation to evaluate and report those injuries and illnesses as another class of persons (*i.e.,* Employee not on duty (Class B); Passenger on Trains (Class C); Nontrespassers-On Railroad Property (Class D); Trespassers (Class E)), rather than as only Employee Not On Duty (Class B). For example, an employer who is present in the work environment as a member of the general public and is injured may qualify as a Class C or Class D person, rather than as a Class B person. This is a clarifying amendment; therefore, it should not alter railroads' reporting responsibilities and is consistent with the exceptions contained in FRA's 2003 Final Rule and 2003 FRA Guide.

Paragraph (c) contains reporting exceptions applicable to all employees (whether on or off duty). With respect to the reporting exception listed in paragraph (c)(3), FRA wishes to clarify that an injury or illness that is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption is not reportable. It does not matter if the employee bought the food on the employer's premises or brought the food into work. For example, if the employee is injured by choking on a sandwich while in the employer's establishment, the case would not be considered work-related. If, however, the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered reportable if the case meets the general reporting criteria set forth at § 225.19(d)(1)–(d)(6). With respect to the reporting exception listed in paragraph (c)(5), self-inflicted casualties do not need to be reported except that, for FRA reporting purposes, a railroad will still be responsible for reporting or recording self-inflicted casualties that are determined to be suicides and attempted suicides that qualify as accountable or reportable. FRA will not be providing suicide data to DOL.

In paragraph (d), FRA addresses the applicability of the reporting exceptions listed in paragraph (b) and (c) to contractors and volunteers. The reporting exceptions for employee injuries and illnesses apply equally to volunteer injuries and illnesses and to contractor injuries (contractor illnesses are not reportable to FRA). Because an injury to a contractor, or injury to or illness of a volunteer, must occur on property owned, leased, operated over or maintained by the railroad (rather than in the work environment), any reference to the term "work environment" in paragraph (b) is construed to mean, for the purposes of paragraph (d) only, on property owned, leased, operated over, or maintained by the railroad. The application of the exceptions as stated in paragraph (d) do not reflect any change to FRA's provisions, but is included to clarify the applicability of the reporting exceptions to contractors and volunteers. Consistent with the changes made to the definition of "event or exposure arising from the operation of the railroad," paragraph (d) was amended to include the term "operated over." FRA does not believe that this clarifying amendment increases the burden on railroads because it is consistent with common industry practice as well as FRA's long-standing policy.

Lastly, paragraph (e) addresses reporting exceptions for rail equipment accidents/incidents which were included in the 2003 FRA Guide.

The agency believes that the incorporation of these exceptions into the rule will provide a better understanding of FRA's employee injury and illness reporting requirements. Again, the reporting exceptions do not affect a railroad's obligation to maintain records of accidents/incidents as required by § 225.25 (Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," and Form FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record"), as applicable.

The final rule also eliminates from the reporting exceptions suicides and attempted suicides. In doing so, FRA is requiring that casualties due to suicides and attempted suicides, that arise from the operation of the railroad and meet the general reporting criteria listed in § 225.19(d)(1) through (d)(6), be reported to the agency on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)," as a new category of data called "suicide data." In addition, casualties due to suicides and attempted suicides that arise from the operation of the railroad and meet the general reporting criteria listed in § 225.19(d)(1) through (d)(6) should be included on Form FRA F 6180.55, "Railroad Injury and Illness Summary," in Field 18, Reported Casualties. Under this system, a reportable injury caused as a result of a suicidal act is reported to FRA regardless of the need for other reporting of the event (*i.e.,* the suicide resulted in a reportable train accident or highway-rail grade crossing collision). FRA will not report such suicide data cases to DOL. FRA will also not include suicide data (as defined in § 225.5) in its periodic summaries of data on the number of injuries and illnesses associated with railroad operations. Instead, FRA will maintain such suicide data in a database that is not publicly accessible. Accordingly, suicide data will not be available on FRA's Web site for individual reports or downloads. Suicide data will, however, be available to the public in aggregate format on FRA's Web site and via requests under the Freedom of Information Act (FOIA). For additional information about FOIA requests, see FRA's Web site at *http://www.fra.dot.gov/us/foia.* Suicide data will be available to FRA's inspectors and other authorized representatives, including State agencies participating in investigative surveillance activities under part 212. *See* Section-by-Section Analysis for § 225.41, "Suicide data." States will also be able to obtain individual reports directly from the railroads pursuant to § 225.1. *See* § 225.1, "Suicide data;" *see also* Section-by-Section Analysis for § 225.1, "Suicide data."

In addition, casualties due to suicides and attempted suicides that arise from the operation of the railroad and meet the general reporting criteria listed in § 225.19(d)(1) through (d)(6) shall also be included in Field 18, Reported Casualties, on Forms FRA F 6180.55,

"Railroad Injury and Illness Summary." This will allow FRA to verify the number of forms submitted with the count listed on the form. The railroad should report the person by the "type of person" regardless of the fact that it is suicide data. As such, if a trespasser commits suicide on the railroad, the railroad should report it as a trespasser fatality. *See* FRA Guide, Chapter 3.

Suicide data counts will also be included in casualty counts on Forms FRA F 6180.57, "Highway-Rail Grade Crossing Accident/Incident Report," and FRA F 6180.54, "Rail Equipment Accident/Incident Report," so that the number of casualties reported to FRA on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)," for the month is consistent with the number of casualties reported to FRA on each of these accident/incident reporting forms. In addition, suicide data counts will also be included in casualty counts on Form FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record." *See* § 225.41, "Suicide data;" *see also* Section-by-Section Analysis for § 225.5, "Definitions," and the FRA Guide, for additional information.

UP requested that highway-rail grade crossing accident/incidents that result from suicides or attempted suicides not be included on the Form FRA F 6180.57. As explained above, the final rule requires the inclusion of this information on the Form FRA F 6180.57 so that the number of casualties is consistent with the number of casualties on Form FRA F 6180.55a and on the Form FRA F 6180.54 that might also be required for the same incident. In addition, FRA only excludes the individuals who committed or attempted suicide and, therefore, casualties to others involved in the same incident as a result of the suicidal act may be reportable. Moreover, a Form FRA F 6180.57 must be created for any impact regardless of cause or intent. The Form FRA F 6180.57 does not require any Personal Identifying Information (PII) and, as such, FRA is not as concerned about making the individual forms available to the public. *See* FRA Guide.

FRA believes that it is important to collect data on suicides. Death by suicide is a national problem as indicated by the fact that more than 30,000 Americans die by suicide each year. Currently, there are no reliable reports about how many of these deaths occur on railroad property. The CPUC indicates that more than 55 percent of pedestrian railroad fatalities in California are attributed to suicide, and according to the American Association of Suicidology, railroads that have tracked probable suicides on the rail system report that suicides are responsible for 39 percent of pedestrian fatalities. Additionally, a March 3, 2005, Chicago Tribune article, "Suicide is Top Cause of Train Track Deaths; State Looks for Ways to Prevent Fatalities," indicates that, in 2004, there were 30 probable suicide deaths and an additional three attempts involving trains in Chicago alone, and that suicide was the leading cause of rail-related fatalities in Illinois for 2004, which led Illinois to implement a systematic tracking program of such incidents on rail property. This information illustrates that there are a large number of fatalities occurring on railroad property without any national initiative to collect data that might be used to address these events.

Since it appears that suicides contribute significantly to the total number of fatalities that are occurring on railroad tracks, it is appropriate to report and collect data about suicides in addition to the other causes of death in the industry. By requiring that the information be reported as suicide data, these fatalities will not be included in the normally reported fatality data. This new data may help FRA, organizations promoting safety on and around railroad property, and suicide prevention agencies assess the problem and develop programs to decrease the incidence of suicides by train.

FRA notes that the collection of suicide data will also aid the Federal Transit Administration (FTA) in its collection and analysis of commuter railroad accidents, since FRA provides certain commuter railroad safety data to FTA. FTA relies on FRA to provide to it data on the types of accidents occurring on commuter rail, their primary causes, and the consequences, in terms of fatalities (which for FTA includes suicides under 49 CFR part 659), injuries and property damage. The data FRA provides to FTA, however, is somewhat incomplete, in that FRA cannot provide suicide data to FTA. Consequently, FTA, which uses this information to better inform their assessments of safety plans and hazard analysis performed by commuter rail grantees applying for FTA grants, must work with an incomplete data set.

Comments suggested that the collection of suicide data would create a duty on the part of the railroad to those individuals attempting to commit suicide as the railroads would now be aware of potential suicide hotspots. However, prior to this Final Rule, railroads were exempt from reporting suicides and attempted suicides. In order to exclude suicides and attempted suicides, railroads were required to prove cause of death by obtaining relevant documents to prove that a casualty was an attempted suicide or suicide. Consequently, railroads should already have knowledge of where suicides and attempted suicides are taking place. Therefore, the final rule does not create a new duty for the railroads, rather it simply requires them to compile the data. Ultimately, by collecting this information, FRA and other government agencies will be able to decrease the number of suicides and attempted suicides occurring on the railroad.

Amtrak stated in its comments that persons entering railroad property to commit suicide are considered trespassers and the suicide is considered a superseding event. As such, Amtrak claims that an event or exposure arising from the operation of the railroad is not a cause. Consistent with OSHA, FRA maintains a no fault reporting system. As such, it does not matter whether the person caused their own injury so long as the event or exposure arising from the operation of the railroad is a discernable cause and it meets the general reporting criteria. And, the collection of this data will help to decrease the number of suicides and attempted suicides that occur each year. Moreover, FRA will not be providing this information to DOL.

Commenters suggested that the collection of suicide data will not improve safety. As stated above, FRA believes that there are many benefits to collecting this information. Specifically, FRA will be able to determine where and how many suicides are occurring on the railroad. Suicides will be segregated from other fatalities, avoiding an over count of fatalities associated with railroad operations, and data will be gathered systematically so that others may use the data to design interventions.

In order for FRA to capture suicide data, the final rule requires railroads to indicate suicide or attempted suicide on Forms FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet);" FRA F 6180.54, "Rail Equipment Accident/Incident Report;" and FRA F 6180.57, "Highway-Rail Grade Crossing Accident/Incident Report;" as follows:

(1) *Form FRA F 6180.55a*—The final rule requires that an "X," representative of "suicide or attempted suicide," be placed in "Special Cause Code" block 5r, when applicable. The final rule also changes the title of block 5m from "Result" to "Tools." This change is a correction to the current form and is

necessary to maintain consistency with types of Circumstance Codes in Appendix F of the FRA Guide.

(2) *Form FRA F 6180.54*—The final rule adds four Miscellaneous Cause Codes for use in block 38 as follows: (i) Code M309 "Suicide (Highway-Rail Grade Crossing Accident);" (ii) Code M310 "Attempted Suicide (Highway-Rail Grade Crossing Accident);" (iii) Code M509 "Suicide (Other Misc.);" and (iv) Code M510 "Attempted Suicide (Other Misc.)." These codes are added to Appendix C, "Train Accident Cause Codes" to refer to "Suicide or Attempted Suicide" for use in "Primary Cause Code" block 38. The final rule also requires railroads to include suicides and attempted suicides in the casualty counts in blocks 46, 47, and 48, as applicable.

(3) *Form FRA F 6180.57*—The final rule adds a code for "Suicide or Attempted Suicide" to block 41 (the final rule also changes, among other things, the title of block 41 from "Driver" to "Highway User."). In addition, the final rule requires railroads to include suicides and attempted suicides, when appropriate, in the casualty counts in block numbers 46, 49, and 52. *See* FRA Guide for additional information.

In addition, when appropriate, the final rule requires railroads to indicate whether a suicide or an attempted suicide was a cause of an injury or illness or an accident or incident in the applicable narrative or description section on the following forms: FRA F 6180.98, "Railroad Employee Injury and/or Illness Record" and FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record." While employee suicides or attempted suicides are rare, FRA is still interested in capturing that information in order to learn more about suicides and attempted suicides in the work environment.

Commenters inquired as to whether the NPRM's proposed cause codes were sufficient to capture the facts surrounding suicides and attempted suicides. FRA believes that the codes and instructions listed above are sufficient at this time to identify key information. FRA welcomes the inclusion of additional information regarding such accidents/incidents in the applicable form's narrative section (*e.g.,* that the person is homeless).

FRA notes that it is also concerned that suicides are being reported as trespasser fatalities, because some railroads have not always made a reasonable inquiry in their efforts to determine the cause of death. In fact, FRA has found that a number of reported trespasser fatalities are actually suicides. Accordingly, FRA revises Chapter 6 of the FRA Guide to clarify that, in order to fulfill its responsibilities to maintain accuracy in reporting, a railroad must try to obtain verbal or written confirmation of a trespasser's cause of death by contacting the coroner, public police officer or other public authority by telephone and, if unsuccessful in obtaining the needed information by telephone, must follow-up in writing. The railroad must continue its efforts to obtain this information for a period of six months following the month in which the fatality occurred. The railroad must keep a record of its efforts to obtain such confirmation. This record and any documentation related to the case obtained by the railroad must be available for review and copying by an FRA representative under the same criteria as set forth in § 225.35(b). If a railroad cannot obtain confirmation of the cause of death by the end of the six month period, the railroad shall report the fatality as a trespasser fatality.

FRA also revises Chapter 6 of the FRA Guide to clarify what documentation is required to prove that an individual committed suicide or attempted to commit suicide. FRA understands that railroads often have difficulty obtaining copies of death certificates and/or have to wait until the death certificate becomes publicly available. As such, as explained in the FRA Guide, railroads may accept verbal confirmation of a suicide or attempted suicide from a coroner, public police officer, or other public authority. When receiving verbal confirmation of a suicide or attempted suicide, a railroad must create an audit trail of that confirmation so that FRA can independently verify and confirm the determination. As part of this audit trail, for example, the railroad must document the date and time of verbal confirmation in addition to the name, title, address, and telephone number of the person who determined the cause of death or injury.

Commenters stated that this information is too difficult to obtain, and that public authorities will often not cooperate with the railroads. Similarly, SEPTA suggested that the law prevents them from obtaining the written confirmation necessary to prove that a person committed suicide or attempted to commit suicide. However, railroads have been able to obtain this information under the requirements in the 2003 Final Rule and, therefore, FRA expects that they will continue to be able to do so. In addition, FRA hopes that allowing verbal confirmation will ease the railroad's burden. Finally, when investigating a trespasser fatality, if a railroad cannot obtain the required information after making a documented, good faith effort for six months, then the railroad may discontinue its investigation and report the casualty as a trespasser fatality.

Commenters also stated that the follow-up requirements are too burdensome. SEPTA suggested that railroads should only have to follow-up for 3 months, rather than 6 months. Moreover, other comments suggested that only one document request and one follow-up request should be necessary. However, based on past comments, railroads have asserted that public authorities require additional time to conclude that a fatality is a suicide. Therefore, FRA believes that the extended investigation period is necessary. Once a railroad obtains a determination, they may terminate their investigation. The FRA Guide indicates that a railroad must follow-up in writing only if a public authority cannot be reached by telephone, and then must continue such efforts for six months or until they have received confirmation. FRA does not mandate how the continued efforts be conducted, in writing or by telephone, so long as those efforts are documented. Consequently, after attempting to reach the public authority once by phone and in writing, a railroad may select the means by which they continue their investigation. Again, if a railroad cannot obtain the required information after making a documented, good faith effort for six months, then the railroad may discontinue its investigation and report the casualty as a trespasser fatality. Finally, FRA believes that these efforts are necessary based on the past apparent over-reporting of trespasser casualties that were in fact suicides.

§ 225.17 Doubtful Cases

In this section, the final rule amended part 225 by re-designating the "Alcohol or Drug Involvement" provisions, currently contained in § 225.17(d), to a newly added § 225.18. FRA has observed that the inclusion of the two unrelated topics in one section has led to confusion. This revision is intended to reduce possible confusion and does not substantively change FRA's current accident/incident reporting requirements.

§ 225.18 Alcohol or Drug Involvement

As stated above, the final rule adds a new section, § 228.18, re-designating the Alcohol and Drug provisions currently contained in § 225.17(d) to a new section, § 225.18, for purposes of clarity only. The final rule also makes the following technical amendments:

changing the word "title" to "chapter," to reference the correct term; inserting "49 CFR" in front of § 219.209, for clarity; and changing the word "paragraph" to "section," to accommodate the proposed re-designation of § 225.17(d) to § 225.18 (a)–(d).

Commenters suggested that contractors and subcontractors be included in § 225.18. The final rule does not adopt this suggestion because it is outside of the scope of the proposed rulemaking. Specifically, the NPRM did not propose any substantive changes, rather the sections were simply divided into two sections for purposes of clarity, and several technical amendments were made.

§ 225.19 Primary Groups of Accidents/Incidents

In this section, the final rule revises paragraph (d) to clarify the agency's existing reporting requirements for death, injury, and occupational illness and to further conform those requirements to OSHA's recordkeeping and reporting regulations.

As discussed, FRA's accident/incident reporting regulations that concern railroad occupational casualties are maintained, to the extent practicable, in general conformity with OSHA's recordkeeping and reporting regulations in order to enable data comparisons on occupational casualties between various industries, to allow integration of railroad industry data into national statistical databases, and to improve the quality of data available for analysis of casualties in railroad accidents/incidents. *See* Section-by-Section Analysis for § 225.5, "Definitions" with respect to "Discernable cause." Moreover, maintaining such compatibility allows railroads to only have to report occupational casualties to FRA, rather than to both OSHA and FRA. *See* 29 CFR 1904.3.

With respect to employee injury and illness recording, OSHA's regulations require that "each employer * * * must record each fatality, injury and illness that is work-related; and is a new case; and meets one or more of the general recording criteria * * * or the application to specific cases." 29 CFR 1904.4(a).

By rewording paragraph (d) to more closely model OSHA's wording, the final rule better conforms its reporting requirements to that of OSHA. The final rule also clarifies that only new cases are reportable (the current regulation requires that the injury or illness must be a new case *or* a significant aggravation of a pre-existing injury or illness). The final rule, therefore, requires, that, to be reportable, a significant aggravation of a pre-existing case must be a "new case" (*i.e.,* a case in which either the employee has not previously experienced a *reported* injury or illness of the same type that affects the same part of the body, or the employee previously experienced a *reported* injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and symptoms had disappeared) from the previous injury or illness and an event or exposure in the work environment caused the signs or symptoms to reappear).

The final rule also revises paragraph (d) by amending the general reporting criteria, specifically paragraph (d)(2), which currently states, "injury to any person that results in medical treatment," to include "significant injury to any person" and "loss of consciousness to any person." Failure to include these classes of injuries as reportable for "any person," rather than just railroad employees, in the general criteria in the agency's 2003 Final Rule (68 FR 10107, March 3, 2003) has resulted in FRA not capturing data for non-employees with respect to significant injuries.

Amtrak expressed concern that extending the reporting criteria to non-employees would impose a significant burden on the passenger railroads. As an initial matter, significant injuries are limited to a small number of injuries (*e.g.,* fractured or cracked bone or punctured eardrum), which must be diagnosed by a qualified physician, further narrowing the number of probable cases. In addition, significant injuries are generally serious, and are the type of injuries the railroads should already be investigating, and will generally meet the other general reporting criteria (*i.e.* someone with a broken bone will most likely receive medical treatment). As such, these changes should not substantially increase the investigative duties of the railroad or the number of cases they are reporting. With respect to loss of consciousness cases, railroads will not be required to report cases where the passenger's loss of consciousness is not due to an event or exposure arising from the operation of the railroad. For these reasons, FRA does not believe that the additional reporting criteria for non-employees will significantly increase the number of reportable cases.

In addition, the final rule amends paragraph (d)(6)(E) (previously (d)(6)(v)) to remove the word "independently" for purposes of clarity. As explained in the Section-by-Section Analysis, MSD's are injuries and illnesses under the rule and are subject to the same recording criteria that apply to other injuries and illnesses.

Lastly, the final rule amends paragraph (d)(6) to include covered data cases. The addition of covered data cases to § 225.19(d) is a technical amendment and intended to correct the inadvertent omission of the criteria in the current rule text. The addition does not alter FRA's reporting criteria or its policy on covered data as stated in § 225.39.

§ 225.21 Forms

In this section, the final rule amends paragraph (j) in relation to the use of Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related." Specifically, the final rule makes the use of the Form FRA F 6180.107, in place of Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," optional, rather than mandatory, and amends and redesignates the instructions for the use of the form currently set forth at § 225.21(j) to § 225.25(i), under the section entitled "Recordkeeping." *See* Section-by-Section Analysis for § 225.25, "Recordkeeping," for additional information and a discussion of the relevant comments.

The final rule also amends this section by adding a paragraph (k) to address the newly created Form FRA F 6180.150, "Highway User Injury Inquiry Form." *See* FRA Guide. Form FRA F 6180.150 shall be used by the railroads in determining whether a highway user suffered a reportable injury or illness in addition complying with part 225's accident/incident requirements. A copy of the Form FRA F 6180.150 shall be sent to each potentially injured highway user, or their representative, involved in a highway-rail grade crossing accident/incident along with a cover letter and a prepaid/preaddressed return envelope. *See* FRA Guide, Chapter 10 for complete instructions. A railroad shall not send a Form FRA F 6180.150 to a highway user, or a highway user's representative, who has died as a result of the accident/incident. The railroad shall complete Part I of Form FRA F 6180.150 and send the form with the completed Part I to the highway user, or their representative. *See* FRA Guide for complete instructions. Moreover, the cover letter shall be drafted in accordance with the instructions contained in the FRA Guide. *See* FRA Guide, Chapter 10.

§ 225.25 Recordkeeping

In this section, the final rule eliminates from paragraph (a) the words "that arise from the operation of the

railroad," in order to maintain conformity with the definition of "accountable injury or illness." *See* Section-by-Section Analysis for § 225.5, "Definitions," for additional information. Moreover, such language is redundant with respect to reportablility, as § 225.19(d) clearly indicates an injury or illness is only reportable if an event or exposure arising from the operation of a railroad is a discernable cause of the resulting condition or a discernable cause of a significant aggravation to a pre-existing injury or illness.

The final rule also revises the criteria for using Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related," and sets forth all of the information that must be included in an alternative railroad-designed record that may be used in lieu of the form.

Prior to FRA's most recent amendments to part 225 in 2003, FRA required that all accountable and reportable injuries and illnesses be recorded on Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," or an equivalent record containing the same information. The subset of those cases that qualified for reporting were then reported to FRA on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)." If the case was not reported, the railroad was required to state, on Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," or the equivalent record, the reason the injury or illness was not reportable. According to the final rule preamble, 68 FR 10107, 10118, March 3, 2003:

> Although this system has generally worked well, problems have arisen with respect to accounting of claimed occupational illnesses. As further explained below, railroads are subject to tort-based liability for illnesses and injuries that arise as a result of conditions in the workplace. By their nature, many occupational illnesses, particularly repetitive stress cases, may arise either from exposures outside the workplace, inside the workplace, or a combination of the two. Accordingly, issues of work-relatedness become very prominent. Railroads evaluate claims of this nature using medical and ergonomic experts, often relying upon job analysis studies as well as focusing on the individual claims.
>
> With respect to accounting and reportability under part 225, railroad representatives asserted their concern that mere allegations (*e.g.,* receipt of a complaint in a tort suit naming a large number of plaintiffs) not give rise to a duty to report. They added that many such claims are settled for what amounts to nuisance values, often with no admission of liability on the part of the railroad, so even the payment of compensation is not clear evidence that the railroad viewed the claim of work-relatedness as valid.
>
> Although sympathetic to these concerns, FRA was disappointed in the quality of data provided in the past related to occupational illness. Indeed, in recent years the number of such events reported to FRA has been extremely small. FRA has an obligation to verify, insofar as possible, whether the railroad's judgments rest on a reasonable basis, and discharging that responsibility requires that there be a reasonable audit trail to verify on what basis the railroad's decisions were made.

As a result, FRA established, at § 225.25(i)(1), a separate category of claimed occupational illnesses to be recorded on a new form, Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related." This category is comprised of: Illnesses for which there is insufficient information to determine whether the illness is work-related; illnesses for which the railroad has made a preliminary determination that the illness was not work-related; and illnesses for which the railroad has made a final determination that the illness is not work-related.

For any case later determined to be reportable, under § 225.25(i)(2), the railroad has been required to remove the designation "illness claimed to be work-related" and transfer the record to the reporting officer for retention and reporting in the normal manner. In the event the railroad determined the case was not reportable, § 225.25(i)(3) requires that the railroad record an explanation in "narrative" block 19 of Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related," describing the reason(s) the railroad made that determination, making reference to the "most authoritative" information relied upon.

FRA believed that this system of accounting for contested illnesses would focus responsibility for reporting decisions and provide an appropriate audit trail. In addition, FRA thought that it would result in a body of information that could be used for research into the causes of prevalent illnesses, particularly in the case of musculoskeletal disorders. *See* 68 FR 10107, 10118, March 3, 2003. Unfortunately, this has not been the case.

Rather than use the Form FRA F 6180.107 "Alternative Record for Illnesses Claimed to be Work-Related," to record only those illnesses described above, FRA found that railroads were frequently recording all occupational illnesses on Form FRA F 6180.107 as a matter of practice, even before evaluating the sufficiency of information provided and/or work-relatedness. Furthermore, FRA found that railroads were allowing these records to remain unevaluated for several months or more without updating or reviewing them for work-relatedness. Moreover, FRA found that railroads were not creating the Form FRA F 6180.107 record within seven working days after receiving information or acquiring knowledge that an employee asserted an occupational illness, as required by the FRA Guide. Consequently, this system of accounting did not focus responsibility for reporting decisions, did not provide an appropriate audit trail, did not result in a body of information that can be used in the future for research into the causes of prevalent illnesses, and was not helpful in correcting the under-reporting of occupational illnesses to FRA.

In order to correct this problem, the final rule refines the circumstances and procedures related to the recording of claimed occupational illnesses on Form FRA F 6180.107. Specifically, the final rule allows the use of the form to record only those claimed occupational illnesses for which the railroad carrier has not received, from the employee or their representative, information sufficient to determine whether the occupational illness is work-related. The final rule also includes, among other things, requirements that railroads: enter each illness claimed to be work-related on the record no later than seven working days after receiving information or acquiring knowledge that an employee is claiming they have incurred an occupational illness; make a good faith effort to obtain information necessary on occupational illness cases to make a reporting decision by December 1 of the next calendar year; document the receipt of new or additional case information in "narrative" block 19 of Form FRA F 6180.107 within fifteen calendar days of receipt, compared to the seven days proposed in the NPRM, and re-evaluate the case in light of the new information within forty-five calendar days of receipt of the information, compared to the thirty days proposed in the NPRM; complete a Form FRA F 6180.98 for any claimed occupational illness case determined to be accountable or reportable within seven calendar days of making such determination; retain the record in accordance with the provisions set forth in § 225.27 and report the illness in accordance with the regular reporting requirements; and provide complete narratives on Form FRA F 6180.107 for those cases the railroad determines are not reportable. The final rule also specifically defines

what data elements an alternative railroad-designed Form FRA F 6180.107 must contain.

Commenters suggested that there is no evidence of underreporting of occupational illnesses and, therefore, the narrowing of the use of the Form FRA F 6180.107 would impose a significant burden on the railroads. As explained above, FRA has found that the railroads have routinely used the Form FRA F 6180.107 to record all occupational illnesses and have failed to review additional evidence for lengthy periods of time, and that use of the form has resulted in the under-reporting of occupational illnesses. FRA believes that it is necessary to limit the use of the form to situations where the cause has not yet been determined, to avoid abuse of the form, to create an up-to-date audit trail, to continue to provide additional time to investigate causation based on the unique nature of occupational illnesses and to ensure that additional evidence is considered within a reasonable period of time.

Many of the commenters critiqued the requirement that railroads update the forms and review additional information within a certain period of time. Several railroads also requested additional time to review new evidence and to update the forms. During the hearing on the NPRM, FRA requested that the railroads provide FRA with a timeframe that they believe is appropriate to update the forms and review additional evidence. AAR suggested that the current reporting timeline, which requires the railroad to update the form by December 1 of the following year, is appropriate. However, AAR also felt that 365 calendar days would be appropriate. In its comments, AAR failed to explain why such a lengthy period of time would be necessary. As explained above, railroads have used the Form FRA F 6180.107 to avoid reporting occupational illness by failing to reconsider additional information and to fully investigate the occupational illness. As such, FRA does not believe railroads need 365 days to simply update a form and to consider new evidence. Upon review, the final rule lengthens the amount of time that the railroads have to review new evidence and to update the Form FRA F 6180.107 from 30 days to 45 days. Moreover, the Form FRA F 6180.107 is an optional form that the railroads may use for occupational illnesses where they have not yet determined the cause of the injury or illness.

AAR also submitted comments suggesting that the railroads should not be required to seek out information on claimed occupational illnesses. Specifically, AAR asserted that there is usually litigation surrounding these types of injuries and, as such, it is difficult to fully investigate the illnesses. Moreover, AAR claims that it will be difficult for FRA to determine whether the railroads made a good faith effort to determine causation. As an initial matter, the railroads' concerns about litigation should not prevent them from making reasonable inquires in addition to updating the Federally required forms as they receive and review new information. However, FRA specifically created the Form FRA F 6180.107 as an alternative form to provide the railroads with additional time to investigate these illnesses because of the unique nature of occupational illnesses and the external delays caused by litigation. Railroads should document their efforts, record new information, and evaluate that new information as required so that FRA can determine whether they are making a good faith effort. Again, the additional requirements are necessary based upon the railroads' past use of the Form FRA F 6180.107 to document all occupational illnesses without making an initial causal determination, even in cases when work-relatedness was obvious, and then failing to update the form when they acquired new information within a reasonable time period.

The final rule amends the requirement at § 225.25(b)(6) so that the alternative railroad-designed record for Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," requires the input of the "Employee identification number" only (eliminating for privacy reasons the employee social security number option). The final rule makes the same amendment to the alternative railroad-designed record for Form FRA F 6180.107, "Alternative Records for Illnesses Claimed to be Work-Related." The final rule also makes corresponding changes for Forms FRA F 6180.98 and 6180.107. *See* FRA Guide.

The final rule replaces the term "log entry" at § 225.25 (b)(28) with "record" and "report" at § 225.25 (e)(28) with "record." Both of these sections refer to "records," specifically alternative railroad-designed Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record" and Form FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record," respectively. This amendment is technical, and is not intended to effect any substantive change.

The final rule also amends the requirements for alternative railroad-designed records by amending § 225.25(b)(28) and (e)(28), and the newly created (j)(25), to reflect that the date required is the initial date the form was signed/completed. FRA finds it necessary to make this change because certain railroads do not retain the initial date a record was completed, but only the date of the most recent update to the record. Consequently, FRA is unable to discern if the railroad entered each reportable and accountable injury and illness and each reportable and accountable rail equipment accident/incident on the appropriate record, as required by § 225.25(a) through (e), no later than seven working days after receiving information or acquiring knowledge that an injury or illness or rail equipment accident/incident has occurred, as required by § 225.25(f). FRA believes that specifying the date will resolve any confusion regarding the requirement. The final rule creates a similar requirement for the alternative railroad-designed Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related," and Forms FRA F 6180.98, 6180.97, and 6180.107. *See* Section-by-Section Analysis for Appendix H, "Forms."

§ 225.27 Retention of records

In this section, the final rule adds a five-year record retention requirement for Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related" and Form FRA F 6180.150, "Highway User Injury Inquiry Form." The 2003 Final Rule did not set forth a retention period for the Form FRA F 6180.107 and the Form FRA F 6180.150 is a newly created form. Five years is the same retention period as that of Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," and is appropriate for accurate recordkeeping and auditing purposes. In addition, the final rule makes a technical change by restructuring the format of paragraph (a) in order to provide additional clarity.

The final rule also adds a requirement that, in the event a railroad opts to submit their monthly Form FRA F 6180.55, "Railroad Injury and Illness Summary" via optical media or electronically via the Internet, rather than in hard copy, the railroad shall retain the original completed hard copy for a period of five years after the calendar year to which it relates. If the railroad opts to submit the report to FRA via the Internet, the final rule requires the railroad to also retain a hard copy print out of FRA's electronic notice acknowledging receipt of the submission for a period of five years after the calendar year to which the report acknowledged relates. These

requirements are made in light of the new electronic submission options in § 225.37, "Optical media transfer and electronic submission," of this final rule.

The final rule also adds system standards for the electronic retention, by railroads, of accident/incident records. Historically, railroads have retained these records in hard copy form. Railroads may maintain these records electronically, so long as the integrity of the records are maintained. In order to ensure such integrity, the final rule adds minimum system requirements for the electronic retention of accident/incident records. These system standards do not become effective until after October 31, 2011. The final rule establishes this delayed effective date, with respect to this requirement only, to provide railroads with sufficient time to bring any electronic retention systems into compliance.

A commenter stated that railroads do not receive receipts from FRA acknowledging receipt of their electronic reports. FRA is reviewing this issue to ensure that railroads receive such receipts when electronic reports are properly submitted. A commenter also stated that the electronic records retention requirements are redundant and burdensome because railroads will have to retain every minor change, and will also result in a high cost to the railroads to both report and store such reports. However, FRA needs to track the development of these forms for purposes of accurate auditing. In addition, the ability to electronically submit forms should ease any possible burden. Moreover, railroads are already required to store many of these records. And, with respect to the Form FRA F 6180.55, the final rule only seeks an extra 36 months of records (with one report per month, for 36 months). This burden is further eased by the fact that the electronic retention system standards do not go into effect until after October 31, 2011. In addition, railroads are not required to retain records electronically.

§ 225.33 Internal Control Plan

In this section, the final rule clarifies the current ambiguity of element number 11 of the internal control plan to allow railroads to have multiple named custodians and locations of completed Forms FRA F 6180.107, "Alternative Records for Illnesses Claimed to be Work-Related," or the alternate railroad-designed forms and supporting documentation. FRA recognizes that railroads do not necessarily keep completed Claimed Occupational Illness Records in a centralized location, and that different individuals may be responsible for keeping the records. By amending the regulation, railroads will be able to accurately indicate who the custodians are and where the custodians and records are located.

In addition, FRA notes that it published a Notice of Interpretation in the **Federal Register** on March 30, 2009, informing interested parties of its application and enforcement of the harassment or intimidation provisions contained in 49 CFR part 225, specifically relating to situations in which a supervisor or other railroad official accompanies an injured employee into an examination room. *See* 74 FR 14091. FRA includes that Interpretation here for interested parties, as follows:

A. General Principle

Harassment and intimidation occur in violation of § 225.33(a)(1) when a railroad supervisor accompanies an injured employee into an examination room, unless one or more of the exceptions listed in section II(B) of this notice exists.

B. Exceptions

FRA recognizes that there are limited circumstances in which it is appropriate, and indeed preferable, for a supervisor to accompany an injured employee into an examination room. Thus, FRA believes that limited exceptions to the general principle articulated in section II(A) of this notice are necessary. Consequently, FRA recognizes the following limited exceptions:

(1) The injured employee issues a voluntary invitation to the supervisor to accompany him or her in the examination room. The injured employee must issue this invitation freely, without coercion, duress, or intimidation. For example, an injured employee may seek the attendance of a supervisor where the supervisor is a friend. This exception does not encompass invitations issued by third parties, including physicians, unless the invitations are made pursuant to the request of the injured employee.

(2) The injured employee is unconscious or otherwise unable to effectively communicate material information to the physician and the supervisor's input is needed to provide such material information to the physician. In these circumstances, the supervisor is assisting the injured employee in providing information to the physician so that the injured employee may receive appropriate and responsive medical treatment.

A commenter requested that the final rule "include safety" in this section. However, the intended meaning of this comment is unclear. Regardless, safety is a critical component of § 225.33, along with all of FRA's regulations.

§ 225.37 Optical Media Transfer and Electronic Submission

The final rule updates the title of this section, to reflect changes in technology, to read, "Optical media transfer and electronic submission." In 1994, at the request of many railroads, FRA designed a method for railroads to submit their monthly accident/incident reports to FRA using computer technologies. At the time, high speed Internet access was not available in many locations. Most Internet users used voice grade phone lines to access the Internet. Transferring high volumes of data was difficult and often led to data transmission errors (missing records or errors in characters received in transmission). The other technology used for sending data was a nine-track magnetic tape or 3½ inch "floppy disk." Both the 9-track tape and floppy disk use a magnetic surface to record data. Due to the probability of errors in both data transmission and magnetic media, FRA required a Batch Control Sheet (Form FRA F 6180.99) to verify a complete and accurate receipt of all data.

The current state of computer technology has changed significantly. High-speed Internet access is almost ubiquitous, via cable, DSL, and satellite. Transmission using phone lines and wireless (using cell phone technology) has also improved. Optical media (CD–ROM) is very reliable and the data is "burned" into the disk. Optical media has replaced magnetic media for most data transfer (USB flash drives are not intended for this type of data exchange). In amending the current regulation, FRA has taken into account the current computer technologies by eliminating the requirement for a Batch Control Sheet, and substituted "magnetic media" with "optical media." Further, FRA allows for document transmission using the .jpg and .pdf formats.

The final rule also makes two changes related to Form FRA F 6180.55, "Railroad Injury and Illness Summary." FRA believes that both of these changes will reduce railroad burdens related to completing and submitting this form. The final rule replaces the oath and notarization requirement of Form FRA F 6180.55, "Railroad Injury and Illness Summary," with a requirement that the signature be signed under penalty of perjury in accordance with 28 U.S.C. 1746. Section 20901 of Title 49 of the United States Code requires a railroad to file an Accident/Incident report "under oath" no later than 30 days after the end of each month. To fulfill this requirement, FRA currently requires a railroad reporting officer to make a sworn statement, under oath, before a notary public each month attesting to the accuracy of that month's submission. The question has arisen as to whether an un-sworn, un-notarized statement is adequate to fulfill the

section 20901 oath requirement. In 1976, Congress addressed the use of "unsworn declarations under penalty of perjury," in lieu of a sworn affidavit. Section 1746 of Title 28 of the United States Code, entitled "Unsworn declarations under penalty of perjury," provides that "wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated * * *" and provides examples of the form the declaration, certificate, verification, or statement must take. Consequently, the oath requirement of section 20901 can be met via an unsworn, un-notarized statement, so long as the statement meets the requirements set forth in 28 U.S.C. 1746.

The final rule also updates the regulatory text to include provisions allowing railroads to make their monthly reporting submissions (Form FRA F 6180.54, "Rail Equipment Accident/Incident Report"; Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)"; and Form FRA F 6180.57, "Highway-Rail Grade Crossing Accident/Incident Report") to FRA via optical media (CD–ROM) or electronically via the Internet. Batch control forms (Form FRA F 6180.99) are no longer required for submission. Form FRA F 6180.55 "Railroad Injury and Illness Summary" reports and Form FRA F 6180.81 "Employee Human Factor Attachment" reports may also be submitted through these means. However, the Form FRA F 6180.55 must be submitted as an image of the completed and signed hard copy and must be in a .pdf or .jpg file format only, and the Form FRA F 6180.81 must also be in a .pdf or .jpg file format. If a railroad opts to submit their completed Form FRA F 6180.55 to FRA via optical media or electronically via the Internet, the railroad must maintain the original completed and signed Form FRA F 6180.55 for at least five years after the calendar year to which the report relates, in accordance with § 225.27(c) of this final rule. FRA will provide to the railroad an electronic notice acknowledging the agency's receipt of Form FRA F 6180.55 reports which are filed electronically via the Internet. Railroads must also maintain a hard copy of this acknowledgment notice for at least five years after the calendar year to which the report acknowledged relates, in accordance with § 225.27(c) of this final rule. The final rule also removes the language in paragraph (e), and replaces it with a statement requiring that railroads choosing to use the optical media transfer option, or the electronic submission via Internet option, must use one of the approved formats specified in the FRA Companion Guide. FRA will reject submissions that do not adhere to the required formats, which may result in the issuance of one or more civil penalty assessments against a railroad for failing to provide timely submissions of required reports as required by § 225.11. The previous requirements of paragraph (e) are no longer necessary because they addressed issues relating to magnetic media.

§ 225.41 Suicide Data

In this section, the final rule adds § 225.41 "Suicide Data," to detail FRA's intended use of suicide data. *See* Section-by-Section Analysis for § 225.15, "Accidents/incidents not to be reported" for additional information.[6]

In the NPRM, FRA requested comments and suggestions regarding States' access to records containing "suicide data." FRA is concerned about the public use and dissemination of this data due to its sensitive nature, but also wants States to have access to such information for safety and enforcement purposes. Under the 2003 Final Rule, States could obtain reports directly from railroads pursuant to § 225.1. In addition, State agencies participating in investigative activities under part 212 could obtain records and reports from the railroads and FRA.

The final rule does not amend § 225.1 as it relates to State access; as such, States may still obtain reports directly from a railroad. All of the reports that the States may access contain no Personal Identifying Information (PII) and, therefore, FRA is not concerned about their availability and use. In addition, the final rule does not amend State access pursuant to part 212, as that access is subject to an FRA agreement, *see* § 212.105, and allows States to assist FRA with its safety mission. State agencies participating in investigative activities under part 212 will have access to relevant claims and medical records in addition to Federal records and reports pursuant to § 225.35(b), which do contain PII. State access to these documents is limited to their role in investigative activities and is for the purpose of improving safety; therefore, the final rule does not limit State access pursuant to part 212. Once a State obtains copies of documents pursuant to part 212 or § 225.1, their disclosure and use are governed by the State's privacy laws. Again, FRA wants to limit the distribution and use of the individual records and reports due to the sensitive nature of the information, and has limited the general public's access to the extent reasonably practicable by limiting its availability online through FRA.

Commenters stated that States wanted access to these reports to ensure the accuracy of their own databases and for other safety purposes. FRA believes that the States should have access to the "Suicide data" in addition to the individual reports, pursuant to part 212 and § 225.1, so that they may take steps to understand and prevent suicides occurring on the railroad. As stated above, pursuant to § 225.1, States only have access to certain reports (*e.g.,* Forms FRA F 6180.54, FRA F 6180.57 and FRA F 6180.55a) and do not have access to any records (*e.g.,* Forms FRA F 6180.98 and FRA F 6180.97). Forms FRA F 6180.54, FRA F 6180.57, and FRA F 6180.55a do not contain PII and the FRA Guide contains instructions requiring railroads to not include any PII in the narrative section. As such, FRA is not concerned about allowing the railroads to provide those records to the States pursuant to § 225.1.

As discussed above, State agencies participating in investigative activities under part 212 can obtain records and reports from the railroads and FRA. In this case, State agencies will have access to documents containing PII. Once the State agencies' obtain these documents, their disclosure will be subject to State privacy laws rather than FOIA requests. While FRA wants to limit the general public's access to these documents and their dissemination due to their sensitive nature, FRA believes that States will be able to use this information to improve safety and that FRA has limited the availability of this information to the extent reasonably practicable.

ICC suggested that FRA create a secure Web site so that more information may be made available. At this time, FRA does not plan on creating such a Web site. Instead, FRA is making

[6] The discussion in this section with regard to States access to reports and reports relates only to those records and reports containing suicide data.

all of the relevant information available in the aggregate for the general public.

Appendix A to Part 225—Schedule of Civil Penalties.

Appendix A to part 225 contains a schedule of civil penalties for use in connection with this part. The final rule revises the schedule of civil penalties to reflect revisions made to part 225. Because such penalty schedules are statements of agency policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Although the schedules are statements of agency policy, the NPRM provided interested parties with an opportunity to comment. However, no such comments were submitted.

FRA Guide

Generally, FRA makes the following revisions to the FRA Guide: An improved table of contents; clarifying instructions on Forms FRA F 6180.57, 6180.54, and 6180.150 that have fields requesting an U.S. DOT Grade Crossing Identification Number includes and is referencing the U.S. DOT Grade Crossing Inventory Number; an updated e-mail and U.S. postal mail address for the monthly accident/incident reporting submissions; the addition of a subject index; the reorganization of the chapter contents for ease of use; the inclusion of necessary updates; the inclusion of new and revised "Questions and Answers" and "Scenarios" taken from the FRA Safety Data Web page (*http://safetydata.fra.dot.gov/officeofsafety*) and from OSHA's Web page (*http://www.osha.gov/comp-links.html*) to clarify reporting issues; the inclusion of the prior and the current reporting threshold to reflect changes made in part 225; the inclusion of Web addresses for access to the most up-to-date contact information and data contained in the appendices; and the elimination of redundant language by replacing verbatim reiterations of part 225 rule text where appropriate (for ease of reference the FRA Guide includes the full regulatory text of part 225 in a newly created Appendix K).

FRA also makes a technical amendment throughout the FRA Guide by changing the term "Gap" to "Passenger Station Platform Gap" because it best captures the intended meaning. *See* FRA Guide.

More specific changes include:

Chapter 1, "*Overview of Accident/Incident Reporting and Recordkeeping Requirements.*"

FRA revises the paragraph titled, "Telephonic Reports of Certain Accidents/Incidents," in accordance with the amendments set forth in § 225.9, and includes the telephonic reporting requirements set forth in 49 CFR parts 229, "Railroad Locomotive Safety Standards;" part 233, "Signal Systems Reporting Requirements;" part 234, "Grade Crossing Signal System Safety;" and part 219, "Control of Alcohol and Drug Use." Such incorporation is for informational purposes only, and places no new reporting requirements on railroads. By including these requirements in the FRA Guide, FRA hopes to better disseminate its telephonic reporting requirements, and to improve railroad compliance by providing a single reference location for determining when accident/incident telephonic notification is required.

FRA also revises the section entitled "Close of Calendar Year" by clarifying the requirements for submitting late and amended reports, revising the time frame in which FRA will accept additional late and amended accident/incident reports, and changing from optional to mandatory the filing of amended reports for certain accidents/incidents.

FRA publishes final accident/incident counts following the conclusion of a reporting year. Submission of the December report concludes the reporting year. However, railroads are still required to provide to FRA late reports of unreported accidents/incidents and amended reports that correct or update earlier submissions.

Previously, the FRA Guide (Chapter 1—Page 12 through 13) specified three cutoff dates for filing late and amended accident/incident reports following the completion of the reporting year:

(1) April 15 of the next calendar year;

(2) December 1 of the following year: and

(3) Five years after the end of the calendar year to which the accident/incident report relates.

FRA found the reporting scheme to be confusing and outdated with the advent of improved technology. Moreover, improvements in database management strategies allow for contemporaneous viewing of reporting accident/incident statistics and have eliminated the need to impose artificial deadlines for keeping files open or for FRA to publish interim reports. As such, FRA removes references to the cutoff date of April 15th of the next calendar year for accepting late reports and amendments. Accordingly, FRA will receive and process any and all late and amended reports for a period of five years following the calendar year to which an amended or late report relates. This accommodation does not relieve a railroad of its obligation to promptly file a late or amended report upon becoming aware of an omission, mistake or otherwise, in accordance with § 225.13 and the late and amended reporting guidance set forth in the FRA Guide. FRA will continue to publish its Annual Report of Railroad Safety Statistics. Because the accident/incident databases will remain open for updating for a period of five years, the statistics published in the Annual Report will be subject to change. The authoritative source for rail safety statistics will now be the Office of Safety's Web site: *http://safetydata.fra.dot.gov/OfficeofSafety.*

To clarify, these revisions do not change the following late and amended reporting requirements, which are currently set forth in the FRA Guide:

(1) Railroads must file amended reports with FRA through December 1 of the year following the year in which the accident/incident was initially reported.

(2) Railroads must file late reports with FRA for five years (following the end of the calendar year to which the accident/incident relates) for all unreported accident/incidents.

FRA does, however, revise the reporting requirements with respect to certain specified accidents/incidents. Previously, the FRA Guide stated that railroads "should" continue to file amended reports after December 1 of the following year (*i.e.,* for five years after the end of the calendar year to which they relate) for the changes listed below. These revisions make such amended reporting mandatory. Accordingly, railroads shall continue to file amended reports for five years after the end of the calendar year to which they relate for the following changes:

(1) Railroad Injury and Illness Summary (Continuation Sheet) (Form FRA F 6180.55a): Change from Injury to Fatality (only if the injured person dies within 180 days from the date of the injury);

(2) Highway-Rail Grade Crossing Accident/Incident Report (Form FRA F 6180.57): Change from Injury to Fatality, change in Grade Crossing ID, change in the Rail Equipment Involved; and

(3) Rail Equipment Accident/Incident Report (Form FRA F 6180.54): Change from Injury to Fatality, change in Grade Crossing ID, Rail Equipment Involved, Primary Cause Code, Contributing Cause Code, Type of Territory, Number of Cars Releasing or Evacuation.

These revisions further provide that railroads shall continue to file amended reports for five years after the end of the calendar year to which they relate for the additional changes listed below:

(1) Railroad Injury and Illness Summary (Continuation Sheet) (Form FRA F 6180.55a): A significant change in the number of reportable days away from work or days restricted; a significant change is at least a 10% variance in the number of actual reportable days away from work or days restricted compared to the number of days already reported.

(2) Railroad Equipment Accident/Incident Report (Form FRA F 6180.54): A significant change in the damage costs for reportable rail equipment accidents/incidents; a significant change is a 10% variance between the damage amount reported to FRA and the current cost figures.

In light of these changes, FRA is revising the timeframe imposed for using the M505 code on the Form FRA F 6180.54. See FRA Guide, Chapter 7.

Chapter 2, ''*Definitions*.''

In the NPRM, FRA added an example to the definition of Worker on Duty-Employee (Class A) characterizing an employee on his lunch break as on duty. In response to the example, AAR submitted comments stating that an employee on an unpaid break should not be considered a Worker on Duty-Employee (Class A) because they are not performing work at that time. AAR stated that there was no justification for this change at this time. FRA removes this example in the final rule to avoid any confusion. In general, an employee on a break, whether paid or unpaid, is considered an Employee Not On Duty (Class B). However, if an employee is performing work-related activities (*i.e.,* lining a switch) during his or her break then the employee is a Worker on Duty-Employee (Class A). Thus, an employer should consider an employee's actual activities during his or her break to determine whether the employee is on or off duty.

FRA adds certain definitions for clarification and ease of reference, and removes definitions that reiterate definitions set forth in § 225.5. FRA adds a definition for ''Temporary Barricaded Crossing'' to mean ''a highway-rail grade crossing that is temporarily closed to highway users by using temporary methods to block highway traffic such as barrels. A temporary barricaded crossing does not constitute a 'closed' crossing.'' FRA also adds a definition for ''Closed Crossing'' to mean a location where a crossing has been physically removed or where rail operations, pathway or highway traffic is not possible (this does not include crossings that are temporarily closed for repairs to the track structure, crossing surface, or roadway approaches). Examples of ''closed crossings'' are locations where the crossing has been permanently barricaded and crossing surface material removed; where the railroad tracks have been cut or barricaded or physically removed; where a connecting turnout has been removed; or where rail operations are not possible because the railroad tracks are paved over, *etc.* Crossings along such inactive railroad lines are closed. FRA adds these definitions to the FRA Guide to eliminate confusion about the meaning of a ''closed'' versus ''barricaded'' crossing, and to revise the definition of ''closed crossing'' to be consistent with the definition used in the Grade Crossing Inventory System (GCIS). The GCIS is a mandatory system used by States, railroads, and the Federal government to profile crossings and determine which crossings need improved warning systems for highway users. FRA and other users regularly compare information from the Highway-Rail Crossing Accident/Incident Reports (Form FRA F 6180.57) to the GCIS. Clearly defining ''closed crossing'' and ''temporary barricaded crossing,'' and making the GCIS and FRA definitions consistent, will reduce confusion and aid in grade crossing accident/incident reporting accuracy.

FRA clarifies in the definition of Highway-Rail Grade Crossing Accident/Incident that all crossing locations within industry and rail yards, ports, and dock areas are considered highway-rail crossings within the meaning of highway-rail grade crossing. This clarifying amendment does not expand the railroads' reporting requirements or create an additional burden as the amendment is consistent with the 2003 FRA Guide, FRA's longstanding policy, and industry practices. The purpose of the amendment is to place the entire definition in one location for ease of reference.

FRA adds a definition for ''Passenger Station Platform Gap'' to mean, ''the horizontal space between the edge of the passenger boarding platform and the edge of the rail car door threshold plate, and the vertical difference from the top of the passenger boarding platform and the top of the rail car threshold.'' This definition, with a minor variation, was recommended by the RSAC General Passenger Safety Task Force to the full RSAC on October 25, 2007, along with the Cause Code Recommendations for platform gap related injuries (see discussion for Appendix F of the FRA Guide). The full RSAC agreed to the recommendations on October 25, 2007. The NPRM proposed adding a definition for ''Gap,'' as opposed to ''Passenger Station Platform Gap.'' A comment to the NPRM suggested that FRA use the phrase ''Platform Gap,'' rather than ''Gap.'' The final rule uses the term ''Passenger Station Platform Gap'' because it best captures the intended meaning. A comment to the NPRM also suggested that the definition itself is too narrow, and not consistent with the common definition of the term. However, as discussed, the definition in the final rule is consistent with the RSAC recommendations, and the definition facilitates the tracking of accidents/incidents that occur on high level platforms.

FRA also adds a definition for ''Passenger Station Platform Gap Incident'' to mean ''an event involving a person who, while involved in the process of boarding or alighting a passenger train at a rail car door threshold plate at a high level passenger boarding platform (*i.e.,* a platform that is 48'' or more above the top of the rail), has one or more body parts enter the area between the car body and the edge of the platform. The following are examples of a Passenger Station Platform Gap Incident:

—While boarding or alighting a passenger train at a high level passenger boarding platform, a person misjudges the passenger station platform gap, resulting in the person's leg entering the passenger station platform gap.

—While boarding or alighting a passenger train at a high level passenger boarding platform, a person is struck by a closing door, resulting in the person's leg entering the passenger station platform gap.

The following are not examples of a Passenger Station Platform Gap Incident:

—While boarding or alighting a passenger train at a high level passenger boarding platform, a person misjudges the gap and falls into the vestibule or platform, without a body part entering the gap.

—While walking on a passenger station at a high level passenger boarding platform, a person slips on the platform, at a location other than the rail car door threshold, resulting in the person's leg entering the gap.

The definition and examples of ''Passenger Station Platform Gap Incident'' were recommended by the RSAC General Passenger Safety Task Force to the full RSAC on October 25, 2007, along with Cause Code Recommendations for platform gap related injuries (*see* discussion for Appendix F of the FRA Guide). The full RSAC agreed to these recommendations on October 25, 2007. The final rule

adopts these recommendations with slight variation.

FRA also revises the definition of "Locomotive" to support changes necessary to include EMU and DMU cars on FRA Form F 6180.54, "Rail-Equipment Accident/Incident Report." In the current FRA Guide (May 1, 2003), a cab car is defined as a locomotive. However, there is no definition for EMU and DMU cars, which created confusion because these cars provide power to the consist and can, therefore, also be classified as locomotives.

FRA adds a definition for "Vehicle" to include automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, and all other modes of surface transportation, motorized and nonmotorized.

Chapter 3, Form FRA F 6180.55, "*Railroad Injury and Illness Summary.*"

FRA revises the instructions for the use of this form consistent with the changes in this final rule. *See* Section-by-Section Analysis for § 225.27, "Retention of records," § 225.37, "Magnetic media transfer and submission," § 225.15, "Accidents/incidents not to be reported," § 225.41, "Suicide data," and the FRA Guide, Appendix H, "Forms" for additional information.

The final rule also revises the Form FRA F 6180.55 to clarify that by signing the form the reporting officer is attesting that all of the information on the form is true and correct. *See* FRA Guide, Appendix H, "Forms" for additional information.

In addition, FRA is clarifying that casualties due to suicides and attempted suicides, for which an event or exposure arising from the operation of the railroad is a discernable cause and meets the general reporting criteria, shall also be included in Field 18, Reported Casualties, on Forms FRA F 6180.55, "Railroad Injury and Illness Summary." This will allow FRA to verify against the number of forms submitted with the actual count. The railroad should report the person by the "type of person." As such, if a trespasser commits suicide, the railroad shall report it as a trespasser fatality. *See* FRA Guide, Chapter 3.

Chapter 4, Form FRA F 6180.98, "*Railroad Employee Injury and/or Illness Record.*"

FRA revises the instructions for the use of this form consistent with the changes in this final rule. *See* Section-by-Section Analysis for § 225.5, "Definitions" definition for Accountable Injury or Illness; § 225.25, "Recordkeeping," § 225.15, "Accidents/incidents not to be reported;" § 225.41, "Suicide data;" and the FRA Guide, Appendix H, "Forms" for additional information.

FRA is clarifying that railroads must create a Form FRA F 6180.98 for employee casualties due to suicides and attempted suicides, that are accountable or reportable. Moreover, FRA instructs the railroad to indicate in the narrative section that the casualty resulted from the person's suicidal act.

Chapter 5, Form FRA F 6180.97, "*Initial Rail Equipment Accident/Incident Record.*"

FRA revises the instructions for the use of this form consistent with the changes in this final rule. *See* Section-by-Section Analysis for § 225.5, "Definitions;" § 225.25, "Recordkeeping;" § 225.15, "Accidents/incidents not to be reported;" § 225.41, "Suicide data;" and the FRA Guide, Appendix H, "Forms" for additional information.

FRA revised the Questions and Answers in Chapter 4 of the FRA Guide to reflect the changes to the definition of accountable rail equipment accident/incident. FRA removed the Q2/A2 from the FRA Guide as it dealt with the disruption of service criteria from the 2003 Final Rule.

In addition, FRA is clarifying that casualties due to suicides and attempted suicides, for which an event or exposure arising from the operation of the railroad is a discernable cause and that meet the general reporting criteria shall also be included in the Field 30, Casualties, on Forms FRA F 6180.97. Also, FRA is also including instructions that when an accountable or reportable rail equipment accident/incident is caused by a suicide or attempted suicide, the railroad shall indicate that fact in Field 31, Narrative Description.

Chapter 6, Form FRA F 6180.55a, "*Railroad Injury and Illness Summary (Continuation Sheet).*"

FRA revises the instructions for the use of this form consistent with the changes in this final rule. FRA also adds instructions that, if an injury is due to a passenger station platform gap incident, the railroad must use in block 5n ("Cause"), "Probable Reason for Injury/Illness Circumstance Codes," code number 18—Slipped, fell, stumbled due to Passenger Station Platform Gap—regardless of whether other codes may also be applicable. *See* Section-by-Section Analysis for § 225.5, "Definitions;" § 225.15, "Accidents/Incident not to be reported;" § 225.19 "Primary Groups of Accidents/Incidents" and the FRA Guide, Appendix H, "Forms" for additional information.

FRA also revised Chapter 6 to make it consistent with the Notice of Interpretation it published in the **Federal Register** on March 30, 2009, informing interested parties of its application and enforcement of the harassment or intimidation provisions contained in 49 CFR part 225, specifically relating to situations in which a supervisor or other railroad official accompanies an injured employee into an examination room. *See* 74 FR 14091; *see also* Section-by-Section Analysis for § 225.33, "Internal Control Plan."

FRA also revises Chapter 6 to instruct railroads that they must presume that a highway user who is involved in a highway-rail grade crossing accident/incident and is transported from the scene of a highway-rail grade crossing accident/incident to a medical facility via ambulance or other form of medical conveyance did, more likely than not, sustain an FRA reportable injury (*i.e.,* an injury meeting the general reporting criteria set forth at § 225.19(d)(1) through (d)(6)). Absent evidence to rebut the presumption, the railroad must report the injury to FRA on Form FRA F 6180.55a, and include the casualty on Form FRA F 6180.57. If the railroad later discovers that the highway user did not sustain a reportable injury, the railroad must notify FRA in accordance with the late reporting instructions set forth at § 225.13. FRA has found that railroads are under-reporting highway-rail grade crossing accidents/incidents related to injures to persons other than railroad employees due to the railroads' limited access to injured highway users' medical records, especially in light of privacy protections related to health information provided by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), Public Law 104–191.

FRA emphasizes, however, that this presumption does not relieve railroads of their duty to make reasonable inquiry to determine the nature and severity of highway-rail grade crossing injuries and to accurately report such injuries. In general, FRA has found that some railroads often do not make such reasonable inquiry into potentially reportable injuries of non-employees. Accordingly, the NPRM required a railroad to fulfill its reasonable inquiry responsibilities in determining the nature and severity of highway-rail grade crossing injuries and to accurately report such injuries, by contacting the injured individual or their representative by phone and, if unsuccessful in obtaining the needed

information, in writing. Moreover, the NPRM required that a railroad keep a record of its efforts to make such contact and that this record and documentation of any information obtained be available for review and copying by an FRA representative under the same criteria as set forth in § 225.35(b).

In light of comments received regarding the burden and effectiveness of contacting potentially injured highway users, the final rule revises the language in the NPRM and requires that the railroad fulfill its inquiry responsibilities by contacting any highway user potentially injured in a highway-rail grade crossing accident/incident, or the highway user's representative(s), in writing and, if unsuccessful in obtaining the needed information, by telephone. If a highway user died as a result of the highway-rail grade crossing accident/incident, a railroad shall not send this form to any person. Moreover, the final rule specifies that the written correspondence should contain the newly created Form FRA F 6180.150, "Highway User Injury Inquiry Form," a cover letter drafted in accordance with the instructions contained in the FRA Guide, and a return envelope that is prepaid and preaddressed. A railroad shall keep a record of its efforts to contact a highway user, and this record and documentation of any information obtained shall be available for review and copying by an FRA representative under the same criteria as set forth in § 225.35(b).

Form FRA F 6180.150 shall be completed in accordance with the instructions contained in the FRA Guide in Chapter 10, dealing with highway-rail grade crossing accidents/incidents. FRA has found that, when railroads do actually conduct an investigation into injuries to highway users, they will solicit medical records and other documents containing PII. This approach has resulted in a lack of response from individuals who do not want to divulge personal information and are unsure about the purpose of the request. This has resulted in the underreporting or inaccurate reporting of highway-rail grade crossing injuries. While a railroad may request this information, in order to make a reporting decision, a railroad is not required to obtain that type of documentation, although it can provide additional insight into the nature and severity of an injury or illness. As such, Form FRA F 6180.150 is meant to be minimally invasive and requires only that information which a railroad needs in order to determine whether the person suffered a reportable injury. This requirement does not prevent a railroad from conducting additional investigation, but is meant to ensure that the railroad performs an investigation into the nature and severity of highway-rail grade crossing injuries, in a less invasive manner. However, a railroad shall not require a highway user to present medical documentation or other supportive information in order to report the casualty.

A railroad shall complete Part I of Form FRA F 6180.150 with information regarding the highway-rail grade crossing accident/incident, in accordance with the instructions provided in FRA Guide. The railroad shall hand deliver or send by first class mail the letter within a reasonable time period following the date of the highway-rail grade crossing accident/incident. The letter shall also contain a prepaid, pre-addressed return envelope, and a copy of the Form FRA F 6180.150 with Part I completed, along with the required cover letter. Highway users are not required to complete Form FRA F 6180.150. Consequently, FRA acknowledges that there will be situations in which a highway user cannot be reached even though a railroad contacts the person in writing and by telephone. Other times, a highway user will refuse to provide any information even though a railroad clearly explains the Federal reporting requirements and the reason for soliciting information. In those cases, a railroad is still responsible for deciding whether, considering all of the circumstances, the highway user suffered a reportable injury (or, whether the presumption discussed above, applies). The railroad must reconsider that determination if new or additional information is later acquired. Moreover, if a highway user completes Part II, or provides additional information during a telephone call, the railroad will be responsible for determining whether, based on the circumstances, the person suffered a reportable injury or illness and for using that information in complying with FRA reporting and recording requirements.

The final rule adds a draft of Form FRA F 6180.150, "Highway User Injury Inquiry Form," to Appendix H and a sample cover letter in Appendix N. *See* FRA Guide. The instructions added to the final rule for completing Form FRA F 6180.150 require the railroad to complete Part I of the form. *See* FRA Guide, Chapter 10. Form FRA F 6180.150 was submitted to OMB for approval with the final rule and is still pending OMB approval; therefore, the railroads cannot use the form until it has been approved. FRA expects that, prior to the delayed six month effective date, the form with be approved. Following approval, the final form will be available at *http://safetydata.fra.dot.gov/officeofsafety.*

The cover letter that accompanies Form FRA F 6180.150 shall be drafted in accordance with the instructions contained in the FRA Guide, Chapter 10. FRA has included a sample cover letter in the FRA Guide for use by the railroads. *See* FRA Guide, Appendix N. Specifically, the cover letter shall clearly explain the Federal reporting requirements imposed on the railroads, address only Federal reporting requirements and not the railroad's claims process, explain that the form is voluntary, and provide clear instructions on how to complete the form. The cover letter may ask the highway user to provide additional information, but the cover letter shall not mandate that the individual provide certain information in order for a railroad to comply with Federal reporting requirements. *See* FRA Guide, Chapter 10 for a complete list of instructions.

With regard to the cover letter, the instructions contained in the final rule require that the letter contain the following:

- An explanation of why the railroad is contacting the highway user;
- An explanation of part 225's accident/incident reporting requirements;
- An explanation of how the form and any response will be used for part 225's accident/incident reporting requirements;
- An explanation that the highway user is not required to respond and that a response is voluntary;
- An opportunity to correct incorrect information in Part I;
- Identify and provide contact information for a person at the railroad who can answer questions with regard to the form;
- Provide instructions on how to complete Part II; and,
- An explanation of how any medical records, if requested, personal identifying information or information will be handled.

The cover letter and Form FRA F 6180.150 are meant to be tools that allow the railroad to gather information and comply with part 225's accident/incident reporting and recording requirements. As such, a railroad shall not require the highway user to provide any medical or personal information in order to report a casualty. Moreover, the cover letter and any communication for the purposes of part 225 shall remain

separate from and not reference the railroad's claims process in order to avoid confusion.

As an initial matter, FRA received comments regarding the language proposed in the NPRM; however, as the language in the final rule simply elaborates on and provides additional directions on how to conduct an inquiry into a potentially reportable injury, a majority of the comments are still relevant.

Commenters suggested that the requirements proposed in the NPRM were overly burdensome and would not be effective as individuals generally do not want to share personal information. As the requirements contained in the final rule are consistent with those proposed in the NPRM, the comments are still applicable. FRA is concerned that these injuries and fatalities are not being reported or investigated; as such, the changes are meant to ensure that both of these things occur. Moreover, the presumption of reportablity created in the final rule is meant to simplify the process. Also, a railroad is allowed to terminate its investigation after calling and mailing the individual as required by this final rule. The inquiry requirement does not impose a timeframe on the follow-up the railroad is required to perform, except that the railroad must initiate its investigation within a reasonable time after the date of the highway-rail grade crossing accident. FRA created the Form FRA F 6180.150 and the sample cover letter in an effort to open the communication process with potentially injured highway users to ensure that railroads and FRA are gathering accurate information. Finally, the final rule requires the railroads to contact the highway user by mail prior to contacting the person by phone because FRA believes that this will be a less intimidating approach.

In addition, UP stated in its comments that the additional requirements would force them to intrude on the private lives of the general public and could increase issues with pending litigation. As an initial matter, private litigation matters should not prevent the railroads from reporting information about casualties and investigating the potential causes of accidents/incidents arising out of the operation of the railroad. Also, the railroads should already be investigating these casualties. FRA's creation of the presumption is meant to alleviate some burden upon the railroad where they follow-up but cannot eventually obtain the necessary information. While the new requirement does mandate that a railroad follow-up with injured persons, a railroad is simply required to send a letter to and possibly call the highway user in an effort to obtain information in order to complete a Federal form. As explained above, the Form FRA F 6180.150 and the cover letter, explaining the purpose of the railroad's inquiry, is meant to encourage the sharing of information and to be less intimidating.

Commenters also suggested that this requirement would not improve safety. FRA uses information about reportable injuries to understand the severity of accidents and incidents occurring due to the operation of the railroad. When the railroads fail to report injuries and illnesses, this prevents FRA from fully understanding the impact and severity of such accidents and incidents.

Amtrak submitted comments stating that, due to their large number of passengers, the burden of these additional requirements will be extreme. As an initial matter, the duty to investigate highway-rail grade crossing incidents and trespasser fatalities, which are discussed below, do not generally apply to passengers (or individuals legally on railroad property). While railroads are required to conduct a reasonable inquiry into any potentially reportable injury or illness, FRA is particularly concerned with, and the additional requirements apply to, only highway users potentially injured in a highway-rail grade crossing accident/incident and trespasser fatalities. *See* FRA Guide.

Next, FRA is also concerned that suicides are being reported as trespasser fatalities. Often this occurs because railroads do not always make reasonable inquiry in their efforts to determine the cause of death. In fact, FRA has found that a number of reported trespasser fatalities are actually suicides. Accordingly, FRA revised Chapter 6 to clarify that, in order to fulfill its responsibilities in determining the nature of a trespasser fatality and to accurately report such a fatality, a railroad must try to obtain documentation indicating the cause of death by contacting the coroner, public police officer, or other public authority by telephone and, if unsuccessful, in writing. The railroad must continue its efforts to obtain this documentation for a period of six months following the month in which the fatality occurred. The railroad must keep a record of its efforts to obtain such documentation. This record and any documentation obtained must be available for review and copying by an FRA representative under the same criteria as set forth in § 225.35(b).

Commenters further suggested that there are already sufficient steps in place requiring the railroads to fully investigate fatalities and to obtain relevant information. As stated above, FRA has found that the railroads often report fatalities as trespasser fatalities when they are in fact suicides. To understand and prevent deaths arising from the operation of the railroad and suicides occurring on the railroad, FRA needs to have accurate and complete information. As such, FRA believes that the additional requirements are necessary. *See* Section-by-Section Analysis for § 225.41, "Suicide data" for additional discussion of the comments and requirements.

Other comments suggested that the six-month follow-up requirement is too burdensome. FRA has found that it often takes time for public authorities to complete their investigations and declare a cause of death. Therefore, FRA believes that the six-month requirement will provide the railroads with sufficient time to obtain this information. One railroad suggested that the railroads should only have to follow-up with one document request within an initial three-month period from the date of the incident. Again, FRA has found that it often takes more time to obtain this information and that follow-up by different means is more effective. In addition, once a railroad has obtained confirmation of the cause of death, they may terminate their investigation.

Several commenters suggested that the railroads do not have the legal authority to obtain the required documentation. As stated above, the railroads have historically been able to obtain this information. If a railroad cannot obtain this information and properly documents its efforts, then the railroad has fulfilled its obligations under part 225. However, if a railroad cannot confirm cause of death, the railroad will still be responsible for reporting the casualty as a trespasser fatality. Finally, FRA believes that allowing the railroads to accept verbal confirmation of the cause of death, which they must document, will ease any potential burden. *See* the Section-by-Section Analysis for § 225.15, "Accidents/incidents not to be reported."

In addition, FRA revises the FRA Guide to clarify who can declare a casualty as an attempted suicide or suicide. As discussed above, the final rule revises the definition of "Suicide data" to mean "data regarding the death of an individual due to the individual's commission of suicide as determined by a coroner, public police officer or other public authority; or injury to an individual due to that individual's

attempted commission of suicide as determined by a public police officer or public authority." The FRA Guide explains that a "public authority" is a Federal, State or local government entity, such as a public health department, that has the legal authority to declare a fatality a suicide or an injury to a person an attempted suicide.

Lastly, FRA revises Chapter 6 to instruct railroads that they must complete the longitude and latitude fields in blocks 5s and 5t on the Form FRA F 6180.55a for any reportable casualty to a trespasser. This requirement may be satisfied by either using global positioning system (GPS) equipment to determine the actual longitude and latitude, or by using a free online technology to determine an estimated longitude and latitude. *See* FRA Guide for additional information.

Chapter 7, Form FRA F 6180.54, "*Rail Equipment Accident/Incident Report.*"

FRA revises the instructions for the use of this form consistent with the changes in this final rule. FRA also adds instructions to Chapter 7 requiring that, if an accident is caused by a bond wire attachment issue (*see* Appendix C "Train Accident Cause Codes"), information on the methods and locations of those attachments be provided in the narrative block 52. *See* Section-by-Section Analysis for §§ 225.5, 225.15, 225.19 and Revisions to the FRA Guide, Appendix H.

FRA also revises Chapter 7 to instruct railroads that they must complete the longitude and latitude in blocks 50 and 51. This requirement may be satisfied by either using GPS equipment to determine the actual longitude and latitude or by using a free online technology to determine an estimated longitude and latitude. *See* FRA Guide for additional information.

The ICC's comments suggested adding additional fields on the Form FRA F 6180.54. FRA did not adopt these recommendations at this time, as the information is captured elsewhere or can be easily obtained at a later time. ICC suggested a field requesting whether the train was equipped with a digital or other recording device and whether the information was retrieved. FRA believes that this field is unnecessary as the train number provides sufficient information, and this information can be obtained at a later time. In addition, ICC recommended requesting whether the grade crossing had a recording device and whether the information was retrieved. FRA believes that sufficient information is already being captured on Forms FRA F 6180.54 and FRA F 6180.57, in addition to the U.S. DOT Grade Crossing Inventory. ICC also suggested including a field asking whether the train movement was recorded and whether that information was retrieved. Again, this additional field is not necessary as PTC becomes mandatory. In addition, ICC wanted a field asking whether the train movement was recorded by GPS and was the information reported by a wireless device. Again, FRA believes that this information can easily be obtained at a later time and does not believe an additional field is necessary. In addition, this change may be done at a later time.

The final rule revises the requirements for the Primary Cause Code with regard to cause code M505 and the railroads' responsibility to update this code. The final rule eliminates the April 15 deadline as it no longer serves a purpose with the updated technology and to be consistent with the changes made in FRA Guide at Chapter 1. *See* FRA Guide, Chapter 1. Consequently, the railroad will be required to submit an amended report pursuant to § 225.13 once it has closed its investigation and determined the cause of the accident/incident. This duty is consistent as the railroad's responsibility under the 2003 FRA Guide, as railroads were previously required to submit an amended report once it determined the cause of accident/incident.

The final rule also adds clarifying instructions on Form FRA F 6180.54, which provide that fields requesting a U.S. DOT Grade Crossing Identification Number are referring to the U.S. DOT Grade Crossing Inventory Number.

Chapter 10—Form FRA F 6180.57— "*Highway-Rail Grade Crossing Accident/Incident Report.*"

As an initial matter, the final rule revises the title of Chapter 10 to Forms FRA F 6180.57—Highway-Rail Grade Crossing Accident/Incident Report & FRA F 6180.150—Highway User Injury Inquiry Form. This change was made in light of the newly created Form FRA F 6180.150 and the instructions which are contained in FRA Guide at Chapter 10.

The final rule revises the instructions for the use of this form consistent with the changes in this final rule. *See* Section-by-Section Analysis for § 225.15, "Accidents/Incident not to be reported" and the FRA Guide, Appendix H, "Forms" for additional information.

The final rule revises Chapter 10 to instruct railroads that they shall presume that a highway user who is involved in a highway-rail grade crossing accident/incident and is transported from the scene of a highway-rail grade crossing accident/incident to a medical facility via ambulance or other form of medical conveyance, did, more likely than not, sustain an FRA reportable injury (*i.e.,* an injury meeting the general reporting criteria set forth at § 225.19(d)(1) through (d)(6)). Absent evidence to rebut this presumption, the railroad must report the injury to FRA on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)" and must include the casualty on Form FRA F 6180.57. This presumption does relieve the railroad of its responsibility to an inquiry into the nature and severity of the highway user's injuries.

In order to fulfill its responsibilities in determining the nature and severity of a highway-rail grade crossing injury and to accurately report such injury, a railroad must try to contact potentially injured highway users involved in a highway-rail grade crossing accident/incident, or their representatives, in writing and, if unsuccessful, obtain the needed information, by telephone. There is no requirement to contact a representative of a highway user who has died as a result of the accident. The written communication must include a Form FRA F 6180.150, cover letter and prepaid/preaddressed return envelope. Form FRA F 6180.150 and the cover letter must be completed, drafted and sent in compliance with the instructions contained in § 225.21 and FRA Guide at Chapter 10. A highway user is not required to respond to a railroad's written or verbal requests for additional information with regard to potential injuries. However, railroads are required to use any response in complying with part 225's accident/incident reporting and recording requirements. See FRA Guide, Chapter 6 of this Final Rule for a complete discussion of the requirements and relevant comments.

Form FRA F 6180.150 was submitted to OMB for approval with the final rule and is still pending OMB approval; therefore, the railroads cannot use the form until it has been approved. FRA expects that prior to the delayed six-month effective date, the form will be approved. Following approval, the final form will be available at *http://safetydata.fra.dot.gov/officeofsafety.*

The railroad must keep a record of its efforts to make such contact including, but not limited to, retaining a copy of the dated Form FRA F 6180.150 that was sent to the highway user and the accompanying cover letter, documenting the date, time and content of the follow-up call, and retaining any response from the highway user. This record and documentation of any information obtained must be available

for review and copying by an FRA representative under the same criteria as set forth in § 225.35(b). For additional information see Section-by-Section Analysis for § 225.15 and the FRA Guide, Subsection F, Form FRA F 6180.55a.

A comment to the NPRM suggested that block 41 on Form FRA F 6180.57 be expanded from "Driver" to "Highway User." As discussed below, the final rule does make this change. Another comment to the NPRM suggests that block 44 on Form FRA F 6180.57 be changed from "Driver" to "Highway User" so as to include non-motorist accidents. The final rule does not adopt this suggestion because this information is captured in block 46. In addition, additional instruction is included in the FRA Guide to clarify that block 44 only concerns motor vehicle operators.

The final rule adds instructions pertaining to the narrative section on Form FRA F 6180.57 stating "Do not record personal identifiers, e.g., names, Social Security Numbers, payroll identification." This change is consistent with the instructions for Forms FRA F 6180.55a and FRA F 6180.54.

The final rule also adds clarifying instructions on Form FRA F 6180.57 the field requesting an U.S. DOT Grade Crossing Identification Number means and is referencing to the U.S. DOT Grade Crossing Inventory Number.

Chapter 13, pertaining to Form FRA F 6180.107, "*Alternative Record for Illness Claimed to be Work-Related.*"

FRA revised the instructions for the use of the form consistent with the changes adopted in the final rule. *See* Section-by-Section Analysis for § 225.21, "Forms," § 225.25, "Recordkeeping," § 225.27, "Record Retention," § 225.33, "Internal Control Plan" and the FRA Guide, Appendix H, "Forms" for additional information.

The final rule revises Q1 in the Question and Answer box as the form no longer has a data element for an employee's social security number. Rather, employee social security number has been replaced with a field requesting the employee's identification number. This clarifying amendment is meant to make the Q1 accurate and consistent with the changes to the form.

Appendix A, "*Railroad Codes.*"

The FRA Guide updates the railroad codes. In addition, the final rule adds a web address where there is an up-to-date list of railroad codes.

Appendix B, "*State Codes.*"

The FRA Guide updates the State codes by adding the abbreviation for Hawaii. This is a correction of an inadvertent admission and is consistent with the change to Form FRA F 6180.56.

Appendix C, "*Train Accident Cause Codes.*"

The FRA Guide revises the following Train Accident Cause Codes:

- T224 "Rail defect originating from bond wire attachment." FRA added Train Accident Cause Code T224 in response to the National Transportation Safety Board's (NTSB) 2005 recommendation that FRA provide a train accident cause code for derailments caused by bond wire attachments. This recommendation arose from the NTSB's investigation of the derailment of northbound National Railroad Passenger Corporation (Amtrak) train No. 58 while operating on Canadian National (CN) track near Flora, Mississippi, on April 6, 2004. The derailment resulted in one fatality, 35 injuries (that were reportable to FRA), and damage costs of approximately $7 million. The NTSB recommended that FRA include in the FRA Guide a train accident cause code for derailments caused by rail cracks originating from bond wire attachments, and that information on the methods and locations of those attachments be provided in the narrative section of the accident/incident report (NTSB Recommendation Number RAR–05/02);
- S104 "Radio controlled switch not locked effectively." FRA amends Train Accident Cause Code S104 by adding "(equipment failure)" to the code's description. The description of Cause Code S104 as amended reads, "Radio controlled switch not locked effectively (equipment failure)." FRA incorporated this change in order to clarify that S104 pertains to equipment failure, not human error.
- H707 "Radio controlled switch not locked effectively." FRA amends Train Accident Cause Code H707 by adding "(human error)" to the code's description. The description for Cause Code H707 denotes "Radio controlled switch not locked effectively (human error)." FRA incorporated this change in order to clarify that H707 pertains to human error, not equipment failure.
- M 309 "Grade Crossing Suicide"; M310 "Grade Crossing Attempted Suicide"; M509 "Suicide Resulting in Train Accident"; and M510 "Attempted Suicide Resulting in Train Accident" for use in block 38 of Form FRA F 6180.54, "Rail Equipment Accident/Incident Report." *See* Section-by-Section Analysis for § 225.15, "Accidents/incidents not to be reported" and the FRA Guide, Appendix H, "Forms" for additional information.

Appendix F, "*Circumstance Codes.*"

FRA adds the following "Probable Reason for Injury/Illness Circumstance Codes," (Probable Reason Circumstance Code) under the subtitle "Remotely controlled locomotive(s) environment" to the Remote Control Locomotive Switching Operations Fatality Analysis Codes (RCL SOFA Codes) to the May 1, 2003, guide as amended:

- R1 Object fouling track, related to using RCL
- R2 Outside caused (*e.g.,* assaulted/attacked), related to using RCL
- R3 Lack of communication, related to using RCL
- R4 Slack adjustment during switching operation, related to using RCL
- R5 Insufficient training, related to using RCL
- R6 Failure to provide adequate space between equipment during switching operation, related to using RCL
- R7 Close or no clearance, related to using RCL
- R8 Act of God, related to using RCL
- U1 Object fouling track, unrelated to using RCL
- U2 Outside caused (*e.g.,* assaulted/attacked), unrelated to using RCL
- U3 Lack of communication, unrelated to using RCL
- U4 Slack adjustment during switching operation, unrelated to using RCL
- U5 Insufficient training, unrelated to using RCL
- U6 Failure to provide adequate space between equipment during switching operations unrelated to using RCL
- U7 Close or no clearance, unrelated to using RCL
- U8 Act of God, unrelated to using RCL

In the final regulation to 49 CFR part 225, 68 FR 10107, March 3, 2003, new codes and form changes were made to accommodate the recording events when remote control locomotive operations (RCL) were involved.

A special task group of railroad safety officers representing labor and industry and FRA members was created in the RSAC Accident/Incident Working Group to discuss the coding of RCL. The results of the special task group would be presented to the entire working group for approval. The concern of the reporting officers was to prevent any major changes to the then current forms or databases. In part, this rested on their

information technology offices' internal charges for making major programming changes. The FRA team was tasked with finding a way to include RCL involved accidents and incidents on the following three forms: Form FRA F 6180.54, "Rail Equipment Accident/ Incident Report"; Form FRA F 6180.57, "Highway-Rail Crossing Accident/ Incident Report"; and Form FRA F 6180.55a, "Railroad Injury/Illness Summary (Continuation Sheet)," without changing the database structures.

FRA found a way to capture RCL-related incidents on both the Form FRA F 6180.54, "Rail Equipment Accident/ Incident Report," and Form FRA F 6180.57, "Highway-Rail Crossing Accident/Incident Report" without expanding the database or making a major change on the form or the respective database. Capturing this information on Form FRA F 6180.55a, "Railroad Injury and Illness (Continuation Sheet)," remained problematic due to the small number of data fields and limited amount of data collected for each reportable event. FRA developed a solution by expanding the number of Probable Causes in the Circumstance Codes. The method chosen by FRA, and accepted by the RSAC Working Group, was to take each code for Probable Reason Circumstance Codes and create two additional codes, one for RCL-related to the event and another for RCL involved but unrelated to the event. Therefore, the probable reason of "Equipment," code 04 had two additional codes: "Equipment, related to using RCL," code 24, and "Equipment, unrelated to using RCL," code 44. This technique, although clumsy, satisfied railroad safety reporting officers, rail labor officials, and FRA.

Codes 21 through 59 in Probable Reason for the "Remotely Controlled Locomotive(s) Environment" was approved by the full RSAC Working Group for Accident/Incident Reporting. At a later RSAC Working Group Meeting in New Orleans, LA, a new discussion started about the Probable Reason Circumstance Codes. This discussion centered on Switching Operations Fatality Analysis (SOFA). SOFA events were claiming 40 to 50 percent of all fatalities of railroad workers. The Working Group decided to include new codes to insure that fatal and non-fatal SOFA events were culled from other injuries. A small task group was formed, and worked one evening to develop the eight new codes. The full Working Group approved these SOFA codes the next day. However, there was an oversight by the Working Group in the process. There should have been two additional sets of codes for SOFA RCL events (related to RCL and unrelated to RCL). This oversight was not discovered until October 2003, well after the publication and effective date of the revised regulation.

All of the parties to the Full Working Group agreed that any omission in capturing SOFA related injuries was a serious problem. FRA developed 16 additional codes to correspond to the previous eight codes. The new codes R1 through R8 and U1 through U8 were promulgated in December 2003, and were subsequently added to the FRA Guide to remedy the immediate concern. While the initial publication of these SOFA codes was not subject to a notice and comment period, FRA invited comments on the addition of these SOFA codes but did not receive any comments on this change.

FRA is also adding new Circumstance Codes to Appendix F of the FRA Guide for use on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)," to better identify injuries that occur in or due to passenger station platform gap. FRA believes that the collection of this information will allow the agency to assess the magnitude of these types of injuries, identify locations where passenger station platform gap related injuries frequently occur, and ultimately aid FRA in efforts to reduce such injuries.

The RSAC General Passenger Safety Task Force reported to the full RSAC on October 25, 2007, its Cause Code Recommendations for passenger station platform gap related injuries as follows:

(1) To the "Physical Act Circumstance Codes" add codes for:

- Passenger Train-Boarding; and
- Passenger Train-Alighting.

Also revise the "Physical Act Circumstance Codes" to clarify that codes 63 (stepping up) and 64 (stepping over) are to be used for boarding/ alighting at high level platforms.

(2) To Part III of the "Location Circumstance Codes" add codes for:

- Rail Car Door Threshold Plate to Edge of Passenger Station Platform Gap;
- Area Between Coupled Cars and Platform;
- Area Along Car body, other than Threshold Plate and Platform Edge;
- Car in Vestibule; and
- On Platform—Other.

Also change Location Circumstance Code C2—"On Platform" to "On Platform Station."

(3) To the "Event Circumstance Codes" add a code for:

- Slipped, fell, stumbled due to Passenger Station Platform Gap.

(4) To Part I of the "Location Circumstance Codes" add a code for:

- Other than Platform.

Also change the Location Circumstance Code "P—Passenger Terminal" to "P—Passenger Station on Platform".

(5) To the "Tools, Machinery, Appliances, Structures, Surfaces, (*etc.*) Circumstance Codes" add codes for:

- Door, End or Side—Passenger Train; and
- Door, Trap.

The full RSAC agreed to these recommendations on October 25, 2007.

Subsequently, FRA's Safety Knowledge Management Division's database experts reviewed the RSAC approved coding scheme in an effort to prevent redundant codes, develop ease in coding for reporting officers and clerks not familiar with all the nuances in gap incidents, and to develop a system to easily cull passenger station platform gap incidents from the casualty database. Based on this review, FRA is adding the following new codes to Appendix F—Circumstance Codes as follows:

(1) To the "Physical Act Circumstance Codes" FRA proposes to add code:

- 80—Stepping across (passenger cars).

(2) To Part III of the "Location Circumstance Codes" FRA proposes to add codes:

- G1—Rail Car Door Threshold Plate to Edge of Platform—Gap;
- G2—Area Between Coupled Cars and Platform;
- G3—Area Along Car body, other than Threshold Plate and Platform Edge; and
- G4—Car in Vestibule.

(3) To the "Probable Reason for Injury/ Illness Circumstance Codes" FRA proposes to add code:

- 18—Slipped, fell, stumbled due to Passenger Station Platform Gap.

(4) To the "Tools, Machinery, Appliances, Structures, Surfaces, (*etc.*) Circumstance Codes" FRA proposes to add codes:

- 1G—Door, End or Side—Passenger Train; and
- 2G—Door, Trap—Passenger Train.

The instructions for coding passenger station platform gap incidents are included in the FRA Guide.

Appendix G, "*FRA Regional Offices and Headquarters.*"

The FRA Guide updates these entries and includes the web address where the most current contact information can be obtained.

Appendix H, "*Forms.*"

FRA is revising its forms, as follows:

(1) *Form FRA F 6180.97 and Form FRA F 6180.98.* FRA is revising block 36 on Form FRA F 6180.97 "Date" to state "Date Initially Signed/Completed"; and block 44 on Form FRA F 6180.98 "Date" to state "Date Initially Signed/Completed" to clarify that the block must contain the initial date the form was completed. FRA finds it necessary to make such change because certain railroads do not retain the initial date a record was completed, but only the date of the most recent update to the record. Consequently, FRA is unable to discern if the railroad entered each reportable and accountable injury and illness and each reportable and accountable rail equipment accident/incident on the appropriate record, as required by § 225.25 (a)–(e), no later than seven working days after receiving information or acquiring knowledge that an injury or illness or rail equipment accident/incident has occurred, as required by § 225.25(f). FRA believes that specifying the date which is required to be maintained on the record will resolve any confusion regarding the requirement.

(2) *Form FRA F 6180.97.* FRA is renaming block 12, "Division" to "Subdivision" and requiring railroads to provide train accident location by providing subdivision data in this block as a means of improving railroad safety in the area of train accidents. If the railroad is not so divided, enter the word "system." If subdivision data is not applicable, the railroad must enter terminal/yard name. This change also applies to alternative railroad-designed Form FRA 6180.97. This change is consistent with the "Division" to "Subdivision" change on Form FRA F 6180.54. *See* paragraph N(6) of this appendix, "Form FRA F 6180.54" for additional information.

FRA is also clarifying that, in situations of joint operations, block 26, "Equipment Damage (in dollars)", refers to the aggregate amount of equipment damage incurred for all railroads involved, and that Block 27, "Track, Signal, Way & Structure Damage (in dollars)" refers to the aggregate amount of track, signal, way and structure damage incurred for all track owners. This revision does not change existing reporting requirements, and does not represent an additional reporting burden, because both railroads should already be exchanging relevant cost data to determine if the accident was FRA reportable.

(3) *Form FRA F 6180.98.* FRA is replacing the "Social Security Number" requirement in block 6 with a requirement for "Employee Identification Number." FRA is making this change in response to privacy concerns. This chapter will include instructions addressing FRA's requirement that (by amending the definition for "Accountable Injury or Illness") railroads complete a Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record" for any abnormal condition or disorder of a railroad employee that causes or requires the railroad employee to be examined or treated by a qualified health care professional regardless of whether or not it meets the general reporting criteria listed in § 225.19(d)(1) through (6), and that the railroad employee claims that, or the railroad otherwise has knowledge that, an event or exposure arising from the operation of the railroad is a discernable cause of the abnormal condition or disorder.

(4) *Form FRA F 6180.55.* FRA has eliminated the notary requirement on Form FRA F 6180.55 block 10, and replaced it with a requirement that the report be signed under penalty of perjury. The NPRM proposed that the signature read, as follows:

(1) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)."

(2) If executed without (*i.e.,* outside of) the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)."

To make clear the signee is attesting to the accuracy of all of the information on the form, the final rule revised the language, as follows:

(1) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the information on this form is true and correct. Executed on (date).

(Signature)."

(2) If executed without (*i.e.,* outside of) the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the information on this form is true and correct. Executed on (date).

(Signature)."

FRA is able to replace the oath requirement, mandated by 49 U.S.C. 20901, with a signature under penalty of perjury under 28 U.S.C. 1746. *See* Section-by-Section Analysis for § 225.37, "Magnetic media transfer and electronic submission," for additional information.

(5) *Form FRA F 6180.55a.* FRA requires railroads to place an "X" representative of "suicide" or "attempted suicide" in block 5r when reporting a suicide or attempted suicide. FRA also adds instructions that, if an injury is due to a passenger station platform gap incident, the railroad must use in block 5n ("Cause"), "Probable Reason for Injury/Illness Circumstance Codes" code number 18—Slipped, fell, stumbled due to Passenger Station Platform Gap, regardless of whether other codes may also be applicable. *See* Section-by-Section analysis for § 225.15, "Accidents/incidents not to be reported," for additional information. FRA also changes the title of block 5m from "Result" to "Tools" to remain consistent with the wording in Appendix F.

In addition, in the NPRM, FRA requested comments and suggestions on whether FRA should require railroads to complete the longitude and latitude blocks on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)" (blocks 5s and 5t) for reportable trespasser casualties, and on Form FRA F 6180.54, "Rail Equipment Accident/Incident Report" (blocks 50 and 51). Currently, completion of longitude and latitude data on both of these forms is optional.

Because railroads do not report longitude and latitude to FRA, FRA cannot currently geo-locate reportable trespasser casualties. In addition, although FRA can geo-locate reportable accidents/incidents based on the information available in the Form FRA F 6180.54, it is time consuming. The final rule provides FRA with the ability to determine the precise location of accidents and trespasser injuries. For example, FRA will be able to determine the exact location of releases of hazardous materials or leakages of diesel fuel. Having the location information for all train accidents will allow FRA to develop better inspection planning, identify locations of hazardous materials contamination affecting the health and/or environment, and provide to the Transportation Security Administration another tool for security planning. Traditionally, FRA and the railroad industry have relied on the railroad milepost system to reference location, and, in many cases, such location data is accurate for short-term issues. However, the railroad milepost system is not reliable. Over the long-term, railroads change mileposts during mergers and reorganizations. Also, mileposts can be inaccurate when a railroad is able to build a shorter link, or when a railroad does not remove old mileposts when replacement mileposts,

which have a different starting location, are installed.

Several commenters generally supported the collection of this type of information. One commenter, while not opposed to the collection of such data, was concerned about the resulting costs and indicated that the requirement should be phased-in so railroads had time to acquire the technology to comply with the regulation. This commenter also indicated that FRA should consider providing funding for GPS equipment, and that longitude and latitude should only be required for certain types of incidents. Commenters who were opposed to the mandatory inclusion of longitude and latitude generally argued that the cost to obtain GPS technology was too costly, that the technology was unreliable, that the industry was not ready for such a change, and that the regulation would not improve data collection or railroad safety.

After considering the comments received, this final rule requires the mandatory completion of the longitude and latitude blocks on Form FRA F 6180.55a (blocks 5s and 5t) for any reportable casualty to a trespasser, and on Form FRA F 6180.54 (blocks 50 and 51). In order to defray potential costs, the longitude and latitude coordinates may be either actual or estimated. Obtaining actual coordinates requires GPS technology in the field, but obtaining estimated coordinates only requires internet access. For example, this requirement may be satisfied by providing either: The actual longitude and latitude, as determined at the time of the accident/incident, or injury using GPS technology; or an estimated longitude and latitude, as determined by using a Web site, such as Google maps or the FRA's free Web site (*http://fragis.frasafety.net/GISFRASafety/default.aspx*). Moreover, as discussed previously, the final rule is effective Wednesday, June 1, 2011. As such, railroads do have a significant period of time to come into compliance. Regardless, the latitude/longitude requirement has been an optional field on both forms, and while it will be mandatory on the Form FRA F 6180.54 for all reportable rail equipment accidents/incidents, with respect to the FRA Form F 6180.55a, it will only be a requirement for reportable casualties to trespassers.

FRA believes that the majority of railroads already have the capability to determine actual longitude and latitude for such events on-site. Moreover, within the next six years, about one half of the general rail system will be equipped with Positive Train Control ("PTC").[7] While such PTC systems will vary widely in complexity and sophistication, such systems will provide railroads with longitude and latitude coordinates for specific track locations. For those railroads that do not currently have the equipment necessary to obtain longitude and latitude coordinates, the final rule permits the use of estimated coordinates which can be freely obtained on the internet. For example, railroads may estimate longitude and latitude via publicly accessible Web sites at no charge (*e.g., http://www.gorissen.info/Pierre/maps/googleMapLocation.php* or *http://itouchmap.com/latlong.html*).

A comment to the NPRM stated that this revision may create a duty for railroads towards trespassers that somehow impacts States' rights. This revision does not create any such duty, and railroads are already required to collect information on trespassers—this revision simply adds a level of detail to increase the value of the information. *See* Section-by-Section Analysis § 225.41, "Suicide data," for additional information. A comment suggested that longitude/latitude should be collected and stored in decimal degrees. The final rule does not adopt this suggestion because the FRA Guide provides recording instructions that are sufficient for FRA's needs. A comment suggested that additional fields be added for the city name, station name, railroad division, and milepost to help determine where the incident occurred. The final rule does not adopt this suggestion because such information is not necessary as the longitude/latitude will be captured. A comment suggested that additional fields be added for weather, visibility, gender, and railroad yard name. The final rule does not adopt these suggestions because they are outside of the scope of this rulemaking, and weather and visibility information are currently captured by the Form FRA F 6180.54. Comments stated that some GPS equipment would not get reception in all areas, and that GPS is unreliable because satellite networks can fail. However, FRA believes that, in general, GPS does get reception in most areas and that satellites generally do not have failures. Regardless, railroads may use free online technology to provide estimated longitude/latitude in the event that there is no GPS reception. A comment stated that GPS will not provide any additional information that is not otherwise available, and thus would not improve safety. As stated, FRA does not currently obtain sufficient information to geo-locate trespassers. In addition, although FRA can geo-locate reportable accidents/incidents based on information available in the Form FRA F 6180.54, it is time consuming, and thus the requirement of longitude/latitude on that form streamlines the data collection process. Furthermore, longitude/latitude information enables FRA to obtain specific location information in order to pinpoint areas of concern.

(6) *Form FRA F 6180.54.* FRA is revising block 30 by changing the name of the block from "Methods of Operation" to "Type of Territory." The block will have five coding blocks. Each of the five coding blocks printed in block 30 will be labeled for exclusive use in accordance with codes listed in Appendix J. The coding blocks are representative of the following information: The first block (mandatory) will indicate the type of territory (signaled or non-signaled); the second block (mandatory) will indicate the authority for movement; and the third, fourth, and fifth blocks (optional) will indicate additional information through the use of supplemental codes.

FRA is making this change because in the past few years, with the advancement of PTC, there has been a growing requirement for FRA to definitively identify signalized versus "dark" territory.

The revisions should make completing the block less burdensome and allow for the identification of territory in a manner compatible with the railroads' internal railroad coding system. These changes are consistent with suggestions by railroads and the AAR that such coding be made easier and that the FRA Guide provide clearer instruction. They also take into consideration railroad concerns about expense associated with having to revise the form and expressed the desire for FRA to retain the current form and redesign the coding system but not change the database structure or the record size. *See* FRA Guide, Appendix J, "Type of Territory Codes" for additional information.

FRA is renaming block 12, "Division" to "Subdivision" and requiring railroads to provide train accident location by subdivision data (block 12) on Form FRA F 6180.54 as a means of improving railroad safety in the area of train accidents. If the railroad is not so divided, enter the word "system." If subdivision data is not applicable, the railroad must enter terminal/yard name.

FRA also revises this form to require latitude and longitude. This revision is

[7] PTC refers to technology that is capable of preventing certain train collisions, derailments, and unauthorized train movements.

discussed in detail in FRA Guide, Chapter 6, Form FRA F 6180.55a.

FRA is adding to block 49, "Special Study Block" descriptive references "a." to line one and "b." to line two for ease of reference. FRA requires railroads to indicate in block "Special Study Block" 49a the type of track an accident/incident occurred on, by using the codes "CWR" for continuous welded rail or "OTH" for other. FRA notes that the special study block was created to allow for the collection of specific accident information as the need arises. *See* 61 FR 30940, June 18, 1996. The primary purpose of these revisions to the rule is to increase the accuracy, completeness, and utility of FRA's accident database and the clarity of the definitions and requirements. In light of recent track-related accidents/incidents, FRA finds it necessary to gather and analyze data of this nature. The collection and analysis of this data is consistent with 49 CFR part 213 regarding joint bar inspection and reporting.

To account for suicides and attempted suicides on Form FRA F 6180.54, FRA adds four Miscellaneous Cause Codes to Appendix C for use in block 38, Primary Cause Code: M309 "Suicide (Highway-Rail Grade Crossing)"; M310 "Attempted Suicide (Highway-Rail Grade Crossing)"; M509 "Suicide (Other Misc.)"; and M510 "Attempted Suicide (Other Misc.)" to Appendix C, "Train Accident Cause Codes" to indicate "Suicide or Attempted Suicide." Additionally, FRA requires railroads to include suicides and attempted suicides in the casualty counts in boxes 46, 47, and 48, as applicable, and to maintain consistent casualty counts between the different reporting forms.

FRA, for all highway-rail grade crossing fatalities, requires railroads to include a description in narrative block 52 of the circumstances of the accident.

FRA also requires that, if an accident is caused by a bond wire attachment issue (*see* proposed Appendix C "Train Accident Cause Codes"), information on the methods and locations of those attachments be provided in the narrative block 52.

(7) *Forms FRA F 6180.54 and FRA F 6180.57.* The final rule revises the "Type of Equipment" block—block 25 on Form FRA F 6180.54 and block 24 on Form FRA F 6180.57—as follows:

- Code "2" was changed from "Passenger Train" to "Passenger Train—Pulling;"
- Code "3" was changed from "Commuter Train" to "Commuter Train—Pulling;"
- New code "B" reads "Passenger Train—Pushing;"
- New code "C" reads "Commuter Train—Pushing;"
- New Code "D" reads "EMU Train;" and
- New Code "E" reads "DMU Train."

These amendments allow for the delineation of additional types of equipment in FRA's database, specifically, locomotives pushing or pulling, and EMU and DMU trains. The need for such information comes in light of the 2005 passenger train accident, in which an impact with a deliberately placed obstruction caused a derailment with two consequent secondary collisions in Glendale, California, in which a number of individuals were killed or injured. Subsequent to that event, FRA was asked to conduct analysis regarding the relative safety of trains with passenger-occupied cars in the lead. Under its prior reporting criteria, FRA could not determine from the database if the passenger or commuter equipment being used was in "pull" or "push" mode at the time of an accident/incident (*i.e.,* whether the locomotive unit providing power was in the front or back of the train). In addition, because EMU and DMU trains neither push nor pull as all of the cars provide power to the train, FRA needed a code to accurately describe that circumstance as well.

(8) *FRA Form FRA F 6180.57.* The final rule revises block 16, "Position," to read as follows: (1) Stalled or stuck on crossing (currently "Stalled on Crossing"); (2) Stopped on crossing; (3) Moving over crossing; (4) Trapped on crossing by traffic (currently "Trapped"); and (5) Blocked on crossing by gates. In doing so, FRA clarifies the difference between choices (1) and (4). FRA has found that under the prior options railroads did not necessarily understand that prior option (4) "Trapped" means trapped by traffic. The final rule also adds a fifth option, (5) "Blocked on crossing by gates," to capture those situations where a highway user is prevented from leaving the crossing because the highway user is blocked-in by the crossing gates.

The final rule also revises block 34 by changing the title from "Whistle Ban" to "Roadway Conditions" and by including the following options: (A) Dry; (B) Wet; (C) Snow/Slush; (D) Ice; (E) Sand, Mud, Dirt, Oil, Gravel; and (F) Water (Standing, Moving). Block 34 captures the roadway conditions at the time of the highway-rail grade crossing accident/incident. This information is needed because data provided to FRA regarding "Weather Conditions" in block 23 does not necessarily speak to road conditions. For example, while the weather may be clear at the time of a highway-rail grade crossing accident/incident, the roadway may be wet, covered with snow, or icy. This revision provides FRA with vital information useful in assessing the risks and causes of highway-rail grade crossing accident/incidents. In addition, FRA no longer needs to capture Whistle Ban/Quiet Zone information in Form FRA F 6180.57, as this information is provided to FRA in Quiet Zone Notices of Establishment. *See* FRA 49 CFR part 222.

The final rule revises the title of block numbers 38, "Drivers Age;" 39, "Driver's Gender;" 40, "Driver Drove Behind or in Front of Train and Struck or was Struck by Second Train;" and 41, "Driver," by replacing the term "Driver" or "Driver's" with "Highway User" or "Highway User's", as applicable. In addition, the final rule revises block numbers 40 (in block title) and 41 (in block's response options) by replacing the term "drove" with "went." Such changes clarify that railroads should provide the information for all highway users involved in a highway-rail grade crossing accident/incident, rather than just for drivers.

The final rule revises block 41 by adding the following descriptive options: "Went around/thru temporary barricade" and "Suicide/Attempted suicide." The final rule also revises the "Drove around or thru the gate" descriptor to two separate descriptive choices: "Went around the gate"; and "Went thru the gate." If "Went around/thru temporary barricade" is selected in block 41 due to the temporary closure of the crossing, the circumstance of the closure (*e.g.,* the roadway was closed for repair of crossing surface; maintenance/testing of automated warning devises; *etc.*) should be explained in narrative in block 54. Additionally, such a narrative should explain how the closure was accomplished (*e.g.,* roadway closed to traffic with jersey barriers (concrete traffic barriers) on both approaches; roadway closed with construction barrels on easterly approach; *etc.*). In the event of a suicide or attempted suicide, option 8, "Suicide/Attempted suicide" must be indicated in block 41, regardless of whether other choices may also be applicable. The final rule requires the inclusion of the suicide or attempted suicide in the casualty counts in block numbers 46, 49, and 52, as applicable, to maintain consistent casualty counts between the different reporting forms.

The final rule revises the title of block 48, "Total Number of Highway-Rail Crossing Users" to read "Total Number of Vehicle Occupants (including driver)." Collection of this data allows

FRA to cross-check "Casualties to:" block 46 with the number of vehicle occupants in block 48. FRA has found that this information is an important tool in analyzing reports and ensuring continuity and compliance in reporting. In accordance with Chapter 2 of the FRA Guide, vehicles include automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, and all other modes of surface transportation, motorized, and unmotorized.

The final rule requires, in "Special Study Block" 53a, that railroads indicate whether the highway-rail crossing accident/incident was recorded by a locomotive video recorder and, if so, whether information gathered in viewing the recording was used by the railroad to complete the FRA Highway-Rail Grade Crossing Accident/Incident Report. To facilitate the collection of this information, FRA includes instructions in the FRA Guide and places two sets of "yes or no" options in block 53a; one for "video taken" and one for "video used." This information provides FRA with knowledge of the availability of video footage for particular accidents/incidents; how often and to what degree railroads are collecting and reviewing video footage of these accidents/incidents; and make available to FRA an additional tool to study the causes and circumstances of these accident/incidents. Whether or not video footage was captured and reviewed for a particular accident/incident may also serve as an indicator as to the accuracy of the railroad's accident/incident report. For additional information on requirements related to locomotive event recorders, see 49 CFR 229.135, "Event Recorders."

The final rule includes instructions that railroads should limit the use of the "unknown" option in block 36, "Crossing Warning Interconnected with Highway Signals" and block 37, "Crossing Illuminated by Street Lights or Special Lights." FRA has found that numerous completed Form FRA F 6180.57 forms are submitted to the agency with "unknown," marked in block numbers 36 and/or 37. Railroads have an obligation to submit accurate reports to FRA and may not simply mark "unknown" without investigating the matter. As such, block 36 requires that a railroad must only enter option 3, "unknown," after having first consulted with the signal department of the railroad responsible for track maintenance in an effort to obtain the information. In Block 37, the railroad must only enter option 3, "unknown" after the railroad has first made a diligent effort to discern the relevant lighting conditions in an effort to obtain the information, but still cannot make a determination. These limitations will increase the quality and accuracy of data the agency gathers related to highway-rail grade crossing accidents/incidents by requiring railroads to make an effort to gather the information.

In the NPRM, FRA requested comments and suggestions for any additional information that might be gathered on Form FRA F 6180.57, that would be useful in determining how and why highway-rail grade crossing accidents/incidents occur. This final rule makes several revisions to the FRA Guide specifically regarding Form FRA F 6180.57 based on the comments received, in addition to other changes proposed in the NPRM.

Specifically, the final rule revises the FRA Guide to clarify that block 41's "other" designation should be selected for drivers who were shoved onto the track and who were then in a collision, so that the accident/incident may be described in the narrative section. The final rule also revises the FRA Guide regarding block 14 in order to clarify that the inclusion of a vehicle speed of 0 mph when the form elsewhere indicates that the vehicle was moving over the crossing or around the gate is prohibited. The final rule also revises the FRA Guide by designating block 39 ("Highway user's Gender") as a mandatory field, unless the gender is unknown as a result of the accident/incident being a hit and run. The final rule also revises the FRA Guide by designating block 38 (Highway user's Age) as a mandatory field, unless the highway user's age is unknown as a result of the accident/incident being a hit and run. In addition, the final rule revises the FRA Guide by clarifying that block 6 seeks the time of the accident/incident in the local time of the location where the accident/incident occurred (the time in the headquarters should not be used).

One commenter asserted that some of the publicly-submitted comments regarding Form FRA F 6180.57 were improper because they were new and should be pursued in a separate rulemaking. However, interested parties had opportunities to address such comments during the hearing and in the second comment period. In addition, the interested parties were on notice that FRA was interested in receiving suggested changes to Form FRA F 6180.57. The revisions to the FRA Guide regarding Form FRA F 6180.57 are a logical outgrowth of this notice. A commenter also requested that no additional fields be added to the form because any such additions would be unduly burdensome. However, the final rule does not add additional fields, and only clarifies the available selections for existing fields.

FRA received the following other comments regarding proposed Form FRA F 6180.57 revisions that are not adopted in this final rule:

- A commenter requested that FRA revise block 32 by adding a field to indicate whether there was a stop/yield sign at the highway-rail grade crossing, to determine whether such signs are effective. This final rule does not adopt this suggestion because this data can be captured in the U.S. DOT National Highway-Rail Crossing Inventory.
- A commenter requested that FRA eliminate the "Watchman" code in block 32 because it is rarely used. The final rule does not adopt this suggestion because the "Watchman" code provides valuable safety data.
- A commenter requested that FRA revise block 32 by adding a field to show whether the crossing warning was a pedestrian or vehicular warning device. The final rule does not adopt this suggestion because block 32 sufficiently captures data relating to the type of crossing warning.
- A commenter requested that Form FRA F 6180.57 be revised to collect "near miss" information. The final rule does not adopt this suggestion because it would be very difficult to obtain such information and it is overly burdensome.
- A commenter requested that Form FRA F 6180.57 require railroad carriers to submit up-to-date crossing information because the inventory is out of date. The final rule does not adopt this suggestion because § 204 of the Railroad Safety Improvement Act of 2008, once implemented, imposes a mandatory inventory updating scheme for both States and railroads.
- A commenter requested that Form FRA F 6180.57 capture whether trains involved in highway-rail grade crossing accidents/incidents had retroreflective sheeting. The final rule does not adopt this suggestion because, in general, all trains will be required to have such retroreflective sheeting, capturing the data is overly burdensome, and it would be difficult to enforce.
- A commenter requested that Form FRA F 6180.57 be reconciled with the U.S. DOT Crossing Inventory Form, so that discrepancies between the forms would be flagged. The final rule does not adopt this suggestion because it is not germane to the substance of Form FRA F 6180.57, and FRA can check for mismatches in certain data fields between the Form FRA F 6180.57 and the U.S. DOT Crossing Inventory Form.

• A commenter requested that Form FRA F 6180.57 capture the relevant police report number for reported accidents/incidents as well as the police department information. The final rule does not adopt this suggestion because it does not contribute material safety information to the Form, is overly burdensome, and is not supported by the November 28, 2005, report by the Department of Transportation's Office of Inspector General, entitled, "Audit of Oversight of Highway-Rail Grade Crossing Accident Reporting, Investigations, and Safety Regulations," Report No. MH–2006–016.

• A commenter requested that Form FRA F 6180.57 require a narrative when "other" is checked in a data field and when there is a collision resulting in a fatality. The final rule does not make any revisions to Form FRA F 6180.57 in response to this suggestion because the narrative is already mandatory in such cases.

• A commenter requested that Form FRA F 6180.57 capture the total tonnage of trains involved in collisions. The final rule does not adopt this suggestion because such data does not contribute additional material safety information as the U.S. DOT Crossing Inventory Form captures the number of trains that use the track.

• A commenter requested that Form FRA F 6180.57 capture whether the train or the automatic warning device at the crossing had an event recorder. The final rule does not adopt this suggestion because such data does not contribute material safety information to the Form.

• A commenter requested that Form FRA F 6180.57 capture annual track density and total train tonnage. The final rule does not adopt these suggestions because such data does not contribute material safety information to the Form.

• A commenter requested that Form FRA F 6180.57 capture the relevant posted speed limit. The final rule does not adopt this suggestion because such data can be captured in the U.S. DOT National Highway-Rail Crossing Inventory.

• A commenter requested that Form FRA F 6180.57 capture, with respect to collisions that occur at a private crossing, whether the crossing was located within the limits of a railroad yard and whether the collision involved an on-duty railroad employee or contractor. The final rule does not adopt this suggestion because such data does not contribute material safety information to the Form, there are few such accidents, and such information may be captured by the Form FRA F 6180.55a if the accident resulted in an injury or a fatality.

• A commenter requested that Form FRA F 6180.57 capture data regarding the quality and "rideability" of the surface of the highway-rail grade crossing at the time of the collision. The final rule does not adopt this suggestion because it is subjective, difficult data to capture, and overly burdensome.

• A commenter requested that Form FRA F 6180.57 capture data regarding whether a sidewalk was available for non-motorized vehicles, the type of sidewalk, and whether the person used the sidewalk. The final rule does not adopt this suggestion because it is overly burdensome.

• Lastly, a commenter requested that Form FRA F 6180.57 capture whether a traffic violation was issued. The final rule does not adopt this suggestion because such data does not contribute material safety information to the Form.

FRA received another comment taking the position that some comments regarding Form FRA F 6180.57 are not proper because they are new and should be pursued in a separate rulemaking. The final rule does adopt some of the comments, as discussed above. Interested parties had an opportunity to respond during the hearing and in the second comment period. In addition, the interested parties were on notice that FRA was interested in receiving suggested changes to Form FRA F 6180.57. Revisions to Form FRA F 6180.57 and the FRA Guide are a logical outgrowth of this notice.

FRA notes that the final rule makes many of the Form FRA F 6180.57 revisions in response to a November 28, 2005, report by the Department of Transportation's Office of Inspector General, entitled, "Audit of Oversight of Highway-Rail Grade Crossing Accident Reporting, Investigations, and Safety Regulations, Report No. MH–2006–016.

(9) *Form FRA F 6180.107.* FRA revises block 6 on Form FRA F 6180.107, "Employee Number or Social Security Number" to "Employee Identification Number" to address privacy concerns.

FRA revises block 23 on Form FRA F 6180.107 "Date the Log Entry was Completed (mm/dd/yy)" to state "Date initially signed/completed." FRA made this change to clarify that the block must contain the initial date the form was completed. FRA finds it necessary to make such change because the agency has found certain railroads do not retain the initial date a record was completed, but only the date of the most recent update to the record. FRA is making this revision to ensure that it can discern if the railroad entered each claimed occupational illness on the appropriate record no later than seven calendar days after receiving information or acquiring knowledge that an injury or illness or rail equipment accident/incident has occurred, as required in § 225.25(i)(2). FRA believes that by specifying the date required to be maintained on the record, any confusion regarding the requirement will be resolved.

The final rule revises Questions and Answers section at the bottom of the form as the form no longer has a data element for an employee's social security number. Rather, employee social security number has been replaced with field requesting the employee's identification number. This is a clarifying amendment is meant to make the Questions and Answers section accurate and consistent with the changes to the form.

(10) *Form FRA F 6180.150.* In the final rule, FRA included a draft of this form dealing with following up with potentially injured highway user involved in a highway-rail grade crossing accident/incident. *See* FRA Guide, Chapters 10 and 6 of this final rule for further discussion. Form FRA F 6180.150 was submitted to OMB for approval with the final rule and is still pending OMB approval; therefore, the railroads cannot use the form until it has been approved. FRA expects that prior to the delayed six month effective date, the form will be approved.

(11) *Form FRA F 6180.56.* The final rule amends Block 6, State, by adding Hawaii to the list of States. Hawaii was mistakenly omitted. This is a technical amendment and should not create additional reporting requirements for the railroads.

Appendix I, "Model Internal Control Plans, Including Model Statement of Policy against Harassment and Intimidation and Model Complaint Procedures."

The FRA Guide reorders the ICP components in Appendix I's sample Internal Control Plan (ICP) to more closely model the listing of components as set forth in § 225.33.

Appendix J, "Type of Territory Codes."

FRA adds an Appendix J to the FRA Guide, which provides Type of Territory Codes and instructions for the use of those codes when completing block 30, "Type of Territory," on Form FRA F 6180.54, "Rail Equipment Accident/Incident Report." The codes represent type of territory (*i.e.,* signaled territory versus non-signaled territory); the authority for movement (*i.e.,* signal indication; mandatory directive; other than main track—Rule 105); and additional miscellaneous supplemental codes. *See* FRA Guide, Appendix H,

"Forms" in this final rule for additional information.

Appendix K, "*Electronic Submission of Reports to FRA.*"

The FRA Guide adds Appendix K to specifically provide electronic submission instructions and guidance.

Appendix L, "*49 CFR part 225.*"

The FRA Guide includes in Appendix L the full regulatory text of part 225.

Appendix M, "*Telephonic Reporting Chart.*"

The FRA Guide revises the Telephonic Reporting Chart to correct an error. This clarification is intended to bring the chart into compliance with the rule text. Specifically, this change simply instructs the user to look at other reasons why telephone notification may be required regardless of whether the answer to the question—"Was the fatality to Railroad Employee, Contractor on Railroad Property, Passenger, Highway User due to collision with railroad rolling stock?"—is "No."

Appendix N, "*Form FRA F 6180.150,* "*Highway User Injury Inquiry Form,*" *Sample Cover Letter.*"

The final rule included a sample cover letter that the railroads could use to comply with the requirement that they send a Form FRA F 6180.150 and a cover letter to each potentially injured highway user involved in a highway-rail grade crossing accident/incident. The cover letter must be drafted and comply with the requirements outlined in § 225.21 and the FRA Guide at Chapter 10.

With regard to the cover letter, the instructions contained in the final rule require that the letter contain the following:

- An explanation of why the railroad is contacting the highway user;
- An explanation of part 225 accident/incident reporting requirements;
- An explanation of how the form and any response will be used for part 225 reporting requirements;
- An explanation that the highway user is not required to respond;
- An opportunity to correct incorrect information in Part I;
- Identify and provide contact information for a person at the railroad who can answer questions with regard to the form;
- Provide instructions on how to complete Part II; and,
- An explanation of how any medical records or information will be handled.

The cover letter and Form FRA F 6180.150 are meant to be tools that allow the railroad to gather information and comply with part 225 accident/incident reporting and recording requirements. As such, the railroad the cover letter should not require the highway user to provide any medical or personal information in order to report a casualty. Moreover, the cover letter and any communication for the purposes of part 225 should not reference claims process.

V. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures, and determined to be non-significant under both Executive Order 12866 and DOT policies and procedures. 44 FR 11034, February 26, 1979. FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this final rule. Document inspection and copying facilities are available at U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue, SE., Washington, DC 20590. Docket material is also available for inspection on the Internet at *http://www.regulations.gov*. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk at the Office of Chief Counsel, RCC–10, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590; please refer to Docket No. FRA–2006–26173.

The changes in this final rule would serve to simplify accident/incident reporting for railroads, ensure that railroad worker casualty statistics conform to the same criteria as statistics from other Federal agencies, and improve the quality of data available for analysis of railroad accidents and incidents.

The amendments to part 225 will increase the accuracy, precision, completeness of railroad accidents/incident records and reports, and correspondingly, FRA's and the railroad industry's information base related to accidents and incidents. This increased awareness will not only aid FRA in assessing and managing risk, but aid railroads, their employees, and other interested parties in recognizing and correcting dangerous conditions and practices in order to maintain a safe and healthy environment for railroad workers and the public. Moreover, FRA anticipates that requirements related to the collection of longitude and latitude data for trespasser accidents/incidents on Form FRA F6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)" will reduce trespasser casualties. In addition to the final revisions to its regulations contained in this notice, FRA is revising the FRA Guide for Preparing Accident/Incident Reports, certain accident/incident recording and reporting forms, and the FRA Companion Guide: Guidelines for Submitting Accident/Incident Reports by Alternative Methods.

When quantifiable, FRA estimated costs and benefits for the twenty-year period immediately following implementation of this final rule. FRA estimated total, present discounted costs to equal approximately $5.5 million using a 3 percent discount rate and $3.9 million using a 7 percent discount rate. Total, present discounted benefits are estimated to equal approximately $51 million at a 3 percent discount rate and $32.2 million at a 7 percent discount rate.

The net present discounted benefits of the impacts quantified in this analysis equal approximately $45.5 million at a discount rate of 3 percent and $28.3 million at a discount rate of 7 percent.

FRA expects that the benefits flowing from this final rulemaking will surpass any additional costs imposed by the regulation. Most significant are benefits arising from the final rule's requirement that longitude and latitude blocks on Form FRA F6180.55a be completed for trespassers. This requirement will ultimately result in fewer trespasser injuries and fatalities. Additional benefits will arise from consolidated reporting provisions, the easing of telephonic reporting requirements, and accident/incident reporting simplification. Lastly, FRA anticipates substantial but presently unquantifiable benefits flowing from more precise and complete accident/incident reporting data. Not only does the analysis of reported data provide information as to the cause of an accident/incident, this data can help determine trends, assess hazards, and assist in the development of effective countermeasures that may then be implemented to prevent similar accidents and incidents from occurring in the future. More precise and complete data will also help to identify where safety-oriented programs should be focused and aid railroads and FRA in setting priorities among inspection and safety improvement efforts. Accordingly, FRA is confident that such benefits, combined with those that were quantified, will more than justify

incurring the costs associated with implementation of the final rule.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and final rules to assess their impact on small entities. The Regulatory Flexibility Act 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 impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the FRA Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities. Although a substantial number of small railroads will be affected by the rule, none of these entities will be significantly impacted. At the NPRM stage, FRA certified that the proposal would not result in a significant economic impact on a substantial number of small entities and requested comment on such certification as well all other aspects of the NPRM. Although many comments were received in response to the NPRM, no comments directly addressed the certification. In developing the final rule, FRA considered all comments received in response to the NPRM.

"Small entity" is defined in 5 U.S.C. 601 as including a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a "small entity" in the railroad industry is a for profit "line-haul railroad" that has fewer than 1,500 employees, a "short line railroad" with fewer than 500 employees, or a "commuter rail system" with annual receipts of less than seven million dollars. *See* "Size Eligibility Provisions and Standards," 13 CFR part 121 subpart A. 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. SBA's "size standards" may be altered by Federal agencies, in consultation with SBA and in conjunction with public comment. Pursuant to that authority FRA has published a final statement of agency policy that formally establishes "small entities" or "small businesses" as being railroads, contractors and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is $20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891, May 9, 2003, codified at Appendix C to 49 CFR part 209. The $20 million limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking. This final rule applies to railroads.[8] There are approximately 665 small railroads that would be affected by this final rule. FRA anticipates that most of the recording and reporting burdens imposed by this regulation will be borne by railroads that are not considered small, due to the decreased likelihood that a small railroad will experience an accident/incident necessitating such recording and/or reporting. For example, on average from 2005 through 2007, small railroads reported approximately 875 or nine percent of all reportable casualties, and only 294 or 10 percent of all reportable accidents/incidents.

FRA also anticipates that the computer-related burdens will be borne by the larger railroads because the large railroads have chosen to retain their accident/incident records and reports electronically in their own systems. Large railroads also submit their accident/incident reports to FRA electronically via their own systems. Most small railroads complete their federally required accident/incident recordkeeping and reporting on a personal computer using FRA supplied Accident/Incident Report Generator (AIRG) software. This software allows railroads to send reports to FRA on a CD–ROM or to transmit the information to FRA over the Internet. FRA will send a free updated or new version of the AIRG software to any railroad that requests it. Other small railroads do not use a computer system for reporting. Accordingly, FRA does not anticipate that these burdens will be imposed on small entities.

The *factual basis* for the certification that this final rule will not have a significant economic impact on a substantial number of small entities, is that the total cost incurred is far less than one percent of the annual average revenue for small railroads (approximately $47,000 each in 2006 (not discounted)). Total costs to small railroads due to this final regulation will be approximately $159 (not discounted) per railroad during the first year of the analysis. This burden is solely due to the time (3 hours each) for reporting officers to become acquainted with the revised FRA Guide. On an individual basis, FRA estimates that $159 is one percent or more of the annual operating revenues for less than one percent of all small railroads. FRA estimates the total cost for years 2 through 20 will be less than $100 for small railroads impacted (not discounted) per year, and that the small railroads will experience a positive net benefit for those years. Accordingly, FRA does not consider this impact to be significant. Nor does FRA anticipate that this regulation would result in long-term or short-term insolvency for any small railroad.

C. Paperwork Statement—Accident/Incident Reporting and Recordkeeping

The information collection requirements in this final rule have been 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 and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
225.6—Consolidated Reporting—New Requirements—Written Request by RR.	718 railroads	4 requests	40 hours	160
—Written agreements on subsidiaries	718 railroads	4 agreements	2 hours	8

[8] Note that FRA has not, unless specifically noted, updated the data used in this analysis from the Certification Statement for the NPRM. Adjustments were not made for this final certification because they would not significantly affect numerical estimates, would result in very few additional costs and would not change the outcome or results of the analysis.

CFR Section—49 CFR	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Notifications on changes to subsidiaries and amended written agreement.	718 railroads	1 notification + 1 agreement.	1 hr. + 1 hr	2
225.9—Telephone Reports—Certain Accidents/Incidents and Other Events.	718 railroads	3,300 reports	15 minutes	825
225.11—Reporting of Rail Equipment Accidents/Incidents (Form FRA F 6180.54).	718 railroads	3,600 forms	2 hours	7,200
225.12(a)—Form FRA F 6180.81—Rail Equipment Accident/Incident Reports—Human Factor.	718 railroads	1,600 forms	15 minutes	400
225.12(b)—Form FRA F 6180.78—Part I Rail Equipment Accident/Incident Reports (Human Factor).	718 railroads	1,000 notices + 4,000 copies + 10 copies.	10 minutes + 3 minutes.	367
225.12(c)—Rail Equipment Accident/Incident Reports—Human Factor—Joint Operations.	718 railroads	100 requests	20 minutes	33
225.12(d)—Rail Equipment Accident/Incident Reports—Human Factor—Late Identification.	718 railroads	20 attachments + 20 notices.	15 minutes	10
225.12(g)—Rail Equipment Accident/Incident Reports—Human Factor—Employee Supplement—Part II Form FRA F 6180.78.	718 railroads	75 statements	1.5 hours	113
225.12(g)(3)—Rail Equipment Accident/Incident Reports—Human Factor—Employee Confidential Letter.	RR Employees	10 letters	2 hours	20
225.13—Late Reports	718 railroads	25 reports	1 hour	25
—Amended Rail Equipment Accident/Incident Reports	718 railroads	50 amended rpts/40 copies.	1 hour + 3 minutes	52
225.18—Alcohol or Drug Involvement	718 railroads	80 reports	30 minutes	40
—Appended Reports	718 railroads	5 reports	30 minutes	3
225.19—Highway-Rail Grade Crossing Accident/Incident Reports—Form FRA F 6180.57.	718 railroads	2,880 forms	2 hours	5,760
—Death, Injury, or Occupational Illness—(Form FRA F 6180.55a).	718 railroads	11,544 forms	20 minutes	3,848
—Trespasser Fatalities (FRA F 6180.55a)	718 railroads	486 forms	50 minutes	405
—New Requirement—Suicide/Attempted Suicide Data (FRA F 6180.55a).	718 railroads	608 forms	65 minutes	659
225.21 Forms				
—Form FRA F 6180.55—Railroad Injury/Illness Summary	718 railroads	8,616 forms	10 minutes	1,436
—Form FRA F 6180.56—Railroad Annual Report of Man Hours by State.	718 railroads	718 forms	15 minutes	180
—Form FRA F 6180.98—Railroad Employee—Injury and/or Illness Record.	718 railroads	18,900 forms	1 hour	18,900
—Form FRA F 6180.98—Copies	718 railroads	567 copies	2 minutes	19
—Form FRA F 6180.97—Initial Rail Equipment Accident/Incident Record.	718 railroads	18,200 forms	30 minutes	9,100
—New Requirement—Suicide/Attempted Suicide Narrative—Form FRA F 6180.97.	718 railroads	1 form	30 minutes	1
—Form FRA F 6180.107—Alternate Record for Illnesses Claimed To Be Work Related.	718 railroads	300 forms	75 minutes	375
—Form FRA F 6180.39i—RR Accident Notification & Initial Investigation Report.	654 Class I & II RR/55 Federal/State agencies/562 inspectors.	1,000 forms	90 minutes	1,500
—New Requirement—Form FRA F 6180.150—Highway User Statement—Sent Out by RRs to Potentially Injured Individuals.	718 railroads	950 forms	50 minutes	792
—New Requirement—Form FRA F6180.150—Highway User Statement Return Responses by Persons.	950 possibly injured individuals.	665 forms	45 minutes	499
225.25—Posting of Monthly Summary	718 railroads	8,616 lists	16 minutes	2,298
225.27—Retention of Records—FRA F 6180.98 (New Requirement).	718 railroads	18,900 records	2 minutes	630
—Form FRA F 6180.107	718 railroads	300 records	2 minutes	10
—Monthly List of Employee Injuries	718 railroads	8,616 records	2 minutes	288
—Form FRA F 6180.97 records	718 railroads	18,200 records	2 minutes	607
—Records required under section 225.12	718 railroads	2,675 records	2 minutes	89
—New Requirement—Electronic Recordkeeping System Requirements and RR System Modifications.	718 railroads	18 systems	120 hours	2,160
225.33—Internal Control Plans—Amended	718 railroads	25 amendments	14 hours	350
225.35—Access to Records and Reports—Lists	15 railroads	400 lists	20 minutes	133
—Subsequent Years	4 railroads	16 lists	20 minutes	5
225.37—Optical Media Transfers	8 railroads	200 transfers	3 minutes	10
—Electronic Submissions—Form FRA F 6180.55	718 railroads	2,400 forms	3 minutes	120
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225.37—Optical Media Transfers	8 railroads	200 transfers	3 minutes	10
—Electronic Submissions—Form FRA F 6180.55	718 railroads	2,400 forms	3 minutes	120

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 e-mail at the following addresses: *Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov*.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th St., NW., Washington, DC 20503, attn: FRA Desk Officer. Comments may also be sent via e-mail to the Office of Management and Budget at the following address: *oira_submissions@omb.eop.gov*.

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

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

D. Federalism Implications

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

FRA has determined that this final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, nor on the distribution of power and responsibilities among various levels of government. In addition, FRA has determined that this final rule will not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply. AAJ commented that FRA should delete any language in the preamble regarding the preemption of State common law claims. AAJ stated that, contrary to the agency's assertions, the Federal Railroad Safety Act of 1970 (FRSA) does not authorize the preemption of State common law claims. AAJ claimed that FRA regulations have never lawfully preempted State law claims. The petition also stated that Congress reiterated its intent to preserve State tort claims against negligent railroads. Finally, AAJ argued that agency rules must clearly follow the FRSA's limited preemption language, and that State common law should govern railroad safety issues.

Although this final rule removes the preemption language previously contained in part 225, FRA notes that this part could have preemptive effect by the operation of law under the FRSA. *See* 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or 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 § 20106.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132, and has determined that preparation of a federalism summary impact statement for this final rule is not required.

E. International Trade Impact Assessment

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

F. Environmental Impact

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

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

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

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (adjusted annually for inflation) [$140.8 million in 2010] 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. This final rule would not result in the expenditure, in the aggregate, of $140.8 million or more in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355, May 22, 2001. Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) That is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this 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.*). To get more information on this matter and to view the Regulations.gov Privacy Notice go to *http://www.regulations.gov/search/footer/privacyanduse.jsp.* You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477–78).

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

For the reasons discussed in the preamble, FRA amends part 225 of chapter II, subtitle B of Title 49, Code of Federal Regulations, as follows:

PART 225—[AMENDED]

■ 1. The authority citation for part 225 continues to read as follows:

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

■ 2. Section 225.1 is revised to read as follows:

§ 225.1 Purpose.

The purpose of this part is to provide the Federal Railroad Administration with accurate information concerning the hazards and risks that exist on the Nation's railroads. FRA needs this information to effectively carry out its regulatory responsibilities under 49 U.S.C. chapters 201–213. FRA also uses this information for determining comparative trends of railroad safety and to develop hazard elimination and risk reduction programs that focus on preventing railroad injuries and accidents. Any State may require railroads to submit to it copies of accident/incident and injury/illness reports filed with FRA under this part, for accidents/incidents and injuries/illnesses which occur in that State.

■ 3. Section 225.3 is amended by revising the introductory text of paragraph (b) to read as follows:

§ 225.3 Applicability.

* * * * *

(b) The Internal Control Plan requirements in § 225.33(a)(3) through (a)(11) do not apply to—

* * * * *

■ 4. Section 225.5 is amended as follows:

■ a. By adding definitions for "discernable cause," "event or exposure," "injury or illness," "railroad carrier," "significant aggravation of a pre-existing injury or illness," and "suicide data";

■ b. By revising paragraphs (1) and (3) in the definition of "accident/incident"; and

■ c. By revising the definitions of "accountable injury or illness," "accountable rail equipment accident/incident," "event or exposure arising from the operation of a railroad," "general reporting criteria," "highway-rail grade crossing," "new case," "qualified health care professional," "railroad," "work environment," and "work-related."

The additions and revisions read as follows:

§ 225.5 Definitions.

As used in this part—

Accident/incident means:

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

* * * * *

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

Accountable injury or illness means any abnormal condition or disorder of a railroad employee that causes or requires the railroad employee to be examined or treated by a qualified health care professional, regardless of whether or not it meets the general reporting criteria listed in § 225.19(d)(1) through (d)(6), and the railroad employee claims that, or the railroad otherwise has knowledge that, an event or exposure arising from the operation of the railroad is a discernable cause of the abnormal condition or disorder.

Accountable rail equipment accident/incident means

(1) Any derailment regardless of whether or not it causes any damage or

(2) Any collision, highway-rail grade crossing accident/incident, obstruction accident, other impact, fire or violent rupture, explosion-detonation, act of God, or other accident/incident involving the operation of railroad on-track equipment (standing or moving) that results in damage to the railroad on-track equipment (standing or moving), signals, track, track structures or roadbed and that damage impairs the functioning or safety of the railroad on-track equipment (standing or moving), signals, track, track structures or roadbed.

* * * * *

Discernable cause means a causal factor capable of being recognized by the senses or the understanding. An event or exposure arising from the operation of a railroad is a discernable cause of (*i.e.,* discernably caused) an injury or illness if, considering the circumstances, it is more likely than not that the event or exposure is a cause of the injury or illness. The event or exposure arising from the operation of a railroad need not be a sole, predominant or significant cause of the injury or illness, so long as it is a cause (*i.e.,* a contributing factor).

* * * * *

Event or exposure includes an incident, activity, or occurrence.

Event or exposure arising from the operation of a railroad means—

(1) With respect to a person who is not an employee of the railroad:

(i) A person who is on property owned, leased, maintained or operated by the railroad, an event or exposure that is related to the performance of the railroad's rail transportation business; or

(ii) A person who is not on property owned, leased, maintained or operated over by the railroad, an event or exposure directly resulting from one or more of the following railroad operations:

(A) A train accident, a train incident, or a non-train incident involving the railroad; or

(B) A release of a hazardous material from a railcar in the possession of the railroad or of another dangerous commodity that is related to the performance of the railroad's rail transportation business.

(2) With respect to a person who is an employee of the railroad, an event or exposure that is work-related.

* * * * *

General reporting criteria means the criteria listed in § 225.19(d)(1) through (6).

Highway-rail grade crossing means:

(1) A location where a public highway, road, or street, or a private roadway, including associated sidewalks, crosses one or more railroad tracks at grade; or

(2) A location where a pathway explicitly authorized by a public authority or a railroad carrier that is dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that is not associated with a public highway, road, or street, or a private roadway, crosses one or more railroad tracks at grade. The term "sidewalk" means that portion of a street between the curb line, or the lateral line of a roadway, and the adjacent property line or, on easements of private property, that portion of a street that is paved or improved and intended for use by pedestrians.

Injury or illness means an abnormal condition or disorder. Injuries include cases such as, but not limited to, a cut, fracture, sprain, or amputation. Illnesses include both acute and chronic illnesses, such as but not limited to, a skin disease, respiratory disorder, or poisoning. A musculoskeletal disorder is also an injury or illness. Pain is an injury or illness when it is sufficiently severe to meet the general reporting criteria listed in § 225.19(d)(1) through (6).

* * * * *

New case means a case in which either the injured or ill person has not previously experienced a reported injury or illness of the same type that affects the same part of the body, or the injured or ill person previously experienced a reported injury or illness of the same type that affected the same part of the body but had recovered completely (all signs and/or symptoms disappeared) from the previous injury or illness, and an event or exposure arising from the operation of a railroad discernably caused the signs and/or symptoms to reappear.

* * * * *

Qualified health care professional is a health care professional operating within the scope of his or her license, registration, or certification. In addition to licensed physicians, the term includes members of other occupations associated with patient care and treatment such as chiropractors, podiatrists, physicians assistants, psychologists, and dentists.

Railroad means a railroad carrier.

Railroad carrier means a person providing railroad transportation.

* * * * *

Significant aggravation of a pre-existing injury or illness means aggravation of a pre-existing injury or illness that is discernably caused by an event or exposure arising from the operation of a railroad that results in:

(1) With respect to any person:

(i) Death, provided that the pre-existing injury or illness would likely not have resulted in death but for the event or exposure;

(ii) Loss of consciousness, provided that the pre-existing injury or illness would likely not have resulted in loss of consciousness but for the event or exposure; or

(iii) Medical treatment in a case where no medical treatment was needed for the injury or illness before the event or exposure, or a change in the course of medical treatment that was being provided before the event or exposure.

(2) With respect to a railroad employee, one or more days away from work, or days of restricted work, or days of job transfer that otherwise would not have occurred but for the event or exposure.

* * * * *

Suicide data means data regarding the death of an individual due to the individual's commission of suicide as determined by a coroner, public police officer or other public authority or injury to an individual due to that individual's attempted commission of suicide as determined by a public police office or other public authority. Only the death of, or injury to, the individual who committed the suicidal act is suicide data. Therefore, casualties to a person caused by the suicidal act of another person are not considered suicide data.

* * * * *

Work environment means the establishment and other locations where one or more railroad employees are working or present as a condition of their employment. The work environment includes not only physical locations, but also the equipment or materials processed or used by an employee during the course of his or her work, and activities of a railroad employee associated with his or her work, whether on or off the railroad's property.

Work-related means related to an event or exposure occurring within the work environment. An injury or illness is presumed work-related if an event or exposure occurring in the work environment is a discernable cause of the resulting condition or a discernable cause of a significant aggravation to a pre-existing injury or illness. The causal event or exposure need not be peculiarly occupational so long as it occurs at work. For example, a causal

event or exposure may be outside the employer's control, such as a lightning strike; involve activities that occur at work but are not directly productive, such as horseplay; or involve activities that are not peculiar to work, such as walking on a level floor, bending down, climbing stairs or sneezing. Such activities, along with other normal body movements, are considered events. So long as the event or exposure occurred at work and is a discernable cause of the injury or illness, the injury or illness is work-related. It does not matter whether there are other or bigger causes as well, or that the activity at work is no different from actions performed outside work. If an injury is within the presumption of work-relatedness, the employer can rebut work-relatedness only by showing that the case falls within an exception listed in § 225.15. In cases where it is not obvious whether a precipitating event or exposure occurred at work or outside work, the employer must evaluate the employee's work duties and environment and decide whether it is more likely than not that an event or exposure at work was at least one of the causes of the injury of the injury or illness.

■ 5. Section 225.6 is added to read as follows:

§ 225.6 Consolidated reporting.

A parent corporation may request in writing that FRA treat its commonly controlled railroad carriers, which operate as a single, seamless, integrated United States rail system, as a single railroad carrier for purposes of this part.

(a) The written request must include the following:

(1) A list of the subsidiary railroads controlled by the parent corporation; and

(2) An explanation as to how the subsidiary railroads operate as a single, seamless, integrated United States railroad system.

(b) The request must be sent to the FRA Docket Clerk, Federal Railroad Administration, U.S. Department of Transportation, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W31–109, 1200 New Jersey Avenue, SE., Washington, DC 20590. Each request received shall be acknowledged in writing. The acknowledgment shall contain the docket number assigned to the request and state the date the request was received.

(c) FRA will notify the applicant parent corporation of the agency's decision within 90 days of receipt of the application.

(d) If FRA approves the request, the parent corporation must enter into a written agreement with FRA specifying which subsidiaries are included in its railroad system, agreeing to assume responsibility for compliance with this part for all named subsidiaries making up the system, and consenting to guarantee any monetary penalty assessments or other liabilities owed to the United States government that are incurred by the named subsidiaries for violating Federal accident/incident reporting requirements. Any change in the subsidiaries making up the railroad system requires immediate notification to FRA and execution of an amended agreement. Executed agreements will be published in the docket.

■ 6. Section 225.7 is amended by revising paragraph (a) to read as follows:

§ 225.7 Public examination and use of reports.

(a) Accident/Incident reports made by railroads in compliance with these rules shall be available to the public in the manner prescribed by part 7 of this title. Accident/Incident reports may be inspected at the U.S. Department of Transportation, Federal Railroad Administration, Office of Safety, West Building 3rd Floor, 1200 New Jersey Avenue, SE., Washington, DC 20590. Written requests for a copy of a report should be addressed to the Freedom of Information Act Coordinator, Office of Chief Counsel, Federal Railroad Administration, U.S. Department of Transportation, RCC–10, Mail Stop 10, West Building 3rd Floor, Room W33–437, 1200 New Jersey Avenue, SE., Washington, DC 20590, and be accompanied by the appropriate fee prescribed in part 7 of this title. To facilitate expedited handling, each request should be clearly marked "FOIA Request for Accident/Incident Report." For additional information on submitting a FOIA request to FRA see FRA's Web site at *http://www.fra.dot.gov/us/foia.*

* * * * *

■ 7. Section 225.9 is amended by revising paragraph (a)(2)(iii) and (iv) to read as follows:

§ 225.9 Telephonic reports of certain accidents/incidents and other events.

(a) * * *

(2) * * *

(iii) A fatality resulting from a train accident or train incident at a highway-rail grade crossing when death occurs within 24 hours of the accident/incident;

(iv) A train accident resulting in damage (based on a preliminary gross estimate) of $150,000 or more to railroad and nonrailroad property; or

* * * * *

■ 8. Section 225.11 is revised to read as follows:

§ 225.11 Reporting of accidents/incidents.

(a) Each railroad subject to this part shall submit to FRA a monthly report of all railroad accidents/incidents described below:

(1) Highway-rail grade crossing accidents/incidents described in § 225.19;

(2) Rail equipment accidents/incidents described in § 225.19; and

(3) Death, injury and occupational illness accidents/incidents described in § 225.19.

(b) The report shall be made on the forms prescribed in § 225.21 in hard copy or, alternatively, by means of optical media or electronic submission via the Internet, as prescribed in § 225.37, and shall be submitted within 30 days after expiration of the month during which the accidents/incidents occurred. Reports shall be completed as required by the current FRA Guide. A copy of the FRA Guide may be obtained from the U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS–22, Mail Stop 25 West Building 3rd Floor, Room W33–107, 1200 New Jersey Avenue, SE., Washington, DC 20590 or downloaded from FRA's Office of Safety Analysis Web site at *http://safetydata.fra.dot.gov/officeofsafety/,* and click on "Click Here for Changes in Railroad Accident/Incident Recordkeeping and Reporting."

■ 9. Section 225.12 is amended by revising paragraph (g)(3) to read as follows:

§ 225.12 Rail Equipment Accident/Incident Reports alleging employee human factor as cause; Employee Human Factor Attachment; notice to employee; employee supplement.

* * * * *

(g) * * *

(3) Information that the employee wishes to withhold from the railroad must not be included in this Supplement. If an employee wishes to provide confidential information to FRA, the employee should not use the Supplement form (part II of Form FRA F 6180.78, "Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor; Employee Statement Supplementing Railroad Accident Report"), but rather provide such confidential information by other means, such as a letter to the employee's

collective bargaining representative, or to the U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS–22, Mail Stop 25 West Building 3rd Floor, Room W 33–306, 1200 New Jersey Avenue, SE., Washington, DC 20590. The letter should include the name of the railroad making the allegations, the date and place of the accident, and the rail equipment accident/incident number.

* * * * *

■ 10. Section 225.15 is revised to read as follows:

§ 225.15 Accidents/incidents not to be reported.

The following accidents/incidents are not reportable:

(a) *With respect to persons other than railroad employees.* A railroad is not to report injuries that occur at highway-rail grade crossings that do not involve the presence or operation of on-track equipment, or the presence of railroad employees then engaged in the operation of a railroad;

(b) *With respect to railroad employees on duty.* A railroad is not to report the following injuries to or illnesses of a railroad employee as Worker on Duty—Employee (Class A), if any of the conditions in this paragraph (b) are met. (These exceptions apply only to Worker on Duty—Employee (Class A) and do not affect a railroad's obligation to report these injuries and illnesses as other types of persons (Employee Not On Duty (Class B); Passenger on Trains (Class C); Nontrespassers-On Railroad Property (Class D); Trespassers (Class E)), or a railroad's obligation to maintain a "Railroad Employee Injury/Illness Record" (Form FRA F 6180.98 or alternative railroad-designed form)).

(1) The injury or illness occurred in or about living quarters and an event or exposure not arising from the operation of a railroad was the cause;

(2) At the time of the injury or illness, the employee was present in the work environment as a member of the general public rather than as an employee; or

(3) The injury or illness is caused by a motor vehicle accident and occurs on a company parking lot or company access road while the employee is commuting to or from work.

(c) *With respect to railroad employees on or off duty.* A railroad is not to report the following injuries to or illnesses of a railroad employee, Worker on Duty—Employee (Class A) or Employee Not on Duty (Class B), if any of the following conditions in this paragraph (c) are met:

(1) The injury or illness involves signs or symptoms that surface at work but result solely from a non-work-related event or exposure that occurs outside the work environment;

(2) The injury or illness results solely from voluntary participation in a wellness program or in a medical, fitness, or recreational activity such as blood donation, physical examination, flu shot, exercise class, racquetball, or baseball;

(3) The injury or illness is solely the result of an employee eating, drinking, or preparing food or drink for personal consumption. However, if the employee is made ill by ingesting food contaminated by workplace contaminants (such as lead), or gets food poisoning from food supplied by the employer, the case would be considered work-related and reported as either a Worker on Duty—Employee (Class A) or Employee Not on Duty (Class B) depending on the employees duty status;

(4) The injury or illness is solely the result of an employee doing personal tasks (unrelated to their employment) at the establishment outside of the employee's assigned working hours;

(5) The injury or illness is solely the result of personal grooming, self medication for a non-work-related condition, or is intentionally self-inflicted (except that for FRA reporting purposes a railroad shall not exclude an accountable or reportable injury or illness that is the result of a suicide or attempted suicide);

(6) The illness is the common cold or flu (Note: contagious diseases such as tuberculosis, brucellosis, hepatitis A, or plague are considered work-related if the employee is infected at work); or

(7) The illness is a mental illness. Mental illness will not be considered work-related unless the employee voluntarily provides the employer with an opinion from a physician or other licensed health care professional with appropriate training and experience (psychiatrist, psychologist, psychiatric nurse practitioner, *etc.*) stating that the employee has a mental illness that is work-related.

(d) *With respect to contractors and volunteers.* A railroad is not to report injuries to contractors and volunteers that are listed in paragraphs (b) and (c) of this section. For purposes of this paragraph only, an exception listed in paragraphs (b) and (c) referencing "work environment" is construed to mean for contractors and volunteers only, on property owned, leased, operated over or maintained by the railroad.

(e) *With respect to rail equipment accidents/incidents.* A railroad is not to report rail equipment accidents/incidents if the conditions in this paragraph are met. (This exception does not affect a railroad's obligation to maintain records of accidents/incidents as required by § 225.25 (Form FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record")).

(1) Cars derailed on industry tracks by non-railroad employees or non-railroad employee vandalism, providing there is no involvement of railroad employees; and

(2) Damage to out of service cars resulting from high water or flooding (*e.g.,* empties placed on a storage or repair track). This exception does not apply if such cars are placed into a moving consist and as a result of this damage a reportable rail equipment accident results.

§ 225.17 [Amended]

■ 11. Section 225.17 is amended by removing paragraph (d).

■ 12. Section 225.18 is added to read as follows:

§ 225.18 Alcohol or drug involvement.

(a) In preparing Form FRA F 6180.54, "Rail Equipment Accident/Incident Report," under this part, the railroad shall make such specific inquiry as may be reasonable under the circumstances into the possible involvement of alcohol or drug use or impairment in such accident or incident. If the railroad comes into possession of any information whatsoever, whether or not confirmed, concerning alleged alcohol or drug use or impairment by an employee who was involved in, or arguably could be said to have been involved in, the accident/incident, the railroad shall report such alleged use or impairment as provided in the current FRA Guide. If the railroad is in possession of such information but does not believe that alcohol or drug impairment was the primary or contributing cause of the accident/incident, then the railroad shall include in the narrative statement of such report a brief explanation of the basis of such determination.

(b) For any train accident within the requirement for post-accident testing under § 219.201 of this chapter, the railroad shall append to the Form FRA F 6180.54, "Rail Equipment Accident/Incident Report," any report required by 49 CFR 219.209(b) (pertaining to failure to obtain samples for post-accident toxicological testing).

(c) For any train or non-train incident, the railroad shall provide any available information concerning the possible involvement of alcohol or drug use or impairment in such accident or incident.

(d) In providing information required by this section, a railroad shall not disclose any information concerning use of controlled substances determined by the railroad's Medical Review Officer to have been consistent with 49 CFR 219.103.

■ 13. Section 225.19 is amended by revising paragraph (d) to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(d) *Group III—Death, injury, or occupational illness.* Each death, injury, or occupational illness that is a new case and meets the general reporting criteria listed in paragraphs (d)(1) through (6) of this section shall be reported to FRA on Form FRA F 6180.55a, "Railroad Injury and Illness Summary (Continuation Sheet)" if an event or exposure arising from the operation of a railroad is a discernable cause of the resulting condition or a discernable cause of a significant aggravation to a pre-existing injury or illness. The event or exposure arising from the operation of a railroad need only be one of the discernable causes; it need not be the sole or predominant cause. The general injury/illness reporting criteria are as follows:

(1) Death to any person;

(2) Injury to any person that results in:

(i) Medical treatment;

(ii) Significant injury diagnosed by a physician or other licensed health care professional even if it does not result in death, medical treatment or loss of consciousness of any person; or

(iii) Loss of consciousness;

(3) Injury to a railroad employee that results in:

(i) A day away from work;

(ii) Restricted work activity or job transfer; or

(iii) Significant injury diagnosed by a physician or other licensed health care professional even if it does not result in death, medical treatment, loss of consciousness, a day away from work, restricted work activity or job transfer of a railroad employee;

(4) Occupational illness of a railroad employee that results in:

(i) A day away from work;

(ii) Restricted work activity or job transfer;

(iii) Loss of consciousness; or

(iv) Medical treatment;

(5) Significant illness of a railroad employee diagnosed by a physician or other licensed health care professional even if it does not result in death, a day away from work, restricted work activity or job transfer, medical treatment, or loss of consciousness;

(6) Illness or injury that:

(i) Meets the application of any of the following specific case criteria:

(A) Needlestick or sharps injury to a railroad employee;

(B) Medical removal of a railroad employee;

(C) Occupational hearing loss of a railroad employee;

(D) Occupational tuberculosis of a railroad employee;

(E) Musculoskeletal disorder of a railroad employee if this disorder is reportable under one or more of the general reporting criteria; or

(ii) Is a covered data case.

* * * * *

■ 14. Section 225.21 is amended by revising the introductory text and paragraph (j) and adding paragraph (k) to read as follows:

§ 225.21 Forms.

The following forms and copies of the "FRA Guide for Preparing Accident/Incident Reports" may be obtained from the U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS–22, Mail Stop 25 West Building 3rd Floor, Room W33–107, 1200 New Jersey Avenue, SE., Washington, DC 20590 or downloaded from FRA's Office of Safety Analysis Web site at *http://safetydata.fra.dot.gov/officeofsafety/,* and click on "Click Here for Changes in Railroad Accident/Incident Recordkeeping and Reporting."

* * * * *

(j) *Form FRA F 6180.107—Alternative Record for Illnesses Claimed to be Work-Related.* Form FRA F 6180.107 or an alternative railroad-designed record may be used by a railroad in lieu of Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record" (described in paragraph (h) of this section), to record each illness claimed by an employee to be work-related that is reported to the railroad for which there is insufficient information for the railroad to determine whether the illness is work-related. This record shall be completed and retained in accordance with the requirements set forth in § 225.25 and § 225.27.

(k) *Form FRA F 6180.150—Highway User Injury Inquiry Form.*—Form FRA F 6180.150 shall be sent to every potentially injured highway user, or their representative, involved in a highway-rail grade crossing accident/incident. If a highway user died as a result of the highway-rail grade crossing accident/incident, a railroad must not send this form to any person. The railroad shall hand deliver or send by first class mail the letter within a reasonable time period following the date of the highway-rail grade crossing accident/incident. The form shall be sent along with a cover letter and a prepaid preaddressed return envelope. The form and cover letter shall be completed in accordance with instructions contained in the current "FRA Guide for Preparing Accident/Incident Reports." Any response from a highway user is voluntary and not mandatory. A railroad shall use any response from a highway user to comply with part 225's accident/incident reporting and recording requirements.

■ 15. Section 225.25 is amended by revising paragraphs (a), (b)(6) and (b)(28), (e)(28), and (i), and by adding paragraph (j) to read as follows:

§ 225.25 Recordkeeping.

(a) Each railroad shall maintain either the Railroad Employee Injury and/or Illness Record (Form FRA F 6180.98) or an alternative railroad-designed record as described in paragraph (b) of this section of all reportable and accountable injuries and illnesses of its employees for each railroad establishment where such employees report to work, including, but not limited to, an operating division, general office, and major installation such as a locomotive or car repair or construction facility.

(b) * * *

(6) Employee identification number;

* * * * *

(28) The railroad shall identify the preparer's name; title; telephone number with area code; and the date the record was initially signed/completed.

* * * * *

(e) * * *

(28) Date the record was initially signed/completed.

* * * * *

(i) Claimed Occupational Illnesses. (1) Each railroad may maintain a Form FRA F 6180.107, "Alternative Records for Illnesses Claimed to be Work-Related," or an alternate railroad-designed record as described in paragraph (j) of this section, in place of Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," only for those claimed occupational illnesses for which the railroad has not received information sufficient to determine whether the occupational illness is work-related.

(2) Each railroad shall enter each illness claimed to be work-related on the appropriate record, as required by paragraph (i)(1) of this section, as early as practicable, but no later than seven working days after receiving information or acquiring knowledge that an employee is claiming they have incurred an occupational illness.

(3) When a railroad does not receive information sufficient to determine whether a claimed occupational illness case is accountable or reportable, the railroad shall make a good faith effort to obtain the necessary information by December 1 of the next calendar year.

(4) Within 15 calendar days of receiving additional information regarding a claimed occupational illness case, each railroad shall document receipt of the information, including date received and type of document/information received, in narrative block 19 of Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related."

(5) Within 45 calendar days of receiving additional information regarding a claimed occupational illness, each railroad shall re-evaluate the claimed occupational illness to determine work-relatedness, taking into account the new information, and document any findings resulting from the re-evaluation in narrative block 19 of Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related."

(6) For any claimed occupational illness case determined to be accountable or reportable, each railroad shall:

(i) Complete a Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record" or alternative railroad-designed form within seven days of making such determination;

(ii) Retain the Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record," in accordance with § 225.27; and

(iii) Report the occupational illness, as applicable, in accordance with § 225.11.

(7) For any claimed occupational illness case determined not to be accountable or reportable, each railroad shall include the following information in narrative block 19 of Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related" or alternative railroad-designed form:

(i) Why the case does not meet reporting criteria;

(ii) The basis upon which the railroad made this determination; and

(iii) The most authoritative information the railroad relied upon to make the determination.

(8) Although Form FRA 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related" (or the alternate railroad-designed form), may not include all supporting documentation, such as medical records, the alternative record shall note the custodian of those documents and where the supporting documents are located so that they are readily accessible to FRA upon request.

(j) An alternative railroad-designed record may be used in lieu of the Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related." Any such alternative record shall contain all of the information required on the Form FRA F 6180.107. Although this information may be displayed in a different order from that on Form FRA F 6180.107, the order of the information shall be consistent from one such record to another such record. The order chosen by the railroad shall be consistent for all of the railroad's reporting establishments. Railroads may list additional information in the alternative record beyond the information required on Form FRA F 6180.107. The alternative record shall contain, at a minimum, the following information:

(1) Name of Reporting Railroad;

(2) Case/Incident Number;

(3) Employee's Name (first, middle, last);

(4) Employee's Date of Birth (mm/dd/yy);

(5) Employee's Gender;

(6) Employee Identification Number;

(7) Date Employee was Hired (mm/dd/yy);

(8) Employee's Home Address (include street address, city, State and Zip code);

(9) Employee's Home Telephone Number (with area code);

(10) Name of Facility Where Railroad Employee Normally Reports to Work;

(11) Location, or Last Know Facility, Where Employee Reports to Work;

(12) Job Title of Railroad Employee;

(13) Department to Which Employee is Assigned;

(14) Date on Which Employee or Representative Notified Company Personnel of Condition (mm/dd/yy);

(15) Name of Railroad Official Notified;

(16) Title of Railroad Official Notified;

(17) Nature of Claimed Illness;

(18) Supporting Documentation;

(19) Custodian of Documents (Name, Title, and Address);

(20) Location of Supporting Documentation;

(21) Narrative;

(22) Preparer's Name;

(23) Preparer's Title;

(24) Preparer's Telephone Number (with area code); and

(25) Date the record was initially signed/completed (mm/dd/yy).

■ 16. Section 225.27 is amended by revising paragraph (a) and adding paragraphs (c) and (d) to read as follows:

§ 225.27 Retention of records.

(a)(1) *Five-year retention period.* Each railroad shall retain the following forms for at least five years after the end of the calendar year to which they relate:

(i) Form FRA F 6180.98, "Railroad Employee Injury and/or Illness Record;"

(ii) Form FRA F 6180.107, "Alternative Record for Illnesses Claimed to be Work-Related;"

(iii) Monthly List of Injuries and Illnesses required by § 225.25; and

(iv) Form FRA F 6180.150, "Highway User Injury Inquiry Form."

(2) *Two-year retention period.* Each railroad shall retain the following forms for at least two years after the end of the calendar year to which they relate:

(i) Form FRA F 6180.97, "Initial Rail Equipment Accident/Incident Record," required by § 225.25;

(ii) The Employee Human Factor Attachments (Form FRA F 6180.81, "Employee Human Factor Attachment") required by § 225.12, that have been received by the railroad;

(iii) The written notices to employees required by § 225.12 (Part I of Form FRA F 6180.78, "Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor; Employee Statement Supplementing Railroad Accident Report"), that have been received by the railroad; and

(iv) The Employee Statements Supplementing Railroad Accident Reports described in § 225.12(g) (Part II of Form FRA F 6180.78, "Notice to Railroad Employee Involved in Rail Equipment Accident/Incident Attributed to Employee Human Factor; Employee Statement Supplementing Railroad Accident Report"), that have been received by the railroad.

* * * * *

(c) Each railroad shall retain the original hard copy of each completed and signed Form FRA F 6180.55, "Railroad Injury and Illness Summary," that the railroad submits to FRA on optical media (CD–ROM) or electronically via the Internet to *aireports@frasafety.net* for at least five years after the calendar year to which it relates. If the railroad opts to submit the report to FRA electronically via the internet, the railroad must also retain a hard copy print out of FRA's electronic notice acknowledging receipt of the railroad's submission for a period of five years after the calendar year to which the report acknowledged relates.

(d) Railroads may retain accident/incident records as required by paragraphs (a) and (b) of this section in hard copy format or in electronic format. After October 31, 2011,

accident/incident records, retained by railroads as required by paragraphs (a) and (b) of this section, in hard copy format or electronic format are subject to the following system requirements:

(1) *Design Requirements.* Any electronic record keeping system used to retain a record required to be retained by this part shall meet the following design parameters:

(i) The electronic record system shall be designed such that the integrity of each record is retained through appropriate levels of security such as recognition of an electronic signature, or other means, which uniquely identify the initiating person as the author of that record. No two persons shall have the same electronic identity;

(ii) The electronic system shall ensure that each record cannot be modified, or replaced, once the record is submitted to FRA;

(iii) Any amendment to a record shall be electronically stored apart from the record which it amends. Each amendment to a record shall uniquely identify the person making the amendment and the date the amendment was made;

(iv) The electronic system shall provide for the maintenance of reports as originally submitted to FRA without corruption or loss of data; and

(v) Policies and procedures must be in place to prevent persons from altering electronic records, or otherwise interfering with the electronic system.

(2) *Accessibility and availability.* Any electronic record system used to create, maintain, or transfer a record required to be maintained by this part shall meet the following access and availability parameters:

(i) Paper copies of electronic records and amendments to those records that may be necessary to document compliance with this part shall be provided to any representative of the FRA or of a State agency participating in investigative and/or surveillance activities under part 212 of this chapter or any other authorized representative for inspection and photocopying upon request in accordance with § 225.35; and

(ii) Paper copies provided to FRA or of a State agency participating in investigative and/or surveillance activities under part 212 of this chapter or any other authorized representative shall be produced in a readable text format and all data shall be identified by narrative descriptions (*e.g.,* "accident/incident number," "number of days away from work," "date of occurrence," *etc.*).

■ 17. Section 225.33 is amended by revising paragraph (a)(11) to read as follows:

§ 225.33 Internal Control Plans.

(a) * * *

(11) In the case of the Form FRA F 6180.107 or the alternate railroad-designed form, a statement that specifies the name(s), title(s) and address(es) of the custodian(s) of these records, all supporting documentation, such as medical records, and where the documents are located.

* * * * *

■ 18. Section 225.37 is revised to read as follows:

§ 225.37 Optical media transfer and electronic submission.

(a) A railroad has the option of submitting the following reports, updates, and amendments by way of optical media (CD–ROM), or by means of electronic submission via the Internet:

(1) The Rail Equipment Accident/Incident Report (Form FRA F 6180.54);

(2) The Railroad Injury and Illness Summary (Form FRA F 6180.55);

(3) The Railroad Injury and Illness Summary (Continuation Sheet) (Form FRA F 6180.55a);

(4) The Highway-Rail Grade Crossing Accident/Incident Report (Form FRA F 6180.57); and

(5) The Employee Human Factor Attachment (Form FRA F 6180.81) (the Employee Human Factor Attachment must be in .pdf or .jpg format only).

(b) Each railroad utilizing the optical media option shall submit to FRA a computer CD–ROM containing the following:

(1) An electronic image of the completed and signed hard copy of the Railroad Injury and Illness Summary (Form FRA F 6180.55) in .pdf or .jpg format only; and

(2) The completed accident/incident report submissions.

(c) (1) Each railroad utilizing the electronic submission via the Internet option shall submit to FRA at *aireports@frasafety.net:*

(i) An electronic image of the completed and signed hard copy of the Railroad Injury and Illness Summary (Form FRA F 6180.55) in .pdf or .jpg format only; and

(ii) The completed accident/incident report submissions.

(2) FRA will provide to the railroad an electronic notice acknowledging receipt of submissions filed electronically via the Internet.

(d) Each railroad employing either the optical media or electronic submission via the Internet option, shall submit its monthly reporting data for the reports identified in paragraph (a) of this section in a year-to-date file format as described in the FRA Guide.

(e) A railroad choosing to use optical media or electronic submission via the internet must use one of the approved formats specified in the Companion Guide. FRA will reject submissions that do not adhere to the required formats, which may result in the issuance of one or more civil penalty assessments against a railroad for failing to provide timely submissions of required reports as required by § 225.11.

■ 19. Section 225.41 is added to read as follows:

§ 225.41 Suicide Data.

FRA does not include suicide data (as defined in § 225.5) in its periodic summaries of data on the number of injuries and illnesses associated with railroad operations. FRA will maintain suicide data in a database that is not publicly accessible. Suicide data will not be available on FRA's Web site for individual reports or downloads. Suicide data will be available to the public in aggregate format on FRA's Web site and via requests under the Freedom of Information Act.

■ 20. Appendix A to part 225 is revised to read as follows:

APPENDIX A TO PART 225—SCHEDULE OF CIVIL PENALTIES [1]

Section [2]	Violation	Willful Violation
225.6: Failure to comply with consolidated reporting requirements	$2,500	$5,000
225.9:		
(1) Failure to report	2,500	5,000
(2) Failure to immediately report	1,000	2,000
(3) Failure to accurately report	1,000	2,000

APPENDIX A TO PART 225—SCHEDULE OF CIVIL PENALTIES [1]—Continued

Section [2]	Violation	Willful Violation
225.11:		
(1) Failure to report accident/incident	2,500	5,000
(a) Highway-rail grade crossing.		
(b) Rail Equipment.		
(c) Death, Injury, or occupational illness.		
(2) Report is incomplete	1,000	2,000
225.12: Failure to file Railroad Employee Human Factor form	2,500	5,000
(a) Failure to file Railroad Employee Human Factor Attachment correctly:		
(1) Employee identified	2,500	5,000
(2) No employee identified	1,000	2,000
(b)		
(1) Failure to notify employee properly	2,500	5,000
(2) Notification of employee not involved in accident	2,500	5,000
(c) Failure of employing railroad to provide requested information properly	1,000	2,000
(d)		
(1) Failure to revise report	2,500	5,000
(2) Failure to notify after late identification	2,500	5,000
(f) Submission of notice if employee dies as result of the reported accident	2,500	5,000
(g) Willfully false accident statement by employee	.....	5,000
225.13:		
(1) Failure to Late reports	2,500	5,000
(2) Failure to Review Employee Statement	2,500	5,000
(3) Failure to Amend Report	1,000	2,000
225.18: Alcohol or drug involvement	2,500	5,000
225.23: Joint operations	([1])	([1])
225.25:		
(1) Recordkeeping	2,500	5,000
(2) Failure to post list	1,000	2,000
(3) Posting Prohibited Information	1,000	2,000
(4) Missing fields	1,000	2,000
225.27:		
(1) Failure to retain records	1,000	2,000
(2) Failure to retain electronic receipt	1,000	2,000
(3) Failure to comply with electronic recordkeeping requirements	1,000	2,000
(4) Failure to provide access to records	1,000	2,000
225.33:		
(1) Failure to adopt Internal Control Plan or more than two missing/outdated/incorrect components	2,500	5,000
(2) Internal Control Plan with less than three missing/outdated/incorrect components	1,000	2,000
(3) Failure to comply with Internal Control Plan	2,500	5,000
(4) Failure to comply with the intimidation/harassment policy in Internal Control Plan	2,500	5,000
(5) Failure to comply with requirements associated with Form FRA F 6180.150	2,500	5,000
225.35: Access to records and reports	2,500	5,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, appendix A. A failure to comply with § 225.23 constitutes a violation of § 225.11. For purposes of §§ 225.25 and 225.27 of this part, each of the following constitutes a single act of noncompliance: (1) A missing or incomplete log entry for a particular employee's injury or illness; or (2) a missing or incomplete log record for a particular rail equipment accident or incident. Each day a violation continues is a separate offense.

[2] The penalty schedule uses section numbers from 49 CFR part 225. If more than one item is listed as a type of violation of a given section, each item is also designated by a "penalty code," which is used to facilitate assessment of civil penalties, and which may or may not correspond to any subsection designation(s). For convenience, penalty citations will cite the CFR section and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation, should they differ.

Issued in Washington, DC, on October 6, 2010.

Joseph C. Szabo,

Administrator, Federal Railroad Administration.

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