

received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, *etc.*). You may review the U.S. Department of Transportation's (DOT) complete Privacy Act Statement in the **Federal Register** published on January 17, 2008 (73 FR 3316), or you may visit <http://edocket.access.gpo.gov/2008/pdf/E8-785.pdf>.

**FOR FURTHER INFORMATION CONTACT:** Mr. Thomas Yager, Chief, Driver and Carrier Operations Division, Federal Motor Carrier Safety Administration, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590, (202) 366-4325.

**SUPPLEMENTARY INFORMATION:**

**Availability of Supplemental Documents**

For a full background on this rulemaking, please see the preamble to the NPRM (75 FR 82170, December 29, 2010). The docket (FMCSA-2004-19608) contains all of the background information for this rulemaking, including comments. FMCSA has placed these four research reports in the docket:

- Blanco, M., Hanowski, R., Olson, R., Morgan, J., Soccolich, S., Wu, S.C., and Guo, F., "The Impact of Driving, Non-Driving Work, and Rest Breaks on Driving Performance in Commercial Motor Vehicle Operations," FMCSA, April 2011.

- Jovanis, J.P., Wu, K.F., and Chen, C., "Hours of Service and Driver Fatigue—Driver Characteristics Research," FMCSA, April 2011.

- Sando, T., Angel, M., Mtoi, E., and Moses, R., "Analysis of the Relationship Between Operator Cumulative Driving Hours and Involvement in Preventable Collisions," Transportation Research Board of the National Academies' 2011 90th Annual Meeting, Paper No.: 11-4165, November 2010.

- Sando, T., Mtoi, E., and Moses, R., "Potential Causes Of Driver Fatigue: A Study On Transit Bus Operators In Florida," Transportation Research Board of the National Academies' 2011 90th Annual Meeting, Paper No.: 11-3398, November 2010.

The two Sando, *et al.*, reports discuss research similar to that which the Florida Department of Transportation Transit Office submitted to the docket on March 4, 2011 (docket item 23834: Sando, T., Moses, R., Angel, M., and Mtoi, E., "Safety Implications of Transit Operator Schedule Policies," University of North Florida and Florida Department of Transportation, October

2010). The two additional reports by Sando and his colleagues were published by the Transportation Research Board of the National Academies for its 2011 90th Annual Meeting. They were provided to 2011 Annual Meeting participants on digital video disk and are available for downloading at <http://www.trb.org>.

FMCSA may consider these four reports in its rulemaking and invites comment on their relevance to the NPRM.

FMCSA is reopening the comment period only for comments on these documents and their relationship to the proposed HOS regulations. Comments unrelated to the studies and/or to their relationship to the NPRM will not be evaluated.

**Rulemaking Schedule**

FMCSA advises the public of an adjustment to the rulemaking schedule agreed to in litigation before the U.S. Court of Appeals for the District of Columbia Circuit (Case No. 09-1094). Pursuant to an October 26, 2009, agreement between Public Citizen, *et al.* (Petitioners), and FMCSA, the Agency was to publish a final rule within 21 months of

the date of the settlement agreement. FMCSA will receive and analyze all comments to this notice before it completes its work on a final rule, however. This extra comment period will require additional time that was not envisioned in 2009, and thus the Agency will be unable to publish a final rule by July 26, 2011. FMCSA has advised Petitioners of this delay to the rulemaking schedule.

Issued on: May 3, 2011.

**Anne S. Ferro,**  
Administrator.

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**BILLING CODE 4910-EX-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Chapter II**

[Docket No. FRA-2011-0025]

**Study on Protection of Certain Railroad Risk Reduction Data From Discovery or Use in Litigation**

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

**ACTION:** Notice and request for public comment.

**SUMMARY:** In accordance with section 109 of the Rail Safety Improvement Act

of 2008 (RSIA), FRA is soliciting public comment on the issue of whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or use in litigation in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under the RSIA, including a railroad carrier's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.

**DATES:** Comments should be received on or before July 8, 2011. Late-filed comments will be considered to the extent practicable.

**ADDRESSES:** You may submit comments to Docket No. FRA-2011-0025 by any of the following methods:

- *Federal e-Rulemaking Portal:* Go to <http://www.regulations.gov> and follow the instructions for sending your comments electronically.

- *Mail:* Docket Management Facility: U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, DC 20590-0001. If you submit comments by mail and would like to know that they reached the facility, please enclose a stamped, self-addressed envelope or postcard.

- *Hand Delivery or Courier:* West Building, Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.

- *Fax:* 202-493-2251

To avoid duplication, please use only one of these four methods. All comments received will be posted without change to <http://www.regulations.gov> and will include any personal information you provide.

*Docket:* To read background documents or comments received, go to <http://www.regulations.gov> and click on the "read comments" box in the upper right hand side of the screen. Then, in the "Keyword" box, insert "FRA-2011-0025" and click "Search." Next, click the "Open Docket Folder" in the "Actions" column. Finally, in the "Title" column, click on the document you would like to review. If you do not have access to the Internet, you may view the docket online by visiting the Docket Management Facility in Room W12-140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m.,

Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:**

Roberta Stewart, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., Room W33-411, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6027), [roberta.stewart@dot.gov](mailto:roberta.stewart@dot.gov).

**SUPPLEMENTARY INFORMATION:**

**The Railroad Safety Improvement Act of 2008**

Pursuant to section 103 of the Rail Safety Improvement Act of 2008 (Pub. L. 110-432, Div. A, or "RSIA") (codified at 49 U.S.C. 20156) and a delegation from the Secretary (49 CFR 1.49(o) <sup>1</sup>), FRA is conducting rulemakings to issue rules by October 16, 2012 that would require the establishment of risk reduction programs by certain passenger and freight railroads. As part of these risk reduction programs, railroads would have to produce detailed analyses of the hazards and risks present in the railroad working environment in order to develop processes to eliminate these hazards and risks. In section 109 of the RSIA (codified at 49 U.S.C. 20118-20119), Congress determined that for these programs to be effective, the risk analyses must, subject to a few exceptions, be shielded from production in response to Freedom of Information Act (FOIA) requests.<sup>2</sup> See 49 U.S.C. 20118.

In lieu of including a statutory provision that would shield the risk analysis information from production and use in litigation, Congress mandated a study. In Section 109 of the RSIA, codified at 49 U.S.C. 20119, Congress directed FRA to evaluate whether it is in the public interest (including public safety and the legal rights of persons injured in railroad accidents) to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages against a railroad carrier certain information compiled or collected for a safety risk reduction program required by FRA. 49 U.S.C. 20119(a). In conducting this study, FRA is required to solicit input from railroads, railroad

non-profit employee labor organizations, railroad accident victims and their families, and the general public.

The Secretary has delegated the responsibility to carry out this provision to the Administrator of FRA. 49 CFR 1.49(o). In accordance with section 109 of the RSIA, FRA is therefore issuing this notice to solicit public comments on whether it is in the public interest to protect railroad risk reduction information from production and use in litigation. Once the mandated study is completed, FRA may, if it is in the public interest, prescribe a rule to address the results of the study. Any such final rule would not become effective until one year after its adoption.

Section 109 of the RSIA specifically refers to public safety as a component of the public interest to be evaluated in the study. Comments received by FRA in response to its advance notice of proposed rulemaking (ANPRM) on a risk reduction program indicate that railroads are reluctant to participate in the development of a statutorily mandated risk reduction program rule and to provide comprehensive risk analyses that might be used against them in litigation. See 49 U.S.C. 20156 and 75 FR 76345 (December 8, 2010), Docket No. FRA-2009-0038. The purpose of shielding sensitive risk information from production in private litigation would be to encourage a railroad to describe its safety vulnerabilities, including its security vulnerabilities, and the mitigation measures it has identified with which it will address those risks, in documents that are not simply recitations of platitudes or pamphlets suitable for public relations campaigns but instead serious, comprehensive, and in-depth analyses. In other words, because railroads have indicated that they would be reluctant to produce comprehensive risk reduction analyses if they may be released in response to discovery requests or used in litigation, safety may be enhanced by prohibiting their release.

In addition to the public interest in railroad safety, section 109 of the RSIA also mentions specifically the legal rights and interests of persons injured in railroad accidents. There are numerous lawsuits each year against railroads that involve matters such as passenger train accidents, rail-highway grade crossing accidents, and railroad employee injuries. If the risk reduction information that would be generated and collected by the railroads under FRA's risk reduction programs were protected from discovery and use in

these types of private lawsuits, another important question is whether private litigants would be disadvantaged by that protection.

Accordingly, FRA is soliciting comments on the following issues:

- Whether and how railroad safety and railroad risk reduction programs would be impacted if risk reduction information collected for these programs were discoverable and could be used in litigation; and
- Whether and how the legal rights of persons injured in railroad accidents would be impacted if railroad risk reduction program information were protected from discovery and use in litigation.

These specific questions are not intended to limit the comments; if there are other issues applicable to the protection of railroad risk information from use in litigation that commenters believe should be addressed, FRA invites a discussion of those issues.

Once the comment period has closed, FRA will evaluate, digest and summarize the comments. The public comments will then be used as part of a final study report to fulfill the requirements of 49 U.S.C. 20119 in determining whether it is in the public interest to protect railroad risk reduction information from discovery and use in litigation. If, based on the final study report, FRA were to conclude that it would be in the overall public interest to protect such information, FRA would then prepare and issue a notice of proposed rulemaking requesting public comment on draft regulations regarding limitations on the use of railroad risk information in litigation. The final study report will be made available to the public.

**Supplemental Materials**

To assist commenters in evaluating and discussing the issues at hand, FRA will place several items in the public docket for review.

First, FRA will put in the docket copies of the applicable statutes relating to the establishment of railroad risk reduction programs, the statutory protection of railroad risk reduction information from FOIA, and the statutory requirement for the study on the protection of railroad risk reduction information from discovery and use in litigation.

Second, FRA will put in the docket a copy of a report (produced by FRA's contractor for the study) that discusses existing Federal government programs, both within and outside of DOT, that protect similar types of risk information from use in litigation, and the

<sup>1</sup> "The Federal Railroad Administrator is delegated authority to: \* \* \* (oo) Carry out the functions and exercise the authority vested in the Secretary by the Rail Safety Improvement Act of 2008 (Pub. L. 110-431, Div. A, 122 Stat. 4848)."

<sup>2</sup> If the information is "necessary for the Secretary of Transportation or another Federal agency to enforce or carry out any provision of Federal law" it may be disclosed. The Secretary may also disclose "any part of any record comprised of facts otherwise available to the public if \* \* \* the Secretary determines that disclosure would be consistent with the confidentiality needed for that safety risk reduction or pilot program."

mechanisms by which that information is protected. The report provides an overview of the legal means by which certain types of information provided to the Federal government are protected from disclosure. Part II of the report identifies certain existing legal principles applicable to disclosure of information held by the Federal government, focusing on FOIA and the discovery process in Federal and State court litigation. Part III summarizes the RSIA's statutory requirements regarding the establishment of risk reduction programs, and summarizes FRA's actions to date to implement the RSIA's requirements. Parts IV and V provide an

overview of a number of statutes and regulations that limit access to information submitted to DOT and other Federal government agencies. Within each Part, the report describes programs under which disclosure of safety-related information has been specifically limited by statute or regulation. The report also discusses programs that provide various degrees of protection for certain types of non-safety-related information.

#### **Regulatory Notices**

*Privacy Act:* Anyone is able to search the electronic form of any written communications and comments

received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, *etc.*). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70, pages 19477-78) or online at <http://www.dot.gov/privacy.html>.

Issued in Washington, DC, on May 3, 2011.

**Joseph C. Szabo,**  
*Administrator, Federal Railroad  
Administration.*

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