

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Parts 270 and 271**

[Docket No. FRA–2011–0060, Notice No. 12 and FRA–2009–0038, Notice No. 8]

RIN 2130–AC73

System Safety Program and Risk Reduction Program

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

ACTION: Final rule.

SUMMARY: In this final rule, FRA is amending its regulations requiring commuter and intercity passenger rail (IPR) operations to develop and implement a system safety program (SSP) to improve the safety of their operations. The rule clarifies that each passenger rail operation has responsibility for ensuring compliance with the SSP final rule. FRA also adjusts the SSP rule's compliance dates to account for FRA's prior stay of the rule's effect and amends the rule to apply its information protections to the Confidential Close Call Reporting System (C³RS) program included in a passenger rail operation's SSP. FRA is making conforming amendments to the Risk Reduction Program (RRP) final rule to ensure that the RRP and SSP rules have essentially identical consultation and information protection provisions.

DATES: This final rule is effective May 4, 2020.

ADDRESSES: *Docket:* For access to the docket to read background documents, petitions for reconsideration, or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE, Room W12–140, Washington, DC 20590.

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I. Background

On August 12, 2016, FRA published a final rule requiring each commuter and intercity passenger railroad¹ to develop and implement an SSP. *See* 81 FR 53850 (Aug. 12, 2016). This final rule was required by section 103 of the Rail Safety Improvement Act of 2008 (RSIA) (Pub. L. 110–432, Div. A, 122 Stat. 4883 (Oct. 16, 2008), codified at 49 U.S.C. 20156). The Secretary of Transportation delegated the authority to conduct this rulemaking and implement the rule to the Federal Railroad Administrator. *See* 49 CFR 1.89(b).

On October 3, 2016, FRA received four petitions for reconsideration

¹ Throughout this document, FRA uses the term “railroad,” as it is defined in 49 CFR 270.5.

(Petitions) of the final rule: (1) Certain labor organizations (Labor Organizations)² filed a joint petition (Labor Petition); (2) certain State and local transportation departments and authorities³ filed a joint petition (Joint Petition); (3) North Carolina Department of Transportation (NCDOT) filed a separate petition; and (4) Vermont Agency of Transportation (VTrans) filed a separate petition. The Joint, NCDOT, and VTrans petitions are hereinafter referred to as the “State Petitions.”

Massachusetts Department of Transportation (MassDOT) filed a comment in support of the Joint Petition on November 15, 2016. Three other individual comments were filed, but related to the rule generally, not the petitions.

On February 10, 2017, FRA stayed the SSP final rule's requirements until March 21, 2017, consistent with the new Administration's guidance issued January 20, 2017, intended to provide the Administration an adequate opportunity to review new and pending regulations. *See* 82 FR 10443 (Feb. 13, 2017). FRA's review also included the Petitions. To provide additional time for that review, FRA extended the stay until May 22, 2017; June 5, 2017; December 4, 2017; December 4, 2018; and then September 4, 2019. *See* 83 FR 63106 (Dec. 7, 2018).

On October 30, 2017, FRA met with the Passenger Safety Working Group and the System Safety Task Group of the Railroad Safety Advisory Committee (RSAC) to discuss the Petitions and comments received in response to the Petitions.⁴ *See* FRA–2011–0060–0046.

² The Labor Organizations participating in the Labor Petition are the: American Train Dispatchers Association (ATA); Brotherhood of Locomotive Engineers and Trainmen (BLET); Brotherhood of Maintenance of Way Employees Division (BMWED); Brotherhood of Railroad Signalmen (BRS); Brotherhood Railway Carmen Division; and Transport Workers Union of America.

³ The State and local transportation departments and authorities who filed the Joint Petition are the: Capitol Corridor Joint Powers Authority (CCJPA); Indiana Department of Transportation (INDOT); Northern New England Passenger Rail Authority (NNEPRA); and San Joaquin Joint Powers Authority (SJJPA).

⁴ Attendees at the October 30, 2017, meeting included representatives from the following organizations: ADS System Safety Consulting, LLC; American Association of State Highway and Transportation Officials; American Public Transportation Association (APTA); American Short Line and Regional Railroad Association; ATDA; Association of American Railroads (AAR); BLET; BMWED; BRS; CCJPA; The Fertilizer Institute; Gannett Fleming Transit and Rail Systems; International Brotherhood of Electrical Workers; Metropolitan Transportation Authority; National Railroad Passenger Corporation (Amtrak); National Transportation Safety Board (NTSB); NCDOT; NNEPRA; San Joaquin Regional Rail Commission (SJRRC)/Altamont Corridor Express; Sheet Metal, Air, Rail, and Transportation Workers

This meeting allowed FRA to receive input from industry and the public and to discuss potential paths forward to respond to the Petitions. During the meeting, FRA made an introductory presentation and invited discussion on the issues raised by the Labor Petition. FRA also presented for discussion draft rule text that would respond to the State Petitions by amending the SSP final rule to include a delegation provision that would allow a railroad that contracts all activities related to its passenger service to another person to designate that person as responsible for compliance with the SSP final rule. FRA uploaded this proposed draft rule text to the docket for this rulemaking. *See* FRA–2011–0060–0045. The draft rule text specified that any such designation did not relieve a railroad of legal responsibility for compliance with the SSP final rule. In response to the draft rule text, the State Petitioners indicated they would need an extended caucus to discuss. On March 16, 2018, the Executive Committee of the States for Passenger Rail Coalition, Inc. (SPRC)⁵ provided, and FRA uploaded to the rulemaking docket, proposed revisions to the draft rule text. *See* FRA–2011–0060–0050. FRA issued a notice of proposed rulemaking (NPRM) on June 11, 2019, responding to the Petitions and proposing certain amendments to the SSP final rule. *See* 84 FR 27215. FRA further extended the stay to allow FRA time to review comments received on the NPRM and to issue this final rule. *See* 84 FR 45683 (Aug. 30, 2019). In addition to the comments received on the NPRM, FRA also reviewed and considered SPRC’s March 16, 2018 suggested revisions in formulating the NPRM and this final rule.

Accordingly, this rule revises part 270 in response to the Petitions, as well as the comments received on the June 2019 NPRM, which are discussed below. FRA also adjusts the rule’s compliance dates to account for FRA’s stay of the rule’s effect and amends the rule to specify that its information protections apply to C³RS programs included in a passenger rail operation’s SSP. This rule also amends part 271 to ensure that the RRP and SSP rules have essentially identical consultation and information protection provisions.

(SMART–TD); and United States Department of Transportation—Transportation Safety Institute.

⁵ SPRC’s website indicates it is an “alliance of State and Regional Transportation Officials,” and each State Petitioner appears to be an SPRC member. *See* <https://www.s4prc.org/state-programs> (last accessed Aug. 13, 2019).

II. Discussion of Comments Received on the NPRM

The NPRM solicited written comments from the public under the Administrative Procedure Act (5 U.S.C. 553). By the close of the comment period on August 12, 2019, FRA received fourteen comments, including comments from AAR; Amtrak; APTA; CCJPA jointly with INDOT, Los Angeles-San Diego-San Luis Obispo Rail Corridor Agency, and SJPA (CCJPA Joint Comment); Connecticut Department of Transportation (CTDOT); Massachusetts Bay Transportation Authority (MBTA); MassDOT; NCDOT; NNEPRA jointly with the State of Maine Department of Transportation (MEDOT); SPRC; VTrans; and Washington State Department of Transportation (WSDOT). FRA also received two general comments from members of the public. FRA grouped these comments into two categories: (A) States’ Concerns and (B) Other Topics (Consultation Comments, Information Protections, Submission Time, and RRP Rule).

A. States’ Concerns

The CCJPA Joint Comment and SPRC’s submission contained essentially identical comments (hereinafter, State Comments). *See* FRA–2011–0060–0031 and FRA–2009–0038–0106. These State Comments reiterated many arguments the States have raised with FRA previously on this topic. Generally, MassDOT, NCDOT, NNEPRA/MEDOT, VTrans, and WSDOT concurred with the State Comments. These individual State comments included context for the particular rail services provided (for example, NNEPRA/MEDOT explained its “Downeaster” service) and emphasized the apparent lack of control and operational role of the State in the IPR service.

Specifically, the State Comments argued that: (1) FRA would exceed its statutory authority to impose SSP requirements on States; (2) the SSP rule would impose substantial burdens on States without improving safety; and (3) States should not be required to consult with their IPR operators’ employees. Therefore, the State Comments requested that FRA modify the SSP rule to exclude a State that provides financial support for, but does not operate, IPR service; to exclude a State that owns a railroad or railroad equipment, but does not operate a railroad or railroad equipment; and to remove from the definition in § 270.5, “Railroad,” the words “whether directly or by contracting out operation of the railroad to another person.” *See* SPRC at

15; CCJPA at 17; VTrans at 6. The State Comments also contended that FRA’s proposed delegation provision in § 270.7(c) was insufficient relief because the State would retain the burden of compliance.

1. FRA’s Statutory Authority

The State Comments alleged FRA lacks statutory authority to require States that provide funding for IPR service to comply with the SSP rule requirements. *See* SPRC at 3; CCJPA at 5. Further, the State Comments argued that neither the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) (Pub. L. 110–432, Div. B (Oct. 16, 2008)) nor the RSIA reflected a Congressional “intent to include States as IPR providers with responsibility for anything more than service funding.” *See* SPRC at 3, 4; CCJPA at 3; VTrans at 11. Instead, the State Comments suggested any safety responsibility belongs only to the IPR operator. *See* SPRC at 3; CCJPA at 3. Moreover, the State Comments urged FRA to “remove from State financial sponsors the responsibility for compliance with FRA’s safety regulations unless a State elects to assume that responsibility on its own.” SPRC at 5; CCJPA at 5.

Specifically, the State Comments contended that a “State” cannot be a “railroad carrier” under 49 U.S.C. 20102(3). *See* SPRC at 5; CCJPA at 6. The State Comments explained that the definition of “person” in 1 U.S.C. 1, includes “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals,” but does not specifically include the word “State.” *See* SPRC at 5–6; CCJPA at 6. The State Comments argued that a “State” therefore cannot be a “person,” and by extension, a “State” cannot be a “person providing railroad transportation” under the definition of “railroad carrier” in 49 U.S.C. 20102(3). *See* SPRC at 5–6; CCJPA at 5–6. To support its argument, the State Comments indicated that Congress in PRIIA did not include “States” in the definition of “Persons” generally, and when Congress wanted to include “States” as “persons,” it explicitly said so, citing to 49 U.S.C. 1139(g)(1), in PRIIA, concerning accident investigations. *See* SPRC at 6; CCJPA at 6.

MassDOT, NNEPRA/MEDOT, and VTrans additionally commented that Surface Transportation Board (STB) precedent allows States to maintain an STB status as a “non-carrier” when a State acquires track, right-of-way, and related physical assets. MassDOT explained that “ownership of railroad

assets does not necessarily confer upon the asset owner rail carrier status.” See MassDOT at 2. NNEPRA/MEDOT stated that NNEPRA does not provide railroad transportation, but rather pays Amtrak the difference between service costs and revenues to operate the Downeaster service. See NNEPRA/MEDOT at 4. VTrans noted that it already delegates responsibility to railroad carriers through long-term contractual relationships. See VTrans at 3. VTrans contended State ownership of railroad property leased to a railroad carrier does not make the State a railroad carrier for the Interstate Commerce Act, the Federal Employers Liability Act, and the Railway Labor Act. See VTrans at 7–8. Further, VTrans argued that State financial support for Amtrak services, such as that required by PRIIA section 209, should not trigger the SSP rule’s applicability. VTrans at 11.

The State Comments, NCDOT, and NNEPRA/MEDOT commented that some State statutes prohibit States from owning or operating a railroad. See, e.g., SPRC at 9; CCJPA at 9; NCDOT at 2; NNEPRA/MEDOT at 4. As such, the States argued, requiring States to comply with the SSP rule would require States to seek statutory authority to engage in rail operations, or it would prevent them from underwriting the service at all. See SPRC at 9; CCJPA at 9.

Finally, the State Comments argued FRA expanded the definition of “railroad” in part 270 without authority to include entities that “contract [] out operation of the railroad to another person.” See SPRC at 7; CCJPA at 7. The State Comments asserted that FRA’s regulatory definition is broader than the statutory definition, and there is no clear direction from Congress to extend the definition as FRA proposed. See SPRC at 7; CCJPA at 8.

2. State Comments Alleged the SSP Rule Imposes Burdens Without Improving Safety

The State Comments continued to argue the SSP rule would impose substantial burdens on States. See SPRC at 9; CCJPA at 10. The State Comments explained State sponsors⁶ “do not

⁶ There is currently no statutory or regulatory definition of the term “sponsor” in relation to IPR service. The Joint Petition appears to understand “sponsor” in this context as being a State that “provide[s] financial support” for IPR routes and “contract[s] for the operation of IPR.” See Joint Pet. at 2, fn. 2. The NCDOT petition defines “sponsors” as “State or other public entities that own railroads, equipment or that financially sponsor intercity passenger rail service.” NCDOT Pet. at 3. In its proposed revisions to the strawman text FRA presented during the October 2017 RSAC meeting, SPRC suggested defining “State sponsor” as “a

employ qualified railroad personnel with the detailed technical knowledge to develop, implement, and oversee compliance with an SSP.” See SPRC at 10; CCJPA at 11. They also claimed FRA’s regulatory impact statement “underestimates the costs to States of compliance with the proposed SSP requirements” and “did not consider” the costs of “developing, implementing, and monitoring compliance with an SSP” and the “negative impacts on the overall insurance market.” See SPRC at 11; CCJPA at 13. Further, the State Comments alleged the rule would require States to renegotiate operating agreements which would increase costs. See SPRC at 12; CCJPA at 13. In sum, the State Comments indicated the SSP rule’s financial burdens could cause States to discontinue IPR service entirely, and may therefore necessitate repaying Federal grants or loans for early termination of service. See SPRC at 13; CCJPA at 14. Moreover, the State Comments argued that including State sponsors in the rule could subject sponsors to other statutory obligations, such as railway labor and retirement requirements, and would increase costs and discourage IPR service. See SPRC at 14; CCJPA at 16.

The State Comments asserted that “FRA has not demonstrated that requiring States, as well as IPR operators, to be responsible for full SSP compliance would improve safety.” SPRC at 3; CCJPA at 3. The State Comments theorized that requiring both the IPR operator and State sponsor to develop an SSP would be duplicative and could create “contradictory and possibly conflicting measures.” See SPRC at 3, 10, 13; CCJPA at 3; WSDOT at 1. To support this claim, the State Comments pointed to the NTSB’s report in the Dupont, Washington 501 accident to suggest that because the NTSB issued a recommendation to Amtrak to include the various responsible parties in a comprehensive safety management system (SMS), and NTSB did *not* issue a recommendation to WSDOT to develop such an independent safety program, which implies that requiring States to prepare and implement an SSP plan would not improve safety. See SPRC at 13–14; CCJPA at 15.

Finally, the States indicated that State sponsors of IPR service lack control over

State, regional or local authority, that contracts with a railroad to provide intercity passenger railroad transportation pursuant to Section 209 of the Passenger Rail Investment and Improvement Act of 2008, as amended.” See Comments of the SPRC at 2. For purposes of discussion in this rule, FRA understands “State sponsor” as being a State, regional, or local authority, or other public entity, that provides financial (and potentially other) support for IPR routes.

the operator (typically, Amtrak), and although they pay Amtrak to keep the service running (as required by PRIIA), the only remedy they have for oversight is to cancel the contract (*i.e.*, terminate the IPR service entirely). See, e.g., NCDOT at 3; CCJPA at 12, 14. WSDOT noted that non-operating State sponsors “do not control operations nor have access to critical safety reports or other information” and lack the required “appropriate expertise, authority, and ability to receive timely critical information to make decisions or take appropriate actions.” WSDOT at 1–2. WSDOT reiterated that contractor operators have the appropriate personnel to meet safety requirements and provide oversight, and having States duplicate that effort would potentially create conflicting, redundant, and deflective measures. See WSDOT at 3. MassDOT agreed that the SSP rule “imputes to the States a non-existent degree of State control over Amtrak’s day-to-day operations.” See MassDOT at 2. MassDOT distinguished the service and contract provided by MBTA (contracting out commuter rail operations to a third-party operator) from itself, where MassDOT funds (as required by PRIIA) certain IPR multi-state (Massachusetts, New Hampshire, Vermont) routes without an operational role for MassDOT. See MassDOT at 2. MassDOT posited that including a State sponsor as a regulated entity “adds confusion as to responsibility, threatens clear and timely communications between appropriate parties and misdirects regulatory attention.” See MassDOT at 4. VTrans, like NNEPRA, MassDOT, and NCDOT, explained that it has no authority to govern or enforce any safety rules, even when it is the owner of the property, and all responsibilities lie with the actual rail operators. See VTrans at 11.

3. State Comments Alleged Requirements To Consult With Its IPR Operators’ Employees Would Interfere With State-IPR Operator Contracts

Finally, the State Comments argued States should not be required to consult with their IPR operators’ employees because it “introduces substantial barriers to efficient procurement practices.” See SPRC at 16; CCJPA at 18. WSDOT and MassDOT shared the concern that direct contact with an IPR service operator’s employees could create labor and operator issues. See WSDOT at 3; MassDOT at 4. NCDOT emphasized it is not a party to, nor is it privy to, Amtrak’s agreements with its host railroads and the SSP rule would purportedly insert States into that relationship. See NCDOT at 3.

With the above arguments, the State Comments, MassDOT, NCDOT, NNEPRA/MEDOT, VTrans, and WSDOT, urged FRA to amend the SSP rule to exempt State sponsors from part 270.

4. Other Comments Related to States' Concerns

In contrast to the above arguments, APTA commented that it supports the part 270 definition of "railroad," supports FRA's statement that "each entity involved in providing passenger rail service—including "State sponsors"—is responsible for complying with Federal rail safety requirements," and believes "[S]tates must be solely responsible for [their] employees and contractor's compliance." See APTA at 2. CTDOT supported FRA's proposal to allow for designation of another entity to ensure compliance with the SSP, and explained the entities it would so designate for its three passenger services (New Haven Line, Hartford Line, and Shore Line East). See CTDOT at 1.⁷

Amtrak agreed with FRA's statement that "the vast majority of State providers of [IPR] service would fall under Amtrak's [SSP plan]." See Amtrak at 2. Amtrak asserted that "uniformity in the management of system safety program elements is critical to the successful implementation of risk reduction efforts." See *id.* Amtrak stated that it supplemented its Amtrak-wide SSP plan with separate agreements with host railroads, tenant railroads, and States, detailing specific aspects of the service and infrastructure, along with the responsibilities of each party, and incorporated these agreements by reference into its SSP plan.⁸ See *id.* Amtrak explained these supplemental, collaborative, written agreements can prevent variation in programs that could lead to duplication of efforts or issues where entities think they may be obligated to provide oversight of Amtrak beyond their skills or resources. See *id.* Amtrak requested that FRA clarify that these agreements align with FRA's intent to sufficiently detail the requirements and obligations of each party. See *id.*

Finally, a member of the public, Mr. Quinton Simpson stated "even if the State contracts" an IPR service provider, the State has responsibility and "needs to ensure that the company is operating

safely." Similarly, Dr. Edwin "Chip" Kraft commented to FRA that the "type of communications disconnect resulting in avoidance of responsibility" is what the SSP rule is trying to prevent.

B. Other Topics

1. Consultation Comments

FRA received two comments regarding FRA's proposed changes to the consultation provision in § 270.107. Amtrak commented that it "concurs with the [NPRM's] proposed clarifications" to require serving "notice on the general chairpersons of labor organizations representing directly affected railroad employees." See Amtrak at 1. Further, Amtrak detailed its own experience on the labor consultation process in developing its SSP plan, and indicated that without such "continuous communication and collaboration between labor organizations and Amtrak management, its [SSP plan] to implement the [Safety Management System] would not be as successful nor sustainable." See *id.* at 1–2. Additionally, Mr. Simpson commented that he agrees that the contact of the General Chairperson makes sense because "the local chairperson was the liaison between the worker and the company."

2. Information Protections

Amtrak commented that it agrees with the NPRM's proposal to extend the SSP information protections to a C³RS program included as part of an SSP, even if the railroad joined C³RS on or before August 14, 2017. See Amtrak at 2. Further, Amtrak requested "that any information resulting from its [SSP plan] processes prior to the effective date of the rule's protection provisions be afforded like protections from discovery or use in civil litigation." See *id.* Amtrak also requested the "protections include information developed in [S]tate sponsored routes, including in circumstances where [S]tate entities may be subject to disclosure requirements." See *id.* at 3.

APTA supported the proposed protection for C³RS outlined in § 270.105(a)(3), but requested it be expanded from Federal or State court proceedings to also protect from other requests to release the data, like requests under the Freedom of Information Act (FOIA) or Freedom of Information Law. See APTA at 1. Further, APTA stated the "protection should also apply to any Federal program utilized by the railroads, such as [the Rail Information Sharing Environment (RISE)] or Clear Signal for Action [(CSA)]." See *id.* at 2. MBTA supported the C³RS program

and, like APTA, commented that FRA "should expand the privacy protections . . . to FOIA requests, as long as the information being requested supports the SSP." See MBTA at 1. Similarly, AAR supported the proposed inclusion of FRA's C³RS program in the information protections, but stated the provision should go further to include railroads' "in-house close call confidential reporting systems." See AAR at 2.

3. Submission Time

FRA requested comments on whether a one-year period after publication of the final rule was appropriate for submission of SSP plans for FRA review. APTA requested that FRA provide two years, to mirror what the Federal Transit Administration (FTA) provided in implementing the SMS program. See APTA at 2. MBTA supported extending compliance dates and providing one year for submission of SSP plans to allow sufficient time for railroads to reengage labor representatives. See MBTA at 1. Amtrak asked FRA to implement the rule as soon as possible. See Amtrak at 3.

4. RRP Rule

Finally, AAR commented that the NPRM "ignores AAR's supplemental comments to the RRP rule, filed October 31, 2018." AAR's comment also stated "[b]y adopting [AAR's] proposed changes to the RRP regulatory text, FRA can dramatically speed up the enhancement of safety on the nation's railroads, at no risk." See AAR at 1.

III. FRA's Response to Comments and Amendments to Parts 270 and 271

After thoroughly considering the comments received on the NPRM, FRA is amending part 270 to clarify the application of the rule's requirements to each "passenger rail operation," as opposed to each "railroad." FRA believes that this approach addresses the concerns raised by the States; effectuates FRA's intent for system safety; provides for a more natural understanding of how system safety works on a practical level; and will ensure each passenger rail operation develops and implements a compliant SSP.⁹ Specific rule text changes to carry out this approach are discussed further below in the section-by-section analysis.

A. FRA's Modified Approach

As FRA has consistently explained, FRA recognizes that there are often

⁷ See FRA–2011–0060–0068 (received Aug. 12, 2019). CTDOT provided clarifying comments dated November 20, 2019, after the comment period closed, which FRA added to the docket. See FRA–2011–0060–0074.

⁸ FRA notes that because of the stay of the SSP rule, FRA has neither approved nor disapproved Amtrak's SSP plan under the rule.

⁹ FRA's treatment of passenger rail service in this rule is only intended to affect the application of Federal safety requirements FRA administers and enforces.

multiple entities involved in each passenger rail service, with each entity having varying safety responsibilities.¹⁰ For purposes of part 270, FRA expects each *passenger rail operation* to have a single SSP and written SSP plan. FRA agrees with the State Comments that each passenger rail operation should have a single SSP governing the entire service, with each entity that may be involved in the service playing a role in the SSP commensurate with any of its activities affecting railroad safety. FRA similarly agrees that if each entity involved in a passenger rail operation filed its own SSP plan, this could lead to confusion and duplicated actions, contrary to promoting a systemic approach to safety. Therefore, FRA is clarifying the rule to place the central responsibilities of developing, filing, and implementing an SSP plan on the passenger rail operation. For most passenger rail operations, FRA expects the entity conducting the railroad operations will develop, submit, and implement the required SSP plan for that passenger rail operation. The entity submitting the plan for a passenger rail operation will typically be the railroad providing the engineers and crews and physically operating the trains on that passenger rail operation's routes. Of course, if the entities involved in a passenger rail operation determine that an entity other than the railroad operating the service should develop and file that operation's SSP plan, that different entity may be designated with such responsibility for the passenger rail operation, provided the required elements of the SSP plan are met with a single plan covering that system. In this manner, FRA is adopting the designation provision proposed in § 270.7(c), but with adjustments to reflect that the responsibility falls on each passenger rail operation and to remove the language that a designator is not relieved of responsibility for compliance.

The passenger rail operation for all current State-sponsored IPR services could be considered part of one, multifaceted system that is organized, managed, performed, and operated by a single railroad. As captured in the amendments to the rule text in this rulemaking, the requirements of part 270 may apply to those national and State-supported IPR services operated by Amtrak as a single passenger rail

operation. FRA anticipates Amtrak would develop and implement an SSP that addresses the varying components of its network. Within that rail system, other entities involved (*e.g.*, host railroads) must participate in the SSP process to ensure those entities' roles are performed safely when they may affect the safe operation of that system's rail service. With the amendments to the rule, FRA clarifies that it does not require such other entities to develop, submit, and implement an independent SSP plan to FRA. For example, a non-operating entity must participate in (and be identified in) the SSP process to the extent that entity owns infrastructure or equipment that will be utilized by the passenger rail operation. But that non-operating entity will not file the SSP plan for the passenger rail operation unless otherwise agreed amongst the entities involved in the passenger rail operation.

Indeed, as stated above, Amtrak agreed with FRA's statement that "the vast majority of State providers of [IPR] service would fall under Amtrak's [SSP plan]." *See* Amtrak at 2. Amtrak asserted that "uniformity in the management of system safety program elements is critical to the successful implementation of risk reduction efforts." *See id.* Amtrak explained that it supplemented its Amtrak-wide SSP plan with separate agreements with host railroads, tenant railroads, and States, detailing specific aspects of each service and infrastructure, along with the responsibilities of each party. *See id.* Amtrak stated these supplemental, collaborative written agreements can prevent variation in programs that could lead to duplication of efforts or issues where entities think they may be obligated to provide oversight of Amtrak beyond their skills or resources. *See id.*

FRA finds that these types of agreements will likely align with the rule's requirements to explain the roles and obligations of each party involved in a passenger rail operation. As stated above, Amtrak's national IPR network currently includes many State-supported routes that compose its system. As Amtrak's comment recognized, if Amtrak files an SSP plan for its passenger rail network incorporating State-sponsored IPR services, Amtrak's network SSP plan must also include details about each route, including State-supported routes, within the Amtrak network, especially to the extent aspects of those routes vary from those common to Amtrak's intercity passenger rail network. In this manner, an SSP plan for Amtrak's system would likely include details from the long-term agreements Amtrak

has with individual States regarding funding, equipment, track, and/or other items specific to those State-supported routes. FRA believes this form of centralized SSP plan addressing various components of the system will conform to the statutory mandate and benefit rail safety.

1. IPR Examples

By way of example, if an entity (State A) merely provides financial support to Amtrak per its obligations under PRIIA Sec. 209¹¹ for a State-supported intercity passenger route under 750 miles, part 270 does not require State A to submit an SSP plan for that State-supported route. Amtrak, as the operator of that State-supported IPR service, likely will file its national Amtrak SSP plan to include that State-supported route for the passenger rail operation's (Amtrak's) SSP. (Amtrak, or any other entity involved in the passenger rail operation, will retain the option of submitting a separate SSP plan for each IPR route, but Amtrak will not be required to subdivide its national network into separate plans.) As required by the rule, Amtrak's SSP plan must describe State A's role in the SSP (*i.e.*, Amtrak's SSP must explain that State A funds those specific operations on that route). *See, e.g.*, § 270.103(d), *System description*, and § 270.103(e), *Management and organizational structure*. In this manner, passenger rail service stakeholders must be included in the description of the rail system in the SSP plan, but are not otherwise responsible for submitting an independent SSP plan for that passenger rail operation.

For purposes of part 270, to the extent an entity (such as a State) does more than just provide financial assistance to a passenger rail operation, the relative responsibilities for that entity in the SSP context will increase. With respect to some operations, States may have a role in making substantive operational and safety-related decisions, including selecting contractors to perform services implementing those decisions. For example, if an entity (State B) is involved in a passenger rail operation

¹¹ Section 209 of PRIIA requires that the Amtrak Board of Directors, in consultation with the Secretary of Transportation, the governors of each relevant State, and the Mayor of the District of Columbia, or entities representing those officials, develop and implement a single, nationwide standardized methodology for establishing and allocating the operating and capital costs of providing IPR service among the States and Amtrak for the trains operated on designated high-speed rail corridors (outside the Northeast Corridor), short-distance corridors, or routes of not more than 750 miles, and services operated at the request of a State, a regional or local authority, or another person.

¹⁰ For example, an entity, such as a State agency or rail authority, may organize and finance the rail service; a primary contractor may oversee the day-to-day operation of the rail service; one subcontractor may operate the trains along the route; another subcontractor may maintain the train equipment; and another entity may own the track.

by funding a State-supported route on Amtrak's national system pursuant to PRIIA Sec. 209, and by procuring rolling stock for use only on that State-supported IPR route, State B will not be responsible for submitting an independent SSP plan for that route. Instead, for purposes of part 270, Amtrak will likely incorporate that State-supported route on its national system into an SSP plan. This understanding reflects current practical circumstances and how such services are organized. However, State B will be required by part 270 to participate in the development of the SSP, to the extent that State B's involvement (here, the procurement of the rail equipment) affects railroad safety. Thus, the entity preparing the SSP plan (here, Amtrak) must coordinate with State B on the equipment's safety to file a compliant SSP plan to include that State-supported route. In this way, FRA requires State B to be involved in the SSP plan in more ways than in the example of State A above. Specifically, the SSP plan requirement regarding equipment procurement is an area where State B must be involved. See § 270.103(o), *Contract procurement requirements*. For example, if State B performs an analysis for determining safety characteristics or features of equipment it is considering purchasing for use in its State-supported route, that role should be described in the passenger rail operation's SSP plan—even if that plan is submitted by the operator of the system (e.g., Amtrak for all current State-sponsored IPR services).¹² Similarly, § 270.103(f)(1)(i) outlines that the passenger rail operation's SSP plan must detail the roles and responsibilities of each position that has significant responsibility for implementing the SSP, including those held by employees and other persons utilizing or providing significant safety-related services as identified pursuant to § 270.103(d)(2). In this example, aspects of the SSP plan benefit from State participation and the identification of the State's role in the passenger rail operation. For purposes of part 270, however, only one entity involved in each passenger rail operation need bear the full responsibility for developing, submitting, and implementing an SSP plan for the passenger rail operation.

¹² For example, the role of the California Department of Transportation's (Caltrans) Rolling Stock Procurement Branch would be described in Amtrak's SSP covering that operation for equipment Caltrans procures. See <https://dot.ca.gov/programs/rail-and-mass-transportation/rolling-stock-procurement-branch>.

2. Commuter (or Other Short-Haul) Examples

In the context of commuter (or other short-haul) passenger rail operations, FRA similarly requires each operation to develop and submit a single SSP plan to FRA for review and approval. FRA's amendments to part 270 make clear that each commuter (or other short-haul) passenger rail operation must file an SSP plan that covers all components of that commuter (or other short-haul) operation. For example, for a commuter passenger rail operation, FRA expects the SSP plan will detail the operation to include any public authority that sponsors or organizes the service, describe the track ownership on the system, identify the contractor operator(s), and explain dispatching responsibilities. If a commuter operation has more than one contractor operator (for example, the operation has distinct operators on specific routes in the commuter system), FRA expects that passenger rail operation will establish and file a single SSP plan to address its entire rail system. The SSP plan could be prepared, filed, and implemented for the passenger rail operation by the commuter rail system's owners, a contractor operator, or some other entity involved in the rail system, provided the SSP plan meets the requirements in the rule and the passenger rail operation works with the relevant stakeholders that compose that commuter rail system to ensure the system is viewed holistically. Of course, FRA is available to assist all passenger rail operations regarding the requirements of part 270.

3. Summary of Amendments and Response to States' Comments

FRA is adding a definition in § 270.5, for "passenger rail operation" to clarify which entity will need an SSP plan. The definition retains the flexibility that entity has in preparing and implementing the plan. FRA is also amending other sections of part 270 to include the term "passenger rail operation." FRA is reframing these regulatory sections as a responsibility for each passenger rail operation to develop and submit an SSP plan to FRA. These amendments are intended to clarify that an SSP plan must be submitted for each passenger rail operation, and FRA does not expect each specific entity involved in a passenger rail service, whether a railroad or not, to establish, submit, and implement its own SSP plan. Rather, each passenger rail operation will have one SSP plan. FRA believes that for purposes of part 270, these changes effectively and practically implement

the rule: (1) Consistent with the statutory mandate; (2) considering the comments received; and (3) considering the regulatory landscape in which the SSP rule overlays and supplements a body of existing rail safety regulations and requires centralized analyses. To be consistent with this approach, FRA is changing "railroad" to "passenger rail operation," as appropriate, throughout part 270.

Additionally, FRA is finalizing proposed amendments to the rule that clarify that while all persons providing IPR or commuter (or other short-haul) rail passenger transportation share responsibility for ensuring compliance with the SSP final rule, the rule does not restrict a passenger rail operation's ability to provide for an appropriate designation of responsibility amongst the entities involved in the service. As discussed in the NPRM, any such designation must be described in the SSP plan, although a passenger rail operation may also notify FRA of a designation by submitting a notice of such designation before submitting the SSP plan. The section-by-section analysis discusses these proposed amendments in detail below. FRA believes these amendments clarify the ability to specify which entity will fulfill the responsibilities of this part for each passenger rail operation, so that work and effort is not duplicated. FRA will look to the designated entity when reviewing and approving a submitted SSP plan, auditing the implementation of that plan, and deciding whether to take action to enforce the SSP rule requirements.

B. How FRA's Approach Responds to the States' Concerns

As discussed above, FRA has modified its approach to address the concerns raised by the State commenters, and to clarify which entity will need an SSP plan. The comments received in response to the NPRM raised varying concerns, as described above, from FRA's statutory authority over State sponsors, to alleged substantial burdens of the rule, and logistical concerns about labor consultation requirements. FRA believes that the modified, practical approach this rule requires, stressing that there must be a single SSP plan for each passenger rail operation, addresses these concerns.

For example, the State Comments argued that State sponsors are not structured to handle the SSP process or they lack sufficient capacity to handle the requirements of the SSP process. Simply stated, FRA's approach to focus on the passenger rail operation allows for an entity that is equipped to manage

and implement such requirements to be responsible for the operation's SSP.

1. Statutory Authority Concerns

The State Comments asserted that FRA lacks authority to apply the SSP rule to State sponsors. As FRA noted in the NPRM, FRA disagrees that applying the SSP rule to State sponsors of IPR service goes beyond FRA's statutory authority. See 84 FR 27220–21. FRA has a long history of applying its safety regulations to State entities involved in passenger rail operations. See generally 49 CFR parts 213, 238 and 239. However, FRA's modified approach in this rule recognizes that each passenger rail operation must have a compliant SSP and SSP plan, but does not specifically require State sponsors to develop and implement SSPs or SSP plans. This SSP plan must describe each entity involved in that passenger rail operation, including State sponsors, and that passenger rail operation must ensure all entities involved in the rail service work together as a system. Overall, for purposes of part 270, FRA focuses on the passenger rail operation, and emphasizes that State sponsors of IPR service are only responsible to the extent and degree their roles and responsibilities are described in the operation's SSP plan. Because this modified approach does not hold a State sponsor responsible for specifically submitting an SSP plan or for being ultimately responsible under the regulation for the passenger rail operation the State sponsors, FRA does not find the States' statutory authority concerns to be implicated.

Although FRA's modified approach in this rule renders the State's statutory authority concerns moot, FRA notes that it does not concur with the States' comments concerning FRA's jurisdiction over States. The State Comments asserted that States are not "persons" under the definition of "person" in 1 U.S.C. 1. See generally SPRC at 5–6. Specifically, the State Comments argued that the definition of "person" in 1 U.S.C. 1, includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals," but does not specifically include the word "State." See *id.* The State Comments, by extension, contended that a State cannot be a "railroad carrier" under 49 U.S.C. 20102(3) or under the SSP rule, because those definitions refer to a "person providing railroad transportation."

While FRA acknowledges that "States" are not explicitly included in the general 1 U.S.C. 1 definition and the presumption that "persons" does not

include sovereigns, that presumption is not a "hard and fast rule of exclusion." *Vermont Agency of Natural Resources v. United States*, 529 U.S. 765, 780–82 (2000). FRA's general jurisdictional statute, 49 U.S.C. 20103, provides the Secretary of Transportation authority to "prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." This authority is generally delegated to FRA in 49 CFR 1.89.¹³ Additionally, the statutory scheme provides that the FRA Administrator shall carry out the duties and powers related to railroad safety vested in the Secretary by section 20134(c) and chapters 203 through 211 of this title, and by chapter 213 of this title for carrying out chapters 203 through 211. See 49 U.S.C. 103(g). The penalty provision for general violations relating to railroad safety provides that a "person may not fail to comply with section 20160 or with a regulation prescribed or order issued by the Secretary of Transportation under chapter 201 of this title." 49 U.S.C. 21301 (emphasis added). Additionally, other sections in the penalty provisions in 49 U.S.C. ch. 213 apply to a *person* violating other specific railroad safety requirements, such as those relating to violations of 49 U.S.C. ch. 203–209 (Safety Appliances, Signal Systems, Locomotives, Accidents and Incidents), and 211 (Hours of Service). See 49 U.S.C. 21302 and 21303.

The statutory mandate in 49 U.S.C. 20156(h) states that FRA (as delegated by the Secretary) "shall have the authority to assess civil penalties pursuant to chapter 213 for a violation of this section, including the failure to submit, certify, or comply with a safety risk reduction program, risk mitigation plan, technology implementation plan, or fatigue management plan."

The use of the term "person" in 49 U.S.C. ch. 213, and 49 U.S.C. 20156(h)'s reference to chapter 213 demonstrates that *persons* used in Subtitle V-Rail Programs, Part A-Safety, of the U.S. Code should include States or political subdivisions of States. To read the statutory scheme otherwise would seemingly mean FRA would not be permitted even to issue civil penalties against commuter rail authorities (often instrumentalities of a State or locality) for violations of Federal rail safety requirements because they would not be considered "persons" under 49 U.S.C. 21301. This result would be incongruous. Additionally, whether or not a State entity may be considered a railroad carrier under 49 U.S.C.

20102(3), FRA has authority over a person, including a State entity, whose actions, roles, or functions affect railroad safety. See 49 U.S.C. 20103. Under the modified approach to part 270 explained here, State sponsors of IPR service are not required to establish and implement an SSP as railroad carriers, but they do have responsibility to the extent they affect railroad safety, under FRA's general jurisdiction. See 49 U.S.C. 20103; 49 CFR part 270.

2. Burden

The State Comments echoed their previous arguments that the SSP rule would impose burdens on State sponsors without improving safety. As FRA noted in the NPRM, FRA disagrees and believes that it properly considered the costs and burdens of the rule on States that sponsor IPR service. See 84 FR 27219–20.

As explained above, all current State-sponsored IPR services could be considered part of Amtrak's SSP. This is because all State sponsors currently have agreements with Amtrak to provide IPR service on their State-supported routes. As such, the typical IPR service is an Amtrak-scheduled service using equipment Amtrak operates and maintains. In fact, for all State-sponsored IPR service FRA is aware of, Amtrak is the operator. FRA continues to attribute the costs of implementing the SSP rule for current State-sponsored IPR operations to Amtrak (consistent with FRA's past rulemaking practice),¹⁴ on the expectation that Amtrak will prepare either one national SSP plan to include State-sponsored routes of IPR service or, if more appropriate, potentially submit separate SSPs on behalf of unique services distinct from those common to Amtrak's national system. See 81 FR 53892, n. 14; 84 FR 27219. In the analysis for the SSP final rule, FRA captured any costs for future State-sponsored IPR service using operators other than Amtrak by estimating there would be one new startup IPR service or commuter rail operation in Years 2 and 3 of the analysis and one new startup every other year thereafter. See 81 FR 53852; 84 FR 27219.

Further, while the State Comments alleged substantial and undetermined burdens, FRA maintains that these burdens were either considered by FRA

¹⁴ See Passenger Equipment Safety Standards, final rule, 64 FR 25560, 25654 (May 12, 1999) ("The [regulatory] evaluation . . . takes into consideration that individual States will contract with Amtrak for the provision of rail service on their behalf. In this regard, for example, a State may utilize Amtrak's inspection forces trained under the rule, and thus not have to train inspection forces on its own.")

¹³ See also 49 U.S.C. 103.

in the regulatory impact analysis or are not mandated by the SSP final rule as revised. The State Comments restated previous arguments contending the rule would impose the following burdens:

(1) States do not employ qualified railroad personnel with the detailed technical knowledge to develop, implement, and oversee compliance with an SSP and would have to hire such individuals; (2) States would face considerable challenges in augmenting existing human resources before the responsibilities imposed by the rule could be fulfilled; (3) implementing the rule will likely require State sponsors to renegotiate their existing operating agreements with Amtrak and other contractors to ensure the exchanges of information the rule requires and to implement required consultation procedures; (4) States may have to discontinue IPR service due to the costs imposed by the rule, and if they discontinue service, FRA may require States to repay grants/loans; and (5) the rule's definition of "railroad" potentially opens the door to attempts to make States that sponsor IPR service responsible for other statutory obligations, including railway labor and retirement requirements. *See generally* 84 FR 27220; Joint Pet. at 4–9; SPRC at 9–14.

The rule does not require States to hire additional technical or human resources personnel. Further, FRA clarifies that the rule does not restrict the ability to designate an entity to fulfill the responsibilities under the rule. FRA discusses designation of SSP responsibility more fully in the section-by-section analysis below. Overall, FRA believes with the changes in the rule text, these alleged burdens will fall more appropriately on each applicable passenger rail operation, and not specifically on State sponsors who merely provide funding to have Amtrak (or another contractor operator) operate additional routes as part of its network. FRA expects that the costs to such State sponsors of cooperating with Amtrak to allow Amtrak to develop and implement an SSP on these State-supported routes will be nominal.

FRA further underscores that State entities involved in providing IPR service have always had to comply with FRA safety regulations to ensure railroad safety, and they have done so successfully.¹⁵ Because State entities have been complying with their responsibilities under these and other

statutorily-based rules,¹⁶ and given the clarified responsibility State sponsors have to cooperate with the passenger rail operation as it formulates and implements a compliant SSP, FRA does not believe that the SSP rule will somehow force States to terminate IPR service.

Regarding the States' claim that implementing the final rule will result in costs associated with renegotiating contracts, FRA notes that the rule itself does not require contract renegotiation. Rather, to the extent any such costs will be incurred, they will result from the States' own decisions on how the IPR service should be provided, and not a requirement of the rule.

Finally, FRA disagrees with the States that being subject to the SSP rule will open them up to application of other statutes. To the extent another agency might argue that labor, tax, or other statutes apply to the States based on the application of this rule, the challenge would be to that agency's statute, not the SSP rule. Further, FRA was mandated by the RSIA to issue an SSP rule that specifically applies to providers of IPR service.¹⁷ There is no basis for disregarding a statutory mandate because another agency might use it to apply an unrelated statute. Further, the amendments in this rule addressing the part 270 requirements to each passenger rail operation, rather than to each railroad, as applicable, emphasizes that each operation must have a compliant SSP, and does not tag a State with any specific responsibility. States and, more precisely, the State entities through which they act, are "persons" subject to part 270 to the extent they affect railroad safety, but FRA need not categorize such State entities (*e.g.*, transportation departments, rail authorities) with a term of art (*e.g.*, railroad carrier) in this context. Therefore, the simple obligation to cooperate to ensure a comprehensive SSP is developed and submitted for that passenger rail operation (typically by the operator of that service) does not suggest State entities will become subject to other statutes.

3. Consultation Concerns

Finally, FRA recognizes the State Comments alleged the rule's requirements to consult with IPR

operators' employees would interfere with State-IPR operator contracts. As discussed above, in formulating this final rule, FRA took a practical approach to address the varying concerns commenters raised. FRA believes this approach is an appropriate way to implement the statutory mandate and is structured to impose the requirements on each passenger rail operation without interfering with the various stakeholders' current ways of doing business. The rule focuses the responsibility on those that have the capacity to plan and implement an SSP. The rule does not directly impose requirements on State sponsors, unless those sponsors choose to adopt that responsibility. Because State sponsors are not specifically responsible for filing the plan for a passenger rail operation, FRA finds the respective consultation concerns are rendered moot. The rule does not require employees of States sponsoring IPR service to consult with a contractor operator's employees. FRA's economic analysis calculated costs and benefits in this way, and, although the requirements are now clarified in the rule text, FRA does not believe there is any meaningful change in cost or benefit calculations from those of the 2016 final rule.

C. Other Topics

FRA is addressing the comments received on other topics within the section-by-section analysis below. However, as a general matter, FRA received no adverse comments on the consultation notification amendments and, given the supporting comments received, is adopting the changes essentially as proposed. Similarly, FRA is adopting the changes in the information protections section generally as proposed, given the support for including C³RS in the rule's protections.

Several commenters who supported extending this rule's information protections to the C³RS program also urged FRA to further extend the application of the information protections. For context, the information protections generally apply to certain information a railroad compiles or collects after August 14, 2017, solely for SSP purposes. *See* 49 CFR 270.105(a). The rule also specifies certain categories of information that are not protected, including information a railroad compiled or collected on or before August 14, 2017, and that the railroad continues to compile and collect, even if the railroad uses that for its SSP. *See*

¹⁵ *See* 63 FR 24630 (May 4, 1998) and 64 FR 25560 (May 12, 1999).

¹⁶ FRA's Passenger Train Emergency Preparedness regulations are generally satisfied by having Amtrak prepare and implement the required emergency preparedness plans for the State-supported routes. FRA does not require the States to duplicate the efforts of the entities that prepare and implement SSP plans for each passenger rail operation.

¹⁷ *See* 49 U.S.C. 20156(a)(1)(A); 49 CFR 1.89(b).

49 CFR 270.105(b)(2).¹⁸ This final rule amends the protections to clarify that they apply to information a passenger rail operation compiles or collects as part of a C³RS program included in its SSP, even if the information was compiled or collected on or before August 14, 2017, for non-SSP purposes.

Two of the comments urging further expansion of the information protections were closely related to FRA's C³RS proposal. Specifically, APTA suggested FRA expand the information protections to cover any Federal program, such as the RISE pilot program or the former CSA program, and AAR suggested FRA expand the protections to a railroad's in-house confidential close call reporting program. FRA understands APTA and AAR are asking FRA to extend the information protections to all information a railroad compiles or collects as part of these programs, even if the information was compiled or collected on or before August 14, 2017, for non-SSP purposes. FRA notes that if a railroad compiles or collects information as part of a voluntary Federal data program that has solely system safety purposes, such as RISE, or a railroad reporting program that has solely system safety purposes, the compilation or collection remains solely for SSP purposes, and that information is eligible for protection under § 270.105.

The remaining comments urging expansion of the rule's information protections related not specifically to the C³RS proposal, but to the nature of the information protections generally. Specifically, APTA suggested FRA extend the protections to FOIA/FOIL requests; Amtrak suggested the protections should extend to any information resulting from SSP plan processes before the effective date of the rule's information protection provisions (*i.e.*, August 14, 2017) and should include information developed relating to State sponsored routes, including circumstances where State entities may be subject to disclosure requirements; and MBTA suggested FRA expand the protections to FOIA requests.¹⁹

For the reasons discussed below, FRA declines to adopt any of the above suggestions.

As an initial matter, FRA notes that expanding the information protections to FOIA requests, as requested by APTA and MBTA, is unnecessary because 49 U.S.C. 20118 already exempts certain railroad safety risk reduction records the Secretary obtains from mandatory disclosure under FOIA. FRA has discussed this FOIA exemption in both the SSP and RRP final rules. *See* 81 FR 53855 and 53878 (Aug. 12, 2016); 85 FR 9262–63, 9266–67, 9268, and 9270 (Feb. 18, 2020).

FRA declines to apply the information protections to all information a railroad compiles or collects under other FRA programs, as requested by APTA, because no other ongoing program presents the same challenge as C³RS. As the NPRM explained, the information protection date of August 14, 2017, presented several problems in determining how the information protections would apply to C³RS programs. *See* 84 FR 27222–23 (June 12, 2019). Without the clarification that all C³RS information would be protected when part of an SSP, even if the information was compiled or collected on or before August 14, 2017, for non-SSP purposes, C³RS would have found itself in the unworkable situation where some C³RS information was protected and some not, based solely on when a participating railroad joined C³RS. *Id.* FRA is unaware of a similar situation with any other FRA program. For example, CSA was an FRA pilot project of limited duration, and RISE is an FRA program currently under development. All CSA participation and information therefore came before August 14, 2017, while all RISE participation and information will come afterwards. As a result, all CSA and RISE participants and information will effectively be treated the same when it comes to the information protections. As for other FRA programs that may engage in risk analysis activities, FRA also participates in Switching Operations Fatality Analysis (SOFA) Working Group and the Fatality Analysis of Maintenance-of-Way Employees and Signalmen (FAMES) Committee.²⁰ Both SOFA and FAMES are programs established well before the date of the rule's information protections and have reached a point where membership and participation

are stable and fairly representative of the railroad industry at large.²¹ Although SOFA and FAMES are active programs currently generating data, unlike with C³RS, FRA does not anticipate significant future growth. As such, neither SOFA nor FAMES is likely to present a situation where some participants receive protection because they joined after August 14, 2017, solely as part of an SSP, while participants who joined on or before August 14, 2017, do not. As an examination of these programs illustrates, FRA concludes it does not need to amend the information protections to cover all information a passenger rail operation compiles or collects under any Federal program, even if the information was compiled or collected on or before August 14, 2017, for non-SSP purposes.

Regarding railroads' own confidential close call protection programs, FRA declines to expand the protections to all information generated by such programs because they are not a single Federal program sponsored by FRA. While some railroads may have established their own reporting programs on or before August 14, 2017, for non-SSP purposes, FRA lacks the direct knowledge necessary to determine that the protections should be expanded to cover these programs. If a railroad's own program was begun after August 14, 2017, and fits entirely within the umbrella of the railroad's SSP or RRP, the existing data protections would apply. FRA therefore concludes that it would be inappropriate to amend the information protections to cover all information a railroad compiles or collects as part of its own confidential close call reporting program, even if that information was compiled or collected on or before August 14, 2017, for non-SSP purposes.

Finally, FRA declines to address the remaining comments from APTA and Amtrak that relate to the nature of the information protections generally, as FRA did not intend for this rulemaking to reopen a substantive discussion of the protections beyond the limited issue of C³RS. FRA presented the information protections for public notice and comment in both the SSP and RRP rulemaking processes and held public hearings on both rulemakings. Numerous parties commented on the proposed protections, and FRA

¹⁸ For a more detailed discussion on how the information protections and their exceptions apply, please see the SSP NPRM and final rule. *See* 77 FR 55373, 55378–79, 55390–92, and 55406 (Sept. 7, 2012); 81 FR 53851, 53855–56, 53858–60, 53878–82, and 53900 (Aug. 12, 2016).

¹⁹ FRA assumes that APTA intended "FOIL" (*i.e.*, "Freedom of Information Law") to refer to State freedom of information laws generally.

²⁰ The SOFA Working Group looks for commonalities among fatalities that occur during switching operations and develops findings and recommendations that will aid in preventing railroad employee deaths. *See* <https://www.fra.dot.gov/SOFA>. FAMES focuses on identifying risks, trends, and factors impacting roadway worker safety. *See* Introduction to the FAMES Committee, May 21, 2012, p. 1, available at <https://www.fra.dot.gov/eLib/Details/L01182>.

²¹ SOFA began in 1998 and FAMES began in 2009. SOFA includes representatives from AAR, ASLRRRA, BLET, FRA, and SMART-TD. FAMES includes participants and affiliates from AAR, Amtrak, APTA, ASLRRRA, BMWED, BNSF Railway, BRS, CSX Transportation, Farmrail System, Inc., FRA, Norfolk Southern Railway, and Union Pacific Railroad.

responded to these comments in the SSP and RRP final rules and in the June 2019 NPRM, proposed extending the information protections to FRA-sponsored C³RS programs included in a passenger rail operation's SSP. As such, there has already been extensive substantive discussion of the information protections. FRA therefore believes that amending the information protections in a manner unrelated to the C³RS program as proposed in this proceeding would not be consistent with the rulemaking process through which the protections have already gone, especially when FRA did not invite public comment on the protections in general.

FRA is addressing the comments received on submission time in the section-by-section, as applicable.

Finally, the purpose of this rulemaking was to specifically address the petitions for reconsideration on the 2016 SSP final rule and to make other necessary clarifying adjustments. FRA was not required to address AAR's supplemental comment²² on the RRP NPRM in either the NPRM or in this final rule. AAR has raised this point directly to FRA in the context of larger discussions on regulatory reform, and any change to the SSP rule arising from those discussions would follow in a separate rulemaking.

D. Conforming Amendments to the RRP Final Rule

The SSP rule implements the RSIA mandate for railroad safety risk reduction programs for passenger railroads. On February 18, 2020, FRA published a separate RRP final rule addressing the mandate for certain freight railroads. *See* 85 FR 9262 (Feb. 18, 2020). Throughout both the SSP and RRP rulemaking proceedings, FRA has consistently stated both an SSP and RRP final rule would contain consultation and information protection provisions that were essentially identical. *See* 81 FR 53855 (Aug. 12, 2016); 80 FR 10955 (Feb. 27, 2015); 85 FR 9262, 9266–68, 9274–75, 9279, and 9300–01 (Feb. 18, 2020). The NPRM in this proceeding stated that FRA may use this final rule to make conforming changes to the consultation and information protection provisions of an RRP final rule. As discussed further in the section-by-section analysis, FRA is therefore amending the RRP rule (49 CFR part 271) as needed to make its consultation and information protection provisions

consistent with the corresponding SSP provisions (as amended by this final rule).

IV. Section-by-Section Analysis

In response to petitions for reconsideration and comments received on the NPRM, FRA is making various clarifying amendments to part 270—System Safety Program. FRA is also clarifying that the SSP rule's information protections apply to C³RS programs included in an SSP and extending certain compliance dates to account for the stay of the rule. FRA is also making conforming changes to 49 CFR part 271, Risk Reduction Program. Specific changes are noted for each section below.

Part 270—System Safety Program

Section 270.1—Purpose and scope

This section contains a formal statement of the rule's purpose and scope. FRA is amending paragraphs (a) and (b) to replace the word “railroads” with “passenger rail operations” to conform with FRA's approach, discussed above. In this manner, FRA makes clear that each passenger rail operation is required to improve railroad safety through structured, proactive processes and procedures in a system safety program.

Section 270.3—Application

This section sets forth the applicability of the rule. FRA is amending paragraphs (a)(1) and (2) to replace the word “railroads” with “passenger rail operations” to conform with the approach discussed above. Specifically, paragraph (a)(1) is revised to read that this part applies to “passenger rail operations that operate intercity or commuter passenger train service on the general railroad system of transportation.” Further, to maintain consistency and parallelism with the language in (a)(1), FRA is amending paragraph (a)(2) to refer to “passenger rail operations that operate commuter or other short-haul rail passenger train service” rather than “railroads that provide” such service.

Section 270.5—Definitions

This section contains a set of definitions that clarify the meaning of important terms as they are used in the rule.

As proposed, FRA is amending the definitions section of part 270 to add a definition for “Confidential Close Call Reporting System (C³RS),” which means an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report

unsafe events that are either currently not required to be reported or are underreported. This definition closely parallels the description of C³RS on FRA's website. *See* <https://www.fra.dot.gov/c3rs>.

Additionally, as part of the changes made throughout the rule to phrase the rule's requirements as those belonging to each passenger rail operation, FRA is adding a definition for “Passenger rail operation,” which means an intercity, commuter, or other short-haul passenger rail service. The term passenger rail operation generally refers to the service itself, and is not limited to the nature of the railroad company that conducts the operation. In other words, the “passenger rail operation” is not referring to just the “operator” or entity that employs the crews operating the train service. *See also* 64 FR 25576 (May 12, 1999). By “operation,” FRA means the specific physical service. The “passenger rail operation” encapsulates all the pieces of the service (including, but not limited to, the right-of-way, track, equipment, crews, railroad employees), and is not limited to a specific route. In the commuter context, an example of a “passenger rail operation” is the Northeast Illinois Regional Commuter Railroad Corp. (Metra Rail) service, encompassing Metra Rail's various routes, contractor operators, and host railroads. At the same time, the “passenger rail operation” for all current State-sponsored IPR services could be considered part of Amtrak's network (including the Northeast Corridor, Amtrak's Long Distance routes, and State-supported routes). FRA recognizes multiple entities are often involved in a passenger rail operation, including contractors, but FRA believes it is nonetheless clearer to describe responsibilities with respect to the passenger rail operation as a whole, for purposes of implementing the regulation.

FRA is amending the definition of “Person” to remove the general reference to “1 U.S.C. 1,” and replace it with a more applicable and FRA-specific statutory provision, “49 U.S.C. 21301.” FRA is making this clarifying change to refer to FRA's general civil penalty authority in 49 U.S.C. 21301 to better align with FRA's safety jurisdiction. *See also* 49 U.S.C. 20103, 20156(h).

FRA is making small adjustments to the definitions of “Fully implemented,” “Hazard,” and “System safety program plan,” to conform to the “passenger rail operation” framework edits described above. For example, the word “railroad” in the definition of “Fully

²² AAR filed its supplemental comment on the RRP NPRM on October 31, 2018. The comment period for the RRP NPRM closed on October 21, 2015.

implemented” is replaced with “passenger rail operation.” The words “the railroad’s” are replaced with the word “a” in the definition of “Hazard.” Similarly, the definition of “System safety program plan” is amended to mean “a document developed by the passenger rail operation that implements and supports the system safety program,” rather than “a document developed by the railroad that implements and supports the railroad’s system safety program.” These changes are intended to clarify that each passenger rail operation have an SSP under the regulation, without focusing specifically on any one entity involved in the operation.

Section 270.7—Penalties and Responsibility for Compliance

This section contains provisions relating to compliance with part 270 and penalties for violations of part 270.

DOT has issued a final rule, in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990 (FCPIAA), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (2015 Act),²³ that provides the 2019 inflation adjustment to civil penalty amounts that may be imposed for violations of certain DOT regulations. See 84 FR 37059 (July 31, 2019). To avoid the need to update this section every time the civil penalty amounts are adjusted for inflation, FRA has changed § 270.7(a) by replacing references to specific penalty amounts with general references to the minimum civil monetary penalty, ordinary maximum civil monetary penalty, and aggravated maximum civil monetary penalty. FRA has also added language to this section referring readers to 49 CFR part 209, appendix A, where FRA will continue to specify statutorily provided civil penalty amounts updated for inflation. These updates are also consistent with the RRP final rule.

As discussed above, to effectuate the framework change, FRA modified paragraph (b) to add the phrase “or passenger rail operation” after the words “duty of a railroad” and after the words “whether or not a railroad” when describing the duties of this part. Paragraph (b) now reads “[a]lthough the requirements of this part are stated in terms of the duty of a railroad or passenger rail operation, when any person, including a contractor or subcontractor to a railroad, performs

any function covered by this part, that person (whether or not a railroad or passenger rail operation) shall perform that function in accordance with this part.” § 270.7(b) (emphasis added).

For reasons discussed in the NPRM and as discussed above, FRA is adding a new paragraph (c)(1) to this section to clarify that even though all persons providing IPR or commuter (or other short-haul) rail passenger transportation share responsibility for ensuring compliance with this part, the rule does not restrict the ability for a passenger rail operation to designate a person as responsible for compliance with this part.

However, FRA is not adopting the sentence in (c)(1) proposed in the NPRM that would have stated that a designator (designating entity) was not relieved of responsibility for compliance with this part. As the State Comments explained, this statement rendered the proposed designation provision of little comfort. As discussed in the NPRM, FRA’s policy is to look to a designated entity as the person with responsibility for compliance with the SSP final rule. In this final rule, FRA emphasizes that it is still FRA’s policy to hold a designated entity responsible for compliance with this part. Of course, FRA’s overall approval of an SSP plan takes into account any designation of responsibility and, as a result, failure to fulfill those compliance responsibilities could lead FRA to reopen consideration of the plan under § 270.201(d).

In paragraph (c)(2)(i), a passenger rail operation may designate a person as responsible for compliance with part 270 by including a designation of responsibility in the SSP plan. This designation must be included in the SSP plan’s statement describing the passenger rail operation’s management and organizational structure and include the information specified by § 270.103(e)(6), the details of which are discussed below in the section-by-section analysis for that section. Any rescission or modification of a designation must be made in accordance with the requirements for amending SSP plans in § 270.201(c).

FRA notes that the use of “may” in paragraph (c)(2) was intentional, as this section does not require a passenger rail operation to designate a person as responsible for compliance—any person can comply with the SSP requirements on its own behalf. However, if a passenger rail operation intends to designate a person as responsible for compliance, the SSP plan must describe the passenger rail operation’s management and organizational structure, including management

responsibilities within the SSP and the distribution of safety responsibilities within the organization, in addition to the requirements of §§ 270.7(c)(2) and 270.103(e)(6).

Nonetheless, FRA further notes that in approving SSP plans, FRA will consider how a designation of responsibility for SSP compliance is consistent with the holistic, system-wide nature of safety management systems. FRA believes that the systemic nature of SSP requires a single entity to have overall responsibility for the entire SSP, to ensure that the SSP is properly implemented throughout the passenger rail operation’s entire system by the potentially various entities responsible for separate aspects of the system’s safety. FRA therefore expects that a designation will identify only a single entity with overall responsibility for SSP compliance, as opposed to designating SSP responsibility piecemeal to multiple entities.

Including a designation provision in an SSP plan will not, however, relieve the passenger rail operation of responsibility for ensuring that host railroads and other persons that provide or utilize significant safety-related services appropriately support and participate in an SSP, as required under § 270.103(e)(5). Designating a single person as responsible for SSP compliance will not mean that no other entity participates in the SSP. Rather, it means that the designated person has the primary responsibility for ensuring overall SSP compliance, which can include ensuring the participation of other persons as appropriate.

FRA acknowledges that some passenger rail operations may wish to make a designation of responsibility for SSP compliance clear before submitting an SSP plan to FRA, particularly if the designation would involve responsibility for consulting with directly affected employees on the contents of an SSP plan. Paragraph (c)(2)(ii) therefore states that a passenger rail operation may notify FRA of a designation of responsibility before submitting an SSP plan by submitting a designation notice to the Associate Administrator for Railroad Safety and Chief Safety Officer. The notice must include all information required under § 270.103(e)(6), although this information must still be included in the SSP plan. If a passenger rail operation does submit a designation notice under this proposed provision, FRA will encourage the passenger rail operation²⁴ to share the notice with

²³ The FCPIAA and the 2015 Act require Federal agencies to adjust minimum and maximum civil penalty amounts for inflation to preserve their deterrent impact. See 84 FR 37059, 37060 (July 31, 2019).

²⁴ The entity designated by the designation notice (the designee) will be the entity representing the

directly affected employees before and during the consultation process. Although FRA specifically requested public comment on whether such a deadline for this notification would be necessary, FRA received no comments on this issue.

Accordingly, FRA is finalizing a designation provision as proposed in the NPRM, with the modifications discussed above. This provision explicitly allows each passenger rail operation to determine what entity has responsibility for compliance and submission of the required SSP plan. FRA will not select for each passenger rail operation what entity will submit the SSP plan. As described above, any designation must be detailed in the SSP plan itself. *See also* § 270.103(e).

Section 270.101—System Safety Program; General

This section sets forth the general requirements of the rule. Each passenger rail operation subject to this part is required to establish and fully implement an SSP that systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities.

As discussed above, FRA is amending § 270.101 to be consistent with changes throughout part 270 that phrase the rule's requirements in terms of a "passenger rail operation" instead of a "railroad." Specifically, FRA is amending paragraph (a) to state "each passenger rail operation subject to this part . . ." rather than "each railroad subject to this part." § 270.101(a) (emphasis added). FRA is also reformulating paragraph (b) to state "a system safety program shall be designed so that it promotes and supports a positive railroad safety culture." These changes are for clarity and are not intended to alter the substantive effect of the rule.

Section 270.103—System Safety Program Plan

This section requires a passenger rail operation to adopt and fully implement an SSP through a written SSP plan containing the information required in this section.

As discussed above, FRA is amending § 270.103 to be consistent with changes throughout part 270 by replacing the requirement in certain places for the "railroad" to be for the "passenger rail operation." For example, in paragraph

passenger rail operation and therefore responsible for sharing the notice with its directly affected employees.

(a), FRA is modifying the language in paragraphs (a)(1) and (2) from "each railroad subject to this part. . ." to "each passenger rail operation subject to this part." In paragraph (b), "each railroad shall set forth in its SSP plan a policy statement that endorses the railroad's [SSP]. . ." becomes "each SSP plan shall contain a policy statement that endorses the passenger rail operation's [SSP]. . ." Similar changes are made throughout § 270.103.

In some places, such as in paragraph (d), FRA re-framed the regulatory language to be applicable to the "rail system" as opposed to the "railroad." Additionally, throughout the part, FRA adjusted references to "a SSP" to "an SSP," to conform with grammar conventions.

Paragraph (e) specifically states an SSP plan must include a statement describing the system's management and organizational structure, and paragraphs (e)(1) through (5) specify information this statement must contain. FRA is amending this section to add a new paragraph (e)(6), which contains the requirements for a designation included in an SSP plan and any designation submitted under § 270.7(c)(2). Under paragraph (e)(6), a designation must include the name and contact information for the designator (designating entity) and the designated entity; a statement signed by an authorized representative of the designated entity acknowledging responsibility for compliance with part 270; a statement affirming a copy of the designation has been provided to the primary contact for each non-profit employee labor organization representing directly affected employees for consultation purposes under § 270.107(a)(2); and a description of how the directly affected employees not represented by a non-profit employee labor organization will be notified of the designation for consultation purposes under § 270.107(a). The central purpose of this amendment is to ensure there is a specific entity identified as the responsible party for submitting an SSP plan for each passenger rail operation. FRA is also making minor formatting amendments to paragraphs (e)(4) and (5) to account for the additional paragraph (e)(6).

FRA is also modifying the introductory language in paragraph (h) regarding rules compliance and procedures review from "the railroad's" rules and procedures to "applicable" rules and procedures. FRA recognized the possibility that a passenger rail operation may have to comply with another railroad's rules and procedures. Similarly, FRA changed "the railroad's"

to "applicable" operating and safety rules and maintenance procedures in paragraphs (h)(2) and (3). FRA believes the existing language in § 270.103(h) was too specific to account for this scenario.

Other clarifying changes to reflect that the rule's requirements are applicable to each passenger rail operation were made throughout the section.

Section 270.105—Discovery and Admission as Evidence of Certain Information

This section sets forth the discoverability and admissibility protections for certain SSP information. The SSP final rule preamble discussed these protections in depth. *See* 81 FR 53878–53882 (Aug. 12, 2016). For reasons discussed in the NPRM and after considering the comments received, FRA is adding paragraph (a)(3) to this section to clarify that for court proceedings initiated after 365 days following publication of this final rule, the protections established by this section apply to C³RS information a passenger rail operation includes in its SSP, even if the passenger rail operation compiled or collected the C³RS information on or before August 14, 2017, for non-SSP purposes. FRA is also adding language to the introductory text of paragraph (a) to indicate the information protections apply except as provided in paragraph (a)(3).

FRA is making minor formatting amendments to paragraphs (a)(1) and (2) to account for the additional paragraph (a)(3).

FRA is making conforming edits in paragraphs (a) and (b) to refer to the "passenger rail operation" rather than the "railroad," to be consistent with the framework and clarifying changes to the rule discussed above.

Finally, FRA is adding new paragraph (e) to clarify that § 270.105 does not protect information during civil enforcement or criminal law enforcement proceedings. For example, § 270.105 will not apply to a civil enforcement or criminal action brought to enforce Federal railroad safety laws, or proceedings such as a civil enforcement action brought by the Department of Justice under the Clean Water Act to address a discharge of pollutants into waters of the United States following a rail accident. Because paragraph (a) of this section plainly states that the information protections apply to a "Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage," FRA believes a court would not find that the protections apply to a civil enforcement or criminal

law enforcement case. Nevertheless, to help ensure no attempt is made to rely on the rule's information protections in a civil enforcement or criminal law enforcement proceeding, paragraph (e) explicitly states that § 270.105 does not apply to civil enforcement or criminal enforcement actions. This change is consistent with language in the RRP final rule (*see* 49 CFR 271.11).

Section 270.107—Consultation Requirements

This section requires a passenger rail operation subject to part 270 to consult with its directly affected employees on the contents of its SSP plan. *See* 49 U.S.C. 20156(g)(1). The SSP final rule preamble discussed the requirements of this section in depth. *See* 81 FR 53882–53887 (Aug. 12, 2016). As discussed in the NPRM, FRA is making several amendments to this section, including incorporating language proposed in the Labor Petitions, as modified and clarified by FRA. To account for the stay of the SSP final rule, FRA is also extending the compliance date for holding the preliminary meeting with directly affected employees. Additionally, as discussed above, FRA is amending this section to be consistent with changes throughout part 270 by replacing certain references to “railroad” with references to “passenger rail operation.”

Paragraph (a)—General Duty

Paragraph (a)(2) of this section states that a passenger rail operation that consults with a non-profit employee labor organization is considered to have consulted with the directly affected employees represented by that organization. If a passenger rail operation contracts out significant portions of its operations, the contractor and the contractor's employees performing those operations are considered directly affected employees for part 270 purposes.²⁵

For reasons discussed in the NPRM and as discussed above, FRA is amending paragraph (a)(2) to add that

²⁵ As discussed in the section-by-section analysis for the new definition of “passenger rail operation,” FRA recognizes that a single passenger rail operation is often composed of multiple entities, including contractors. FRA believes it is nonetheless clearer, when describing the rule's requirements, to refer to the responsibilities of the “passenger rail operation” as a whole. In the context of the consultation requirement, this means that FRA does expect the entities involved in the passenger rail operation to be responsible for meeting the consultation requirement applicable to the operation. For example, when an entity enters into a contract on behalf of a passenger rail operation, that entity would be responsible for consulting with contractors or contractor employees to the extent required by paragraph (a)(2).

unless agreed otherwise, for consultation purposes, the primary point of contact for directly affected employees represented by a non-profit employee labor organization is the general chairperson for that non-profit employee labor organization. Alternatively, at the beginning of the consultation process, a non-profit employee labor organization and a passenger rail operation may agree upon a different point of contact. While the Labor Petition requested FRA amend paragraph (a)(3) to establish the general chairperson of a non-profit employee labor organization as a passenger rail operation's primary point of contact, FRA believes such a provision belongs more appropriately in paragraph (a)(2), which contains requirements addressing the consultation process generally. Paragraph (a)(3), in contrast, only addresses the preliminary meeting portion of the consultation process. By amending paragraph (a)(2) instead of paragraph (a)(3), FRA is clarifying that a general chairperson is the primary contact for the entire consultation process, not just the preliminary meeting. FRA specifically requested public comment on whether amending paragraph (a)(2) instead of paragraph (a)(3) would adequately address the Labor Petition's concerns. FRA received no comments on this issue.

Existing paragraph (a)(3) requires a passenger rail operation to have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed no later than April 10, 2017. To account for the stay of the SSP final rule, as discussed in the NPRM, FRA is amending paragraph (a)(3)(i) to extend the deadline for the preliminary meeting from April 10, 2017, to 120 days after the publication date of this final rule.

Paragraph (b)(3)—Consultation Statements

Paragraph (b)(3) requires a passenger rail operation consultation statement to include a service list containing the name and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the passenger rail operation's directly affected employees.²⁶ When a passenger rail operation submits its SSP plan and consultation statement, it must simultaneously send a copy of both to

²⁶ Paragraph (b)(3) also requires the service list to contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization.

all individuals identified in the service list.

FRA is amending paragraph (b)(3) to add that the service list must also include the name and contact information for either each general chairperson of any non-profit employee labor organization representing a class or craft of the passenger rail operation's directly affected employees or the agreed-upon point of contact that the non-profit employee labor organization and the passenger rail operation agreed upon at the beginning of the consultation process.

Section 270.201—Filing and Approval

This section contains the requirements for filing an SSP plan and FRA's approval process. As discussed in the NPRM, FRA is amending paragraph (a)(1) to account for the stay of the requirements of the SSP final rule. Because FRA extended the date of the preliminary meeting under § 270.107(a)(3), it is also necessary to extend the time for a passenger rail operation to submit its SSP plan to FRA. FRA proposed providing one year after the publication date of this rule to submit SSP plans to FRA for review and approval.

FRA specifically requested public comment on whether an entire year following the publication of a final rule would be necessary for submission of SSP plans to FRA, or whether a shorter deadline, such as six months, would provide sufficient time. As mentioned above, MBTA commented that it supported FRA's proposal to allow a full year to submit SSP plans to FRA (and indicated a shorter time frame would be insufficient). APTA commented that FRA should instead provide two years from the date of the final rule, to be similar to the time frame FTA provided in implementing the SMS program. Amtrak generally commented that FRA should implement the rule immediately. Given these comments, FRA is providing each passenger rail operation with a one-year period after the publication date of this rule, as proposed, to submit SSP plans to FRA for review and approval.

Additionally, as discussed above, FRA is amending § 270.201 to be consistent with changes throughout the part by replacing the requirement for the “railroad” to be framed as a responsibility of the “passenger rail operation.” For example, in paragraph (a)(1), each “passenger rail operation” to which this part applies shall submit one copy of its SSP plan, rather than each “railroad.” As noted above, FRA expects that in most instances, the entity conducting the railroad operation will

submit the passenger rail operation's SSP plan.

Section 270.203—Retention of System Safety Program Plan

This section contains the requirements for retaining an SSP plan. As discussed above, FRA is amending § 270.203 be consistent with changes throughout part 270 by replacing the requirement for “each railroad” to retain a copy of the SSP plan, with a requirement that “each passenger rail operation” retain a copy of the SSP plan.

Section 270.301—General

This section describes the general requirement for each SSP to be assessed internally and audited externally by FRA. As discussed above, FRA is amending § 270.301 to be consistent with changes throughout the part by clarifying the responsibility for the SSP's internal assessment lies with “the passenger rail operation.”

Section 270.303—Internal System Safety Program Assessment

This section describes the requirements for each SSP to be assessed internally. As discussed above, FRA is amending § 270.303 be consistent with changes throughout part 270 by replacing references to “the railroad” with “the passenger rail operation.”

Section 270.305—External Safety Audit

This section describes the process FRA will use when it conducts audits of a passenger rail operation's SSP. As discussed above, FRA is amending § 270.305 to be consistent with changes throughout the part by clarifying the responsibility falls on “the passenger rail operation.”

Appendix A to Part 270 [Reserved]

FRA has removed its civil penalty guidelines from the CFR to the FRA website. See 84 FR 23730 (May 23, 2019). FRA intends to change the wording in the guidelines on the website to be consistent with the changes made in this rule. For example, FRA intends to revise the existing reference to the failure to hold the preliminary meeting by April 10, 2017, as that date has passed, and is being adjusted in this final rule.

Appendix B to Part 270—Federal Railroad Administration Guidance on the SSP Consultation Process

Appendix B contains guidance on how each passenger rail operation could comply with the consultation requirements of § 270.107. FRA is

amending appendix B as proposed to reflect the amended compliance dates in §§ 270.107(a)(3)(i) and 270.201(a)(1). FRA also made changes throughout appendix B to clarify, as discussed above, by removing the modifier “railroad's” from “railroad's SSP plan,” and, where appropriate, changing references from “railroad” to “passenger rail operation.”

Additionally, FRA removed a sentence from the guidance about the passenger rail operation waiting to hold substantive consultations regarding the contents of its SSP to take advantage of the information protection provisions once they go into effect, because for purposes of 49 U.S.C. 20119(b), the information protection provisions were adopted on August 12, 2016. That adoption was unaffected by the subsequent stays, so the rule's information protections are applicable to information a passenger rail operation compiles or collects after August 14, 2017.

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

Appendix C provides passenger rail operations and directly affected employees the option to file SSP plans or consultation statements electronically. FRA is amending appendix C to be consistent with the changes throughout the part. For example, FRA is removing references to “railroad's” from phrases like “railroad's SSP plan.” Additionally, certain references to “railroad” were changed to “passenger rail operation,” where appropriate, to be consistent with other edits made in this part.

Part 271—Risk Reduction Program

As discussed in Section III.D of the preamble, FRA is making conforming changes to part 271 to mirror those in part 270.

Section 271.5—Definitions

For reasons discussed in Section III.D of the preamble and in the section-by-section analysis for § 270.5, FRA is amending § 271.5 by adding a definition for “Confidential Close Call Reporting System (C³RS).” FRA is also revising the definition of “Person” to remove the general reference to “1 U.S.C. 1” and replace it with a more applicable and FRA-specific provision, “49 U.S.C. 21301.”

Section 271.11—Information Protections

As discussed in Sections III.C and III.D of the preamble, FRA is adding paragraph (a)(3) to § 271.11 to clarify

that for court proceedings initiated after 365 days following publication of this final rule, the information protections established by this section apply to C³RS information a railroad includes in its RRP, even if the railroad compiled or collected the C³RS information on or before February 17, 2021, for non-RRP purposes. FRA is also adding language to the introductory text of paragraph (a) to indicate the information protections apply except as provided in paragraph (a)(3).

FRA is also making minor formatting amendments to paragraphs (a)(1) and (2) to account for the additional paragraph (a)(3).

Section 271.207—Consultation

For reasons discussed in Section III.D of the preamble and the section-by-section analysis for § 270.107, FRA is amending paragraph (a)(2) of § 271.207 to add that, unless agreed otherwise, for consultation purposes, the primary point of contact for directly affected employees represented by a non-profit employee labor organization is the general chairperson for that non-profit employee labor organization. Alternatively, at the beginning of the consultation process, a non-profit employee labor organization and a railroad may agree upon a different point of contact. Similarly, FRA is also amending paragraph (d)(3) to add that a service list must also include the name and contact information for either each general chairperson of any non-profit employee labor organization representing a class or craft of a railroad's directly affected employees or the agreed-upon point of contact that the non-profit employee labor organization and the railroad agreed upon at the beginning of the consultation process.

V. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This final rule is a non-significant rulemaking and evaluated in accordance with existing policies and procedures under Executive Order 12866 and DOT Order 2100.6. See 58 FR 51735, Sep. 30, 1993 and <https://www.transportation.gov/regulations/2018-dot-rulemaking-order>. The scope of this analysis is limited to the revisions that FRA is making in this rulemaking. FRA concluded that because this final rule generally includes only voluntary actions or alternative action by designated entities that will be voluntary, or clarifying edits, this final rule does not impart

additional burdens or benefits on regulated entities.

Pursuant to petitions for reconsideration FRA received in response to the SSP final rule and comments received on the NPRM, this final rule contains six sets of substantive amendments to part 270. As discussed in Section III.D of the preamble, this rule also amends part 271 to ensure that the RRP and SSP rules have essentially identical consultation and information protection provisions. The following paragraphs describe analysis of the effects of the amendments.

First, to address the States' concerns discussed in Section III of the NPRM and as explained above, the final rule amends part 270 to clarify that a passenger rail operation subject to the part may designate an entity as responsible for SSP compliance under §§ 270.7(c) and 270.103(e)(6). As any such designation will be voluntary, such clarification adds no additional burden nor provides any additional safety benefit. In addition, the revisions to §§ 270.7(c) and 270.103(e)(6) clarify the responsibilities of the designated entity. FRA requested comment from the public on the costs and benefits described in this paragraph. Although the States commented on the purported burdens of part 270 generally, FRA did not receive specific comments on the NPRM's economic analysis.

Second, to address the Labor Petition's concerns discussed in Section II of the NPRM, FRA is amending both the SSP and RRP rules to add the general chairperson of a non-profit employee labor organization (or a non-profit employee labor organization primary point of contact agreed on at the beginning of the consultation process) as the point of contact for directly affected employees represented by that non-profit employee labor organization.

Third, FRA received a comment from AAR on the 2012 SSP NPRM voicing concern that an inadvertent failure to serve a general chairperson may result in FRA deeming a railroad as not using "best efforts" in the consultation process. In response to such concern, FRA is allowing a passenger rail operation and a non-profit employee labor organization to establish an alternative point of contact within the non-profit employee labor organization. This point of contact could be a person the passenger rail operation and non-profit employee labor organization agree on at the beginning of the consultation process. FRA anticipates any burden associated with requiring the inclusion of a general chairperson in the service list (see paragraph above) will be

significantly alleviated, if not eliminated altogether, by the provision allowing passenger rail operations and non-profit employee labor organizations to agree on an alternative point of contact. Although FRA specifically requested comment from the public on this conclusion, it did not receive adverse comment, and generally finalized the provision as proposed.

Fourth, as discussed in Section VI of the NPRM, FRA is amending the information protections in both the SSP and RRP rules to address the C³RS program. Because this amendment merely addresses the scope of the protections provided by the SSP and RRP final rules, there are no burdens associated with it.

Fifth, FRA is also adjusting the various compliance dates in part 270 to account for the stay of the SSP final rule's requirements. Because the adjustments are necessary only to conform the rule's deadlines with the stay, they have already been accounted for in the regulatory impact analysis that accompanied the final rule extending the stay. See 84 FR 45683 (Aug. 30, 2019).

Finally, as discussed above, FRA is amending part 270 throughout to frame the responsibilities of the rule as belonging to each passenger rail operation. This language does not affect FRA's existing economic analysis of the costs and burdens of the rule.

This rule is not an Executive Order 13771 regulatory action because this rule is not significant under Executive Order 12866. Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a "major rule," as defined by 5 U.S.C. 804(2).

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 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. The six sets of revisions within this final rule would not impart any additional burden on regulated entities. Four of the sets of revisions add clarity to the SSP final rule, and the revision requiring submission of the designation notice to FRA is voluntary and would only apply if a designation is made. Another revision allows an alternative

non-profit employee labor organization primary point of contact to be agreed on at the beginning of the consultation process, thereby eliminating or significantly mitigating any burden associated with the revision requiring inclusion of a general chairperson in the service list.

"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 "linehaul railroad" that has fewer than 1,500 employees, a "short line railroad" with fewer than 1,500 employees, or a "commuter rail system" with annual receipts of less than \$15.0 million dollars. See "Size Eligibility Provisions and Standards," 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as "small entities" governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Federal agencies may adopt their own size standards for small entities, in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final 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 STB's revenue threshold for a Class III railroad. 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.

For purposes of this analysis, the SSP portions of this rule will impact 33 commuter or other short-haul passenger railroads and two intercity passenger railroads, Amtrak and the ARC.²⁷ Neither of the intercity passenger railroads is considered a small entity. Amtrak serves populations well in excess of 50,000, and the ARC is owned

²⁷ This analysis considers all current State-sponsored IPR services to be part of Amtrak's SSP, which is a reasonable expectation as discussed in this final rule.

by the State of Alaska, which has a population well in excess of 50,000.

Based on the definition of “small entity,” only one commuter or other short-haul railroad is considered a small entity: the Hawkeye Express (operated by the Iowa Northern Railway Company). For purposes of this analysis, the RRP portions of this rule will affect 7 Class I railroads and a maximum of 50 Class III railroads. See 85 FR 9262, 9307–11 (Feb. 18, 2020).

Although the regulation may impact a substantial number of small entities, by virtue of its impact on the only identified small entity that is a commuter or other short-haul railroad

subject to the SSP rule, and the maximum of 50 Class III railroads that could be affected by the RRP rule, it would merely provide additional clarifying information without introducing any additional burden. Further, any potential impact on small entities would be positive. The regulation would therefore not have a significant impact on a substantial number of small entities.

A substantial number of small entities may be impacted by this regulation; however, any impact would be minimal. Although FRA requested comments as to the impact that the NPRM would

have on both small passenger railroads as well as all passenger railroads in general, no comments were received on this issue.

C. Paperwork Reduction Act

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

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent ²⁸
270.103—System Safety Program Plan (SSP Plan)—Comprehensive written SSP Plan that meets all of this section’s requirements.	35 passenger rail operations	11.7 plans	40 hours	467	\$42,777
—Copies of designations to non-profit employee labor organizations (New requirement).	35 passenger rail operations	11.7 copies	2 minutes4	30
—Designation notifications to employees not represented by non-profit employee labor organizations (New requirement).	35 passenger rail operations	11.7 notices	5 minutes	1	76
—Records of system safety training for employees/contractors/others.	35 passenger rail operations	495 records	15 seconds	2	157
—(q)(1) Performance of risk-based hazard analyses and furnishing of results of risk-based hazard analyses upon request of FRA/participating part 212 States.	35 passenger rail operations	35 analyses results	20 hours	700	53,200
—(q)(2) Identification and implementation of risk mitigation methods and furnishing of descriptions of specific risk mitigation methods that address hazards upon request of FRA/participating part 212 States.	35 passenger rail operations	35 mitigation methods descriptions.	10 hours	350	26,600
—(r)(1) Performance of technology analysis and furnishing of results of system’s technology analysis upon request of FRA/participating part 212 States.	35 passenger rail operations	35 results of technology analysis.	10 hours	350	26,600
270.107(a)—Consultation requirements—consultation with directly affected employees on SSP Plan.	35 passenger rail operations	11.7 consults (w/labor union reps.).	1 hour	12	912
—(a)(3)(ii) Notification to directly affected employees of preliminary meeting at least 60 days before being held.	35 passenger rail operations	11.7 notices	30 minutes	6	456
—(b) Consultation statements that includes service list with name & contact information for labor organization chairpersons & non-union employees who participated in process.	35 passenger rail operations	11.7 statements	1 hour	12	912
—Copies of consultations statements to service list individuals.	35 passenger rail operations	11.7 copies	1 minute2	15
270.201(b)—SSP Plan found deficient by FRA and requiring amendment.	35 passenger rail operations	4 amended plans	30 hours	120	9,120
—Review of amended SSP Plan found deficient and requiring further amendment.	35 passenger rail operations	1 further amended plan	20 hours	20	1,520
—Reopened review of initial SSP Plan approval for cause stated.	35 passenger rail operations	1 amended plans	30 hours	30	2,280
270.203—Retention of SSP Plans—Retained copies of SSP Plans.	35 passenger rail operations	16 copies	10 minutes	3	228
270.303—Annual internal SSP assessments/reports conducted.	35 passenger rail operations	16 evaluations/reports	2 hours	32	2,432
—Certification of results of internal assessment by chief safety official.	35 passenger rail operations	35 certification statements ...	2 hours	70	8,050
270.305—External safety audit—Submission of improvement plans in response to results of FRA audit.	35 passenger rail operations	6 plans	12 hours	72	8,280
—Improvement plans found deficient by FRA and requiring amendment.	35 passenger rail operations	2 amended plans	10 hours	20	1,520
—Status report to FRA of implementation of improvements set forth in the improvement plan.	35 passenger rail operations	2 reports	4 hours	8	608
Appendix B—Additional documents provided to FRA upon request.	35 passenger rail operations	4 documents	15 minutes	1	76
Appendix C—Written requests to file required submissions electronically.	35 passenger rail operations	7 written requests	15 minutes	2	152

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual dollar cost equivalent ²⁸
Totals	35 passenger rail operations	776 responses	N/A	2,279	186,001

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 Ms. Hodan Wells, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202-493-0440 or Ms. Kimberly Toone, Information Collection Clearance Officer, Office of Railroad Safety, Federal Railroad Administration, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue SE, 3rd Floor, Washington, DC 20590. Comments may also be submitted via email to Ms. Wells at Hodan.Wells@dot.gov or Ms. Toone at Kim.Toone@dot.gov.

OMB must make a decision concerning the collection of information requirements contained in this 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 did not receive any OMB or public comments on the information collection requirements contained in the NPRM.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number for part 270 is 2130-0599.²⁹

D. Environmental Impact

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545 (May 26, 1999)) as required by the National

Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this rule is not a major Federal action, requiring the preparation of an environmental impact statement or environmental assessment, because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. See 64 FR 28547 (May 26, 1999).

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

E. Federalism Implications

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

FRA has analyzed this rule in accordance with the principles and criteria contained in Executive Order 13132. VTrans commented that the SSP rule had significant federalism

implications that FRA did not consider regarding the rule’s applicability to VTrans. See VTrans at 12. Specifically, VTrans contended the rule “would have a chilling effect” on States (like Vermont), that, in reliance on existing law, have “structured their support for . . . intercity passenger rail service to avoid ‘railroad carrier’ status.” See *id.* As discussed above, FRA does not believe the proposal or SSP final rule raised such implications. However, in any event, the revisions to the rule make even clearer that no such implications are intended.

This rule generally clarifies or makes technical amendments to the requirements contained in part 270, System Safety Program, and part 271, Risk Reduction Program. FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the rule is not required.

F. Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This rule would not result in such an expenditure, and thus

²⁸ FRA derived the wage rates from the Surface Transportation Board website for 2018 wage data, and it uses the average annual wages for each employee group as follows: For Executives, Officials, and Staff Assistants, this cost amounts to \$115 per hour. For Professional and Administrative staff, this cost amounts to \$76 per hour.

²⁹ No changes are necessary to the RRP rule’s PRA analysis to account for the conforming amendments to the consultation and information protection provisions in this rule. See 85 FR 9262, 9311-13 (Feb. 18, 2020).

preparation of such a statement is not required.

G. 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). FRA evaluated this rule in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. See 82 FR 16093 (Mar. 31, 2017). FRA determined this rule would not burden the development or use of domestically produced energy resources.

List of Subjects

49 CFR Part 270

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

49 CFR Part 271

Penalties, Railroad safety, Reporting and recordkeeping requirements, Risk reduction.

The Rule

For the reasons discussed in the preamble, FRA amends parts 270 and 271 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 270—SYSTEM SAFETY PROGRAM

■ 1. The authority citation for part 270 continues to read as follows:

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

■ 2. In § 270.1, revise paragraphs (a) and (b) to read as follows:

§ 270.1 Purpose and scope.

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

rates of railroad accidents, incidents, injuries, and fatalities.

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

* * * * *

■ 3. In § 270.3, revise paragraphs (a)(1) and (2) to read as follows:

§ 270.3 Application.

(a) * * *

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

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

* * * * *

■ 4. In § 270.5:

■ a. Add a definition in alphabetical order for “Confidential Close Call Reporting System (C³RS)”;

■ b. Revise the definitions of “Fully implemented” and “Hazard”;

■ c. Add a definition in alphabetical order for “Passenger rail operation”; and

■ d. Revise the definitions of “Person” and “System safety program plan”.

The additions and revisions read as follows:

§ 270.5 Definitions.

* * * * *

Confidential Close Call Reporting System (C³RS) means an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report currently unreported or underreported unsafe events.

* * * * *

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

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

* * * * *

Passenger rail operation means an intercity, commuter, or other short-haul passenger rail service.

Person means an entity of any type covered under 49 U.S.C. 21301, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

* * * * *

System safety program plan means a document developed by the passenger rail operation that implements and supports the system safety program.

* * * * *

■ 5. Revise § 270.7 to read as follows:

§ 270.7 Penalties and responsibility for compliance.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed. See 49 CFR part 209, appendix A. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311. FRA’s website at www.fra.dot.gov contains a schedule of civil penalty amounts used in connection with this part.

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

(c)(1) All persons providing intercity rail passenger or commuter (or other short-haul) rail passenger service share responsibility for ensuring compliance with this part. Nothing in this paragraph (c), however, shall restrict the ability to provide for an appropriate designation

of responsibility for compliance with this part.

(2)(i) Any passenger rail operation subject to this part may designate a person as responsible for compliance with this part by including a designation of responsibility in the SSP plan. This designation must be included in the SSP plan's statement describing the passenger rail operation's management and organizational structure and include the information specified by § 270.103(e)(6).

(ii) A passenger rail operation subject to this part may notify FRA of a designation of responsibility before submitting an SSP plan by first submitting a designation of responsibility notice to the Associate Administrator for Railroad Safety and Chief Safety Officer. The notice must include all information required under § 270.103(e)(6), and this information must also be included in the SSP plan.

■ 6. Revise § 270.101 to read as follows:

§ 270.101 System safety program; general.

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

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

■ 7. Revise § 270.103 to read as follows:

§ 270.103 System safety program plan.

(a) *General.* (1) Each passenger rail operation subject to this part shall adopt and fully implement a system safety program through a written SSP plan that, at a minimum, contains the elements in this section. This SSP plan shall be approved by FRA under the process specified in § 270.201.

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

(b) *System safety program policy statement.* Each SSP plan shall contain a policy statement that endorses the

passenger rail operation's system safety program. This policy statement shall:

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

(2) Describe the safety philosophy and safety culture of the passenger rail operation; and

(3) Be signed by the chief official of the passenger rail operation.

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

(1) Long-term;

(2) Meaningful;

(3) Measurable; and

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

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

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

(3) Each SSP plan shall describe the relationships and responsibilities between the passenger rail operation and: Host railroads, contractor operators, shared track/corridor operators, and persons providing or utilizing significant safety-related services as identified pursuant to paragraph (d)(2) of this section.

(e) *Management and organizational structure.* Each SSP plan shall contain a statement that describes the management and organizational structure of the passenger rail operation. This statement shall include the following:

(1) A chart or other visual representation of the organizational structure of the passenger rail operation;

(2) A description of the passenger rail operation's management responsibilities within the system safety program;

(3) A description of how safety responsibilities are distributed within the rail organization;

(4) Clear identification of the lines of authority used by the passenger rail operation to manage safety issues;

(5) A description of the roles and responsibilities in the passenger rail operation's system safety program for each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified pursuant to (d)(2) of this section. As part of this description, the SSP plan shall describe how each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified pursuant to paragraph (d)(2) of this section supports and participates in the passenger rail operation's system safety program, as appropriate; and

(6) If a passenger rail operation subject to this part designates a person as responsible for compliance with this part under § 270.7(c)(2), the following information must be included in the passenger rail operation's SSP plan and any notice of designation submitted under § 270.7(c)(2):

(i) The name and contact information of the designator;

(ii) The name and contact information of the designated entity and a statement signed by an authorized representative of the designated entity acknowledging responsibility for compliance with this part;

(iii) A statement affirming that a copy of the designation has been provided to the primary point of contact for each non-profit employee labor organization representing directly affected employees for consultation purposes under § 270.107(a)(2); and

(iv) A description of how directly affected employees not represented by a non-profit employee labor organization were notified of the designation for consultation purposes under § 270.107(a).

(f) *System safety program implementation process.* (1) Each SSP plan shall contain a statement that describes the process the passenger rail operation will use to implement its system safety program. As part of the implementation process, the SSP plan shall describe:

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

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

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

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

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

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

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

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

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

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

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

(i) *System safety program employee/contractor training.* (1) Each employee who is responsible for implementing and supporting the system safety program, and any persons utilizing or providing significant safety-related services will be trained on the passenger rail operation's system safety program.

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

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

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

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

(6) The passenger rail operation shall keep a record of all training conducted under this part and update that record as necessary. The system safety program training plan shall set forth the process

used to maintain and update the necessary training records required by this part.

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

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

(k) *Workplace safety.* Each SSP plan shall contain a statement that describes the programs established to protect the safety of the passenger rail operation's employees and contractors. The statement shall include a description of:

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

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

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

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

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

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

(n) *Safety data acquisition.* Each passenger rail operation shall establish and set forth a statement in its SSP plan that describes the processes it uses to collect, maintain, analyze, and

distribute safety data in support of the system safety program.

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

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

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

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

(ii) The processes or procedures used in the risk-based hazard analysis to analyze identified hazards and support the risk-based hazard management program;

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

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

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

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

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

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

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

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

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

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

(q) *Risk-based hazard analysis.* (1) Once FRA approves a passenger rail

operation's SSP plan pursuant to § 270.201(b), the risk-based hazard analysis methodology identified in paragraphs (p)(1)(i) through (iii) of this section shall be applied to identify and analyze hazards on the rail system and to determine the resulting risks. At a minimum, the aspects of the rail system that shall be analyzed include:

Operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations.

(2) A risk-based hazard analysis shall identify specific actions that shall be implemented using the methods described in paragraph (p)(1)(iv) of this section that will mitigate or eliminate the hazards and resulting risks identified by paragraph (q)(1) of this section.

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

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

(2) A passenger rail operation's technology analysis and implementation plan shall describe the process used to:

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

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

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

(i) The processes described in paragraph (r)(2)(i) of this section to identify and analyze technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis pursuant to paragraph (q)(1) of this section. At a

minimum, the technologies a passenger rail operation shall consider as part of its technology analysis are: Processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology; and

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

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

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

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

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

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

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

(2) *Configuration management.* Each passenger rail operation shall establish a configuration management program

and describe the program in its SSP plan. The configuration management program shall:

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

(ii) Establish processes to make configuration changes to the rail system; and

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

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

(t) *Safety culture.* Each SSP plan shall contain a statement that describes how the passenger rail operation measures the success of its safety culture identified in paragraph (b)(2) of this section.

■ 8. In § 270.105, revise paragraphs (a) and (b)(2) and add paragraph (e) to read as follows:

§ 270.105 Discovery and admission as evidence of certain information.

(a) *Protected information.* Except as provided in paragraph (a)(3) of this section, any information compiled or collected after August 14, 2017, solely for the purpose of planning, implementing, or evaluating a system safety program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. For purposes of this section:

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

(2) “Solely” means that a passenger rail operation originally compiled or collected the information for the exclusive purpose of planning, implementing, or evaluating a system safety program under this part. Information compiled or collected for any other purpose is not protected, even if the passenger rail operation also uses that information for a system safety program. “Solely” also means that a passenger rail operation continues to

use that information only for its system safety program. If a passenger rail operation subsequently uses for any other purpose information that was initially compiled or collected for a system safety program, this section does not protect that information to the extent that it is used for the non-system safety program purpose. The use of that information within the passenger rail operation’s system safety program, however, remains protected. This section does not protect information that is required to be compiled or collected pursuant to any other provision of law of regulation; and

(3) A passenger rail operation may include a Confidential Close Call Reporting System (C³RS) program in a system safety program established under this part. For Federal or State court proceedings described by this paragraph (a) that are initiated after March 4, 2021, the information protected by this paragraph (a) includes C³RS information a passenger rail operation includes in its system safety program, even if the passenger rail operation compiled or collected the C³RS information on or before August 14, 2017, for purposes other than planning, implementing, or evaluating a system safety program under this part.

(b) * * *

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

* * * * *

(e) *Enforcement.* This section does not apply to civil enforcement or criminal law enforcement proceedings.

■ 9. Revise § 270.107 to read as follows:

§ 270.107 Consultation requirements.

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

(2) A passenger rail operation that consults with a non-profit employee labor organization as required by paragraph (a)(1) of this section is considered to have consulted with the directly affected employees represented by that organization. For directly affected employees represented by a non-profit employee labor organization, the primary point of contact shall be either the general chairperson of that non-profit employee labor organization

or a non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. If a passenger rail operation contracts out significant portions of its operations, the contractor and the contractor’s employees performing those operations shall be considered directly affected employees for the purposes of this part.

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

(i) Hold the preliminary meeting no later than July 2, 2020;

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

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

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

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

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

(3) A service list containing the name and contact information for either each international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the passenger rail operation’s directly affected employees, or each non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a passenger rail operation submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of

these documents to all individuals identified in the service list.

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

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

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

■ 10. Revise § 270.201 to read as follows:

§ 270.201 Filing and approval.

(a) *Filing.* (1) Each passenger rail operation to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue SE, Washington, DC 20590, no later than March 4, 2021, or not less than 90 days before commencing passenger operations, whichever is later.

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

(3) The SSP plan shall include:

(i) The signature, name, title, address, and telephone number of the chief safety officer who bears primary managerial authority for implementing the program for the submitting

passenger rail operation. By signing, this chief official is certifying that the contents of the SSP plan are accurate and that the passenger rail operation will implement the contents of the program as approved by FRA;

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

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

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

(b) *Approval.* (1) Within 90 days of receipt of an SSP plan, FRA will review the SSP plan to determine if the elements prescribed in this part are sufficiently addressed. This review will also consider any statement submitted by directly affected employees pursuant to § 270.107(c).

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

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

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

(c) *Review of amendments.* (1)(i) A passenger rail operation shall submit any amendment(s) to the SSP plan to FRA not less than 60 days before the proposed effective date of the amendment(s). The passenger rail operation shall file the amended SSP plan with a cover letter outlining the

changes made to the original approved SSP plan by the proposed amendment(s). The cover letter shall also describe the process the passenger rail operation used pursuant to § 270.107(d) to consult with its directly affected employees on the amendment(s).

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

(iii) If the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, FRA approval is not required under the process in paragraphs (c)(1)(i) and (ii) of this section, although the passenger rail operation shall still file the proposed amendment with FRA's Associate Administrator for Railroad Safety and Chief Safety Officer. These proposed amendments may be implemented upon filing with FRA. All other proposed amendments must comply with the formal approval process in paragraph (c) of this section.

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

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

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

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

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

■ 11. Revise § 270.203 to read as follows:

§ 270.203 Retention of system safety program plan.

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

■ 12. Revise § 270.301 to read as follows:

§ 270.301 General.

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

■ 13. Revise § 270.303 to read as follows:

§ 270.303 Internal system safety program assessment.

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

(1) The system safety program is fully implemented;

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

(3) The passenger rail operation has achieved the goals set forth in § 270.103(c).

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

(1) Conduct internal system safety program assessments;

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

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

(4) Develop improvement plans based on the internal system safety program assessments. Improvement plans shall, at a minimum, identify who is responsible for carrying out the

necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; and

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

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

(i) Submit to FRA a copy of the passenger rail operation's internal assessment report that includes a system safety program assessment and the status of internal assessment findings and improvement plans to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590; and

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

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

■ 14. Revise § 270.305 to read as follows:

§ 270.305 External safety audit.

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

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

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

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

■ 15. Revise appendix B to part 270 to read as follows:

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

A passenger rail operation required to develop a system safety program under this part must in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the SSP plan. *See* § 270.107(a). This appendix discusses the meaning of the terms "good faith" and "best efforts," and provides non-mandatory guidance on how to comply with the requirement to consult with directly affected employees on the contents of the SSP plan.

The guidance is provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization. The guidance is not legally binding in its own right and will not be relied upon by the U.S. Department of Transportation as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance (as distinct from existing statutes and regulations) is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations.

The Meaning of "Good Faith" and "Best Efforts"

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

The good faith obligation requires a passenger rail operation to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an SSP plan. If a passenger rail operation consults with its employees merely in a

perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. For example, a lack of good faith may be found if a passenger rail operation's directly affected employees express concerns with certain parts of the SSP plan, and the passenger rail operation neither addresses those concerns in further consultation nor attempts to address those concerns by making changes to the SSP plan.

On the other hand, "best efforts" establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a passenger rail operation must pursue to reach agreement with its employees on the contents of its system safety program. While the good faith obligation is concerned with the passenger rail operation's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the passenger rail operation in an attempt to reach agreement. This would include considerations such as whether a passenger rail operation had held sufficient meetings with its employees to address or make an attempt to address any concerns raised by the employees, or whether the passenger rail operation had made an effort to respond to feedback provided by employees during the consultation process. For example, a passenger rail operation would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing SSP plans, FRA will determine on a case-by-case basis whether a passenger rail operation has met its § 270.107 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the passenger rail operation pursuant to § 270.107(b) and any statements submitted by employees pursuant to § 270.107(c). If FRA finds that these statements do not provide sufficient information to determine whether a passenger rail operation used good faith and best efforts to reach agreement, FRA may investigate further and contact the passenger rail operation or its employees to request additional

information. If FRA determines that a passenger rail operation did not use good faith and best efforts, FRA may disapprove the SSP plan submitted by the passenger rail operation and direct the passenger rail operation to comply with the consultation requirements of § 270.107. Pursuant to § 270.201(b)(3), if FRA does not approve the SSP plan, the passenger rail operation will have 90 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the passenger rail operation did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a passenger rail operation then does not submit to FRA within 90 days an SSP plan meeting the consultation requirements of § 270.107, FRA could impose penalties for failure to comply with § 270.201(b)(3).

Guidance on How a Passenger Rail Operation May Consult With Directly Affected Employees

Because the standard imposed by the best efforts obligation will vary depending upon the passenger rail operation, there may be countless ways to comply with the consultation requirements of § 270.107. Therefore, FRA believes it is important to maintain a flexible approach to the § 270.107 consultation requirements, to give a passenger rail operation and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

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

This guidance does not establish prescriptive requirements but merely outlines a consultation process a passenger rail operation may choose to follow. A passenger rail operation's consultation statement could indicate that it followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach

agreement with its employees on the contents of an SSP plan.

Employees Represented by a Non-Profit Employee Labor Organization

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

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

- Pursuant to § 270.107(a)(3)(i), a passenger rail operation must meet with representatives from a non-profit employee labor organization (representing a class or craft of the passenger rail operation's directly affected employees) no later than July 2, 2020, to begin the process of consulting on the contents of the SSP plan. A passenger rail operation must provide notice at least 60 days before the scheduled meeting.

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

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

- Pursuant to § 270.201(a)(1), a passenger rail operation would file its SSP plan with FRA no later than March 4, 2021, or not less than 90 days before commencement of new passenger service, whichever is later.

- As provided by § 270.107(c), if agreement on the contents of an SSP plan could not be reached, a labor organization (representing a class or craft of the passenger rail operation's directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

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

FRA recognizes that some (or all) of a passenger rail operation's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation

process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a passenger rail operation with non-represented employees should make a concerted effort to ensure that its non-represented employees are aware that they are able to participate in the development of the SSP plan. FRA therefore is providing the following guidance regarding how a passenger rail operation may utilize good faith and best efforts when consulting with non-represented employees on the contents of its SSP plan.

- By April 20, 2020, a passenger rail operation should notify non-represented employees that—

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

- (2) The passenger rail operation is required to meet with its directly affected employees by July 2, 2020, to address the consultation process;

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

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

- This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

- (1) Electronically, such as by email or an announcement on the passenger rail operation's website;

- (2) By posting the notification in a location easily accessible and visible to non-represented employees; or

- (3) By providing all non-represented employees a hard copy of the notification. A passenger rail operation could use any or all of these methods of communication, so long as the notification complies with the passenger rail operation's obligation to utilize best efforts in the consultation process.

- Following the initial notification and initial meeting to discuss the consultation process (and before the passenger rail operation submits its SSP plan to FRA), a passenger rail operation should provide non-represented employees a draft proposal of its SSP plan. This draft proposal should solicit

additional input from non-represented employees, and the passenger rail operation should provide non-represented employees 60 days to submit comments to the passenger rail operation on the draft.

- Following this 60-day comment period and any changes to the draft SSP plan made as a result, the passenger rail operation should submit the proposed SSP plan to FRA, as required by this part.

- As provided by § 270.107(c), if agreement on the contents of an SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining employee's views on the plan on which agreement was not reached.

■ 16. Revise appendix C to part 270 to read as follows:

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

This appendix summarizes procedures for the submission of an SSP plan and statements by directly affected employees consistent with the requirements of this part.

Submission by a Passenger Rail Operation and Directly Affected Employees

As provided for in § 270.101, a system safety program shall be fully implemented and supported by a written SSP plan. Each passenger rail operation must submit its SSP plan to FRA for approval as provided for in § 270.201.

As provided for in § 270.107(c), if a passenger rail operation and its directly affected employees cannot come to agreement on the proposed contents of the SSP plan, the directly affected employees have 30 days following the submission of the proposed SSP plan to submit a statement to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining the directly affected employees' views on the plan on which agreement was not reached.

The passenger rail operation's and directly affected employees' submissions shall be sent to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590. When a passenger rail operation submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified

in the service list pursuant to § 270.107(b)(3).

Each passenger rail operation and directly affected employee is authorized to file by electronic means any submissions required under this part. Before any person submits anything electronically, the person shall provide the FRA Associate Administrator for Railroad Safety and Chief Safety Officer with the following information in writing:

- (1) The name of the passenger rail operation or directly affected employee(s);

- (2) The names of two individuals, including job titles, who will be the passenger rail operation's or directly affected employees' points of contact and will be the only individuals allowed access to FRA's secure document submission site;

- (3) The mailing addresses for the passenger rail operation's or directly affected employees' points of contact;

- (4) The system or main headquarters address located in the United States;

- (5) The email addresses for the passenger rail operation's or directly affected employees' points of contact; and

- (6) The daytime telephone numbers for the passenger rail operation's or directly affected employees' points of contact.

A request for electronic submission or FRA review of written materials shall be addressed to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program or statement. A passenger rail operation that electronically submits an initial SSP plan or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the passenger rail operation that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A passenger rail operation that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

PART 271—RISK REDUCTION PROGRAM

■ 17. The authority citation for part 271 continues to read as follows:

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

■ 18. In § 271.5, add a definition in alphabetical order for “Confidential Close Call Reporting System (C³RS)” and revise the definition of “Person” to read as follows:

§ 271.5 Definitions.

* * * * *

Confidential Close Call Reporting System (C³RS) means an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report currently unreported or underreported unsafe events.

* * * * *

Person means an entity of any type covered under 49 U.S.C. 21301, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

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■ 19. In § 271.11, revise paragraphs (a) introductory text and (a)(1), the final sentence of paragraph (a)(2), and add paragraph (a)(3) to read as follows:

§ 271.11 Discovery and admission as evidence of certain information.

(a) *Protected information.* Except as provided in paragraph (a)(3) of this

section, any information compiled or collected after February 17, 2021 solely for the purpose of planning, implementing, or evaluating a risk reduction program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. For purposes of this section:

(1) “Information” includes plans, reports, documents, surveys, schedules, lists, or data, and specifically includes a railroad’s analysis of its safety risks under § 271.103(b) and a railroad’s statement of mitigation measures under § 271.103(c);

(2) * * * This section does not protect information that is required to be compiled or collected pursuant to any other provision of law or regulation; and

(3) A railroad may include a Confidential Close Call Reporting System (C³RS) program in a risk reduction program established under this part. For Federal or State court proceedings described by this paragraph (a) that are initiated after March 4, 2021, the information protected by this paragraph (a) includes C³RS information a railroad includes in its risk reduction program, even if the railroad compiled or collected the C³RS information on or before February 17, 2021, for purposes other than planning, implementing, or evaluating a risk reduction program under this part.

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■ 20. In § 271.207, add a second sentence to paragraph (a)(2) and revise paragraph (d)(3) to read as follows:

§ 271.207 Consultation requirements.

(a) * * *

(2) * * * For directly affected employees represented by a non-profit

employee labor organization, the primary point of contact shall be either the general chairperson of the non-profit employee labor organization or a non-profit employee labor organization primary point of contact the railroad and the non-profit employee labor organization agree on at the beginning of the consultation process.

* * * * *

(d) * * *

(3) A service list containing the names and contact information for each international/national president of any non-profit employee labor organization representing a class or craft of the railroad’s directly affected employees, or each non-profit employee labor organization primary point of contact the railroad and the non-profit employee labor organization agree on at the beginning of the process. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a railroad submits its RRP plan and consultation statement to FRA under § 271.301, it shall also simultaneously send a copy of these documents to all individuals identified in the service list. A railroad may send the documents to the identified individuals via electronic means or other service means reasonably calculated to succeed.

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Issued in Washington, DC, on February 28, 2020.

Ronald L. Batory,
Administrator, Federal Railroad Administration.

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