

**DEPARTMENT OF TRANSPORTATION****Federal Railroad Administration****49 CFR Parts 214, 232, and 243**

[Docket No. FRA-2009-0033, Notice No. 1]

RIN 2130-AC06

**Training, Qualification, and Oversight for Safety-Related Railroad Employees**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** FRA proposes regulations establishing minimum training standards for each category and subcategory of safety-related railroad employee, as required by the Rail Safety Improvement Act of 2008. The proposed rule would require each railroad or contractor that employs one or more safety-related railroad employee to develop and submit a training program to FRA for approval and to designate the qualification of each such employee. As part of that program, most employers would need to conduct periodic oversight of their own employees to determine compliance with Federal railroad safety laws, regulations, and orders applicable to those employees. The proposal would also require most railroads to conduct annual written reviews of their training programs to close performance gaps. Furthermore, FRA proposes specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, FRA proposes minor clarifying amendments to the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

**DATES:** *Written Comments:* Written comments on the proposed rule must be received by April 9, 2012. Comments received after that date will be considered to the extent possible without incurring additional expense or delay. FRA anticipates being able to determine these matters without a public hearing. However, if prior to March 8, 2012, FRA receives a specific request for a public hearing accompanied by a showing that the party is unable to adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental notice in the **Federal Register** to inform interested parties of the date, time, and location of any such hearing.

**ADDRESSES:** You may submit comments identified by the docket number FRA-2009-0033 by any one of the following methods:

- *Fax:* 1-202-493-2251;
- *Mail:* U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590;
- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- Electronically through the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC06). Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Michael Logue, Deputy Associate Administrator for Safety Compliance and Program Implementation, U.S. Department of Transportation, Federal Railroad Administration, Mail Stop 25, West Building 3rd Floor West, Room W38-340, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493-6301); Robert J. Castiglione, Staff Director—Technical Training, U.S. Department of Transportation, Federal Railroad Administration, 4100 International Plaza, Suite 450, Fort Worth, TX 76109-4820 (telephone: (817) 447-2715); or Alan H. Nagler, Senior Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC-10, Mail Stop 10, West Building 3rd Floor, Room W31-309, 1200 New Jersey Avenue SE., Washington, DC 20590 (telephone: (202) 493-6038).

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**I. Executive Summary**

FRA is proposing that FRA's training experts review training programs that will be used to train safety-related railroad employees. All programs will have to be approved by FRA prior to their implementation. FRA's expectation is that the programs submitted for approval will reflect the insights of training models that are recognized and generally accepted by the academic and training communities for formal initial training, on-the-job training, and refresher training. Furthermore, FRA expects that these training programs will use "hands-on" or engaging training methods where practicable and appropriate. These programs will include: Initial, ongoing, and on-the-job training criteria; testing and skills evaluation measures designed to ensure continual compliance with Federal standards; and the identification of critical safety defects and plans for immediate remedial actions to correct them.

The scientific literature on training in general and FRA's own experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or "hands-on"—and safety. Even though rail transportation in the United States is generally an extremely safe mode of transportation, and rail safety has been improving, well-designed training programs have the potential to further reduce risk in the railroad environment. FRA believes that better designed training can reduce the number of accidents caused by human factors.

FRA has estimated the costs of this proposed rule, evaluated over a 20-year

period and using discount rates of 3 and 7 percent. The total cost of the proposed rule is estimated to be about \$81.6 million, discounted at a 3 percent rate,

and about \$64.1 million, discounted at a 7 percent rate. Table 1 below lists specific costs elements and each element's estimated cost over the first

twenty years following promulgation of the proposed rule, as well as the total cost estimates.

TABLE 1—COSTS OF THE PROPOSED RULE, EVALUATED OVER 20-YEAR PERIOD

Cost element	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Creating and revising training programs and performing annual reviews, original program users .....	\$1,999,728	\$1,564,484
Creating and revising training programs and performing annual reviews, model program users .....	179,116	129,245
Creating and revising training programs, model program users with <400k annual labor hours .....	4,751,465	3,428,505
Customizing model programs .....	910,245	842,919
Designating employees by class or craft .....	771,316	709,480
Additional time in initial training .....	16,539,877	12,235,174
Additional time in refresher training .....	25,456,709	18,831,293
Periodic oversight tests and inspections .....	15,242,583	11,275,517
Additional qualification testing .....	15,741,416	15,075,836
<b>Total .....</b>	<b>81,592,455</b>	<b>64,092,452</b>

Additionally, FRA has performed a breakeven analysis of the proposed rule, estimating the reduction in human factors-caused accidents that would be required in order for the benefits of the proposed rule to at least offset the costs. FRA believes the proposed rule would reduce human factors-caused accidents primarily through requiring that training programs include “hand-on” training components. Reductions in human factors-caused accidents will result in fatalities avoided, injuries avoided, and

property damage avoided. Table 2 below shows the total present discounted annual costs of human factors accidents that would be incurred over the next 20 years without this proposed rule, where injuries and fatalities have been monetized according to DOT policies. Table 2 also shows the percent reduction in human factors-caused accidents that would be necessary for the monetized reduction in fatalities, injuries, and property damages caused by these accidents to justify

implementation of the proposal. This calculation takes into account various recent and concurrent initiatives to address human factor-caused accidents, including implementation of positive train control systems, revisions to hours of service regulations, development of conductor certification standards, and implementation of programs to address fatigue and electronic device distraction among others.

Total present discounted cost of HF accidents (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Total present discounted cost of HF accidents (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
\$1,246,926,928	\$81,592,455	7.3	\$1,020,012,541	\$64,092,452	7.1

FRA estimates that this proposed rule will break even if it results in a twenty-year total reduction in human factors-caused accidents of 7.3 percent using a 3 percent discount rate, and a reduction of 7.1 percent using a 7 percent discount rate. Given the role and prevalence of human factor-caused accidents in the railroad industry and the relationship between quality training and safety, FRA believes it is not unreasonable to expect that improvements in training as proposed in this rule would yield safety benefits that will exceed the costs.

**II. Statutory Background**

Pursuant to the Rail Safety Improvement Act of 2008 § 401(a), Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (codified at 49 U.S.C. 20162) (hereinafter “RSIA”) Congress required the Secretary of Transportation (Secretary) to establish minimum training standards for safety-related

railroad employees and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary’s approval. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.49(oo).

Section 20162 of 49 U.S.C. (Section 401(a) of the RSIA) provides that:

“(a) In general.—The Secretary of Transportation shall \* \* \* establish—  
 (1) minimum training standards for each class and craft of safety-related railroad employee (as defined in section 20102) and equivalent railroad carrier contractor and subcontractor employees, which shall require railroad carriers, contractors, and subcontractors to qualify or otherwise document the proficiency of such employees in each such class and craft regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those Federal railroad safety laws and regulations;

(2) a requirement that railroad carriers, contractors, and subcontractors develop and submit training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner; and  
 (3) a minimum training curriculum, and ongoing training criteria, testing, and skills evaluation measures to ensure that safety-related railroad employees, and contractor and subcontractor employees, charged with the inspection of track or railroad equipment are qualified to assess railroad compliance with Federal standards to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries, and, in implementing the requirements of this paragraph, take into consideration existing training programs of railroad carriers.  
 (b) Approval.—The Secretary shall review and approve the plans required under subsection (a)(2) utilizing an approval process required for programs to certify the

qualification of locomotive engineers pursuant to part 240 of title 49, Code of Federal Regulations.

(c) Exemption.—The Secretary may exempt railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which the Secretary has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008.”

Section 20162(a)(1) contains a citation to the statutory definition of “safety-related railroad employee.” That definition, found in section 20102 of 49 U.S.C. provides that:

(4) “safety-related railroad employee” means—

(A) a railroad employee who is subject to chapter 211;

(B) another operating railroad employee who is not subject to chapter 211;

(C) an employee who maintains the right of way of a railroad;

(D) an employee of a railroad carrier who is a hazmat employee as defined in section 5102(3) of this title;

(E) an employee who inspects, repairs, or maintains locomotives, passenger cars, or freight cars; and

(F) any other employee of a railroad carrier who directly affects railroad safety, as determined by the Secretary.

### III. RSAC Overview

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of RSAC members follows:

American Association of Private Railroad Car Owners (AARPCO);  
 American Association of State Highway & Transportation Officials (AASHTO);  
 American Chemistry Council;  
 American Petroleum Institute;  
 American Public Transportation Association (APTA);  
 American Short Line and Regional Railroad Association (ASLRRRA);  
 American Train Dispatchers Association (ATDA);  
 Association of American Railroads (AAR);  
 Association of Railway Museums (ARM);  
 Association of State Rail Safety Managers (ASRSM);  
 Brotherhood of Locomotive Engineers and Trainmen (BLET);  
 Brotherhood of Maintenance of Way Employees Division (BMWED);  
 Brotherhood of Railroad Signalmen (BRS);  
 Chlorine Institute;  
 Federal Transit Administration (FTA);\*  
 Fertilizer Institute;  
 High Speed Ground Transportation Association (HSGTA);  
 Institute of Makers of Explosives;  
 International Association of Machinists and Aerospace Workers;

International Brotherhood of Electrical Workers (IBEW);  
 Labor Council for Latin American Advancement (LCLAA);\*  
 League of Railway Industry Women;\*  
 National Association of Railroad Passengers (NARP);  
 National Association of Railway Business Women;\*  
 National Conference of Firemen & Oilers;  
 National Railroad Construction and Maintenance Association (NRC);  
 National Railroad Passenger Corporation (Amtrak);  
 National Transportation Safety Board (NTSB);\*  
 Railway Supply Institute (RSI);  
 Safe Travel America (STA);  
 Secretaria de Comunicaciones y Transporte;\*  
 Sheet Metal Workers International Association (SMWIA);  
 Tourist Railway Association Inc.;  
 Transport Canada;\*  
 Transport Workers Union of America (TWU);  
 Transportation Communications International Union/BRC (TCIU/BRC);  
 Transportation Security Administration (TSA); and  
 United Transportation Union (UTU).  
 \*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. The working group may establish one or more task forces or other subgroups to develop facts and options on a particular aspect of a given task. The task force, or other subgroup, reports to the working group. If a working group comes to consensus on recommendations for action, the package is presented to RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, and because the RSAC recommendation constitutes the consensus of some of the industry’s leading experts on a given subject, FRA is often favorably inclined toward the RSAC recommendation. However, FRA is in no way bound to follow the recommendation and the agency exercises its independent judgment on whether the recommended rule achieves the agency’s regulatory goals, is soundly supported, and is in accordance with applicable policy and legal requirements. Often, FRA varies in some respects from the RSAC

recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA resolves the issue(s) through traditional rulemaking proceedings or other action.

### IV. RSAC Training Standards and Plans Working Group

On February 11, 2010, the RSAC accepted a task (No. 10–01) entitled “Minimum Training Standards and Plans.” The purpose of this task was defined as follows: “To establish minimum training standards for each class and craft of safety-related railroad employee and their railroad contractor and subcontractor equivalents, as required by the Rail Safety Improvement Act of 2008 (Act).” The task called for the RSAC Training Standards and Plans Working Group (Working Group) to perform the following:

- Assist FRA in developing regulations responsive to the legislative mandate.
- Determine a reasonable method for submission and FRA review of training plans.
- Establish reasonable oversight criteria to ensure training plans are effective.

The task also listed issues requiring specific report:

- What criteria should be used to determine which, if any, FRA-required training programs may be exempted from the new minimum standards?
- What training methodologies should be employed to ensure that current employees understand which tasks are covered by Federal laws, regulations, and orders, as well as the railroad rules and procedures which implement them?
- What criteria can be developed for the regulated community to determine whether there are safety-related tasks that require training for new employees?
- Should annual proficiency checks be established for all safety-related railroad employees, similar to those required for locomotive engineers and conductors? Should periodic training intervals be extended if such checks were used?
- Which employees should be covered by this regulation?

The Working Group was formed from interested organizations that are members of the RSAC. In addition to FRA, the following organizations contributed members:

AAR, including members from BNSF Railway Company (BNSF), Canadian

National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), Kansas City Southern Railway (KCS), National Railroad Passenger Corporation (Amtrak), Northeast Illinois Regional Commuter Railroad Corporation (METRA), Norfolk Southern Railway Company (NS), Rail America, Inc. and Union Pacific Railroad (UP);

APTA, including members from Bombardier Transportation, Greater Cleveland Regional Transit Authority (GCRTA), Long Island Rail Road (LIRR), Maryland Transit Administration (MTA), Metro-North Railroad (MNCW), Mid-Region Council of Governments/New Mexico Rail Runner Express (MRCOG), Northern Indiana Commuter Transportation District (NICTD), Port Authority Transit Corporation (PATCO), Southeastern Pennsylvania Transportation Authority (SEPTA), and Southern California Regional Rail Authority (Metrolink);

ASLRRRA, including members from Anacostia Rail Holdings (ARH), Genesee & Wyoming Inc. (GNWR), Omnitrax Inc. (Omnitrax), Rio Grande Pacific Corporation (RGP), and WATCO Companies, Inc. (WATCO);

ASRSM, including members from California Public Utilities Commission (CPUC) and Public Utilities Commission of Ohio (PUCO);

ATDA;

BLET;

BMWED;

BRS;

IBEW;

NRC, including members from Balfour Beatty Rail Inc. (BBRI), Delta Railroad Construction Inc., Herzog Transit Services (Herzog), RailWorks Track Systems, and Track Guy Consultants;

RSI, including members from GE Transportation;

SMWIA;

Tourist Railway Association Inc.;

TWU; and

UTU.

In addition to the Working Group members, visitors to the meetings included The Railway Education Bureau and The Transportation Learning Center.

The Working Group convened 6 times on the following dates and locations:

- April 13–14, 2010 in Philadelphia, PA;
- June 2–3, 2010 in Savannah, GA;
- August 17–18, 2010 in Baltimore, MD;
- September 21–22, 2010 in Baltimore, MD;
- October 19–20, 2010 in Atlanta, GA; and
- November 15–16, and 23, 2010 in Washington, DC and via conference call.

To aid the Working Group in its development of recommendations for minimum training standards and plans, FRA prepared draft regulatory text, which it distributed prior to the April meeting. Portions of the draft text were modeled after existing regulations. For

example, the training requirements closely followed 49 CFR § 232.203, which are the general training requirements for railroad and contractor personnel used to perform freight and passenger train brake inspections and tests. As statutorily mandated in 49 U.S.C. 20162(b), the program filing requirements followed the review and approval process required under the qualification and certification of locomotive engineers regulation (49 CFR part 240), but with suggested improvements from the conductor certification RSAC working group. Similarly, the oversight and recordkeeping requirements were modeled after the programs of operational tests and inspections found in 49 CFR 217.9 of the railroad operating rules regulation.

During each meeting, Working Group members made recommendations regarding changes and additions to the draft text. Following each meeting, FRA considered all of the recommendations and revised the draft text accordingly. Minutes of each of these meetings are part of the docket in this proceeding and are available for public inspection.

Having worked closely with the RSAC in developing its recommendations, FRA believes that the RSAC has effectively addressed concerns with regard to requiring minimum training standards and plans. FRA has greatly benefited from the open, informed exchange of information during the meetings. The Working Group reached consensus on all of its recommended regulatory provisions. On December 14, 2010, the Working Group presented its recommendations to the full RSAC for concurrence. All of the members of the full RSAC in attendance at the December meeting accepted the regulatory recommendations submitted by the Working Group. Thus, the Working Group's recommendations became the full RSAC's recommendations to FRA.

#### **V. Employees Charged With Inspection of Track or Railroad Equipment**

The "Statutory Background" section of this preamble cited 49 U.S.C. 20162(a)(3), which requires that the regulation establishing minimum training standards and plans ensure that those employees charged with the inspection of track or railroad equipment are qualified to assess railroad compliance with Federal standards to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries.

FRA is addressing this statutory mandate in this rulemaking by proposing that each employer of one or more safety-related railroad employee, whether the employer is a railroad, contractor, or subcontractor, be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. See proposed §§ 243.1(a) and 243.201. Employees charged with the inspection of track or railroad equipment are considered safety-related railroad employees that each employer must train and qualify. Proposed § 243.5 defines *safety-related railroad employee* to specifically include an individual who is engaged or compensated by an employer to "(3) In the application of parts 213 and 214 of this chapter, inspect \* \* \* track; (4) Inspect \* \* \* locomotives, passenger cars or freight cars; (5) Inspect \* \* \* other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter; [and] (6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition."

The proposal would also require that the training program developed by each employer be submitted to FRA for approval. § 243.109. Thus, the proposal places the burden on each employer to address in its program how it will train those employees charged with the inspection of track or railroad equipment to identify defective conditions and initiate immediate remedial action to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. Furthermore, FRA would reject a program that fails to adequately address training for those employees charged with the inspection of track or railroad equipment.

The proposed formal training for employees responsible for inspecting track and railroad equipment is expected to cover all aspects of their duties related to complying with the Federal standards. FRA would expect that the training programs and courses for such employees would include techniques for identifying defective conditions and would address what sort of immediate remedial actions need to be initiated to correct critical safety defects that are known to contribute to derailments, accidents, incidents, or injuries. FRA would also expect that the

proposed required refresher training address these issues and satisfactorily address Congress's concern for "ongoing training." Because this is a specific statutory requirement, FRA would expect that each employer would pay particular attention to address this issue in its training program.

Although FRA believes this proposed rule adequately covers the specific statutory requirement related to employees charged with the inspection of track or railroad equipment found at 49 U.S.C. 20162(a)(3), FRA seeks comments from interested parties as to whether the proposed regulatory text needs to be more explicit in the final rule. For instance, FRA is considering whether language that mirrors the statutory requirement related to employees charged with the inspection of track or railroad equipment should be added as paragraph (c)(6) to proposed § 243.101 so that it would be one of the specific requirements necessary for each employer's training program. Separately, FRA is also considering whether the proposed regulatory language requiring periodic oversight and annual review should be expanded to directly address those employees inspecting track and railroad equipment. Currently, the oversight and review provisions are only applicable to determine if safety-related railroad employees are complying with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA invites comments on these two specific items under consideration. We also invite comments regarding other options to consider in addressing the specific statutory requirement related to employees charged with the inspection of track or railroad equipment, or any other concern a commenter may have over whether the proposed regulation adequately covers each of the statutory requirements.

#### VI. Incentives for Early Filing of Program

Throughout the RSAC process, FRA expressed its concern that the agency's program review process could be time consuming and resource intensive. As the proposed submission and approval process is statutorily mandated (*see* 49 U.S.C. 20162(a)(2)), FRA views the program filing requirements as necessary to ensure that all safety-related railroad employees receive appropriate training in a timely manner. However, FRA is willing to consider methods or approaches for meeting the statutory review and approval obligations that would lead to a quicker and more efficient review process.

The proposed rule contains two provisions that are expected to reduce FRA's review process burden. In § 243.105, FRA proposes an option for any organization, business, or association to develop one or more model training programs that can be used by multiple employers. Under this approach, once FRA has reviewed and approved a model training program, FRA would only need to look at the aspects of an employer's submission that differ from the model program. For example, if most short line railroads were to use the same, previously approved model program, FRA would likely conserve agency resources and would be able to approve most of those programs in a relatively short period of time. Likewise, in § 243.111, FRA proposes an option for programs to be filed by training organizations and learning institutions. Under this approach, once FRA approves a training organization's or learning institution's training program, FRA would be able to more quickly approve any employer's training program that explained that the employer's training would be provided in accordance with a training organization's or learning institution's previously approved program.

For these reasons, FRA encourages early filing of model programs and programs that could be referenced by multiple employers. FRA is also interested in receiving comments from interested parties on potential ideas for adding other incentives in the final rule to encourage the early filing of these types of programs. One option FRA is considering is pushing back the deadline for an employer submission by at least one year after the submission deadline for an existing training organization or learning institution under § 243.111(b). This potential option would provide associations and other organizations that may be drafting or developing model programs with the incentive to get their optional submissions into and approved by FRA before employers wishing to use those model programs are rushed to file a required employer program.

Another approach FRA is considering is to include an optional deadline for model programs and programs that could be referenced by multiple employers that would include a condition that FRA will issue its approval or disapproval of the program within 180 days, or other date certain, of the date of submission. This condition could also include a provision that if FRA fails to explicitly approve or disapprove the program within that time frame, the program will be deemed approved. FRA believes that an

association or organization with multiple members will have an incentive to produce one or more model programs in order to provide a meaningful product to its members. Likewise, a training organization or learning institution that has developed a training program may garner more clients, and thus have an incentive to file early, if it knows that FRA will expedite its review of the program. Early filing would provide FRA with the benefit of a significant amount of time to dedicate to the review of model programs and programs that could be referenced by multiple employers. It could also give those entities producing such programs sufficient time to market those programs to potential clients or current members/users.

FRA is also considering the approach it followed when requiring training and testing of employees that perform brake system inspections, tests, or maintenance under part 232. In that regulation, FRA provided employers with an extra year to complete refresher training as long as the initial training was completed by a specified date. FRA would similarly consider granting some form of leniency on refresher training, periodic oversight, or the annual review if an employer's program is submitted by an early submission deadline.

Another option might be to extend the date for designating existing employees in accordance with § 243.201(a) as long as the employer's program is submitted by an early submission deadline.

FRA seeks comments on any or all of these proposals and is willing to consider other incentives or approaches that are intended to encourage early submission and improve the efficiency and effectiveness of the review process.

#### VII. Section-by-Section Analysis

##### Part 214—[Amended]

On August 9, 2010, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule regarding "Cranes and Derricks in Construction" (Final Crane Rule). 75 FR 47906. The Final Crane Rule sets forth requirements that are designed to improve safety for employees who work with or around cranes and derricks in the construction industry. In issuing this Final Crane Rule, one of OSHA's provisions established qualification and certification requirements for operators of "power-operated equipment, when used in construction, that can hoist, lower and horizontally move a suspended load." See 29 CFR 1926.1400 and 1926.1427. The qualification and certification requirements for crane

operators are applicable to cranes used in the railroad industry, and would include operators of both on-track and off-track equipment.

Historically, FRA and OSHA have coordinated with each other to ensure that each agency's rules are not in conflict, as there is some potential for overlap of each agency's jurisdiction. In 1978, FRA explained how both agencies have jurisdiction to promulgate rules concerned with assuring safe working conditions for railroad employees in a policy statement titled "Railroad Occupational Safety and Health Standards" (Policy Statement). 43 FR 10583. The Policy Statement recognized the "potential [for] dual regulation" and set out FRA's rationale for terminating a rulemaking addressing railroad occupational safety and health standards. *Id.* at 10584. In terminating that rulemaking, FRA recognized that "it would not be in the best interests of the public and of railroad safety for [FRA] to become involved extensively in the promulgation and enforcement of a complex regulatory scheme covering in minute detail, as do the OSHA standards, working conditions which, although located within the railroad industry, are in fact similar to those of any industrial workplace." *Id.* at 10585. As part of this rule, FRA is proposing crane operator training and qualification requirements that are tailored to the unique aspects of crane operations in a railroad environment. FRA is not proposing similar requirements to those of the OSHA standards, as many of the concerns of working in a railroad environment are dissimilar to those of most industrial workplaces.

Although the Policy Statement clarifies that FRA "is vested with broad authority in all areas of railroad safety, including those of an occupational nature," the agency's policy is to limit itself to involvement in those areas where it could be most effective in providing a "coherent overall railroad safety program." *Id.* at 10584. Because FRA's strengths are found in its developed expertise "assur[ing] safe employment and places of employment for railroad employees engaged in activities related to railroad operations," FRA has generally limited itself to regulating those issues that are of an occupational nature and that have a significant impact on railroad operations. *Id.* at 10585. The term "railroad operations" is not limited to revenue train operations or even on-track operations; instead, it also includes "the conditions and procedures necessary to achieve the safe movement of equipment over the rails." *Id.* For example, roadway workers affect

the safety of railroad operations when they are engaged in laying or repairing rail as they are required to observe certain procedures that impact the final condition of the track and to assure that geometric and other standards are met. *Id.* Likewise, roadway worker protection is also part of the safety of railroad operations as it is used to prevent an employee who is fouling a track from being struck by trains and any other on-track equipment, including cranes. *Id.*

Although the railroad industry uses many different types of cranes, nearly all of the cranes utilized by railroads are used to support railroad operations and would fall within what FRA refers to as "roadway maintenance machines." FRA's "Railroad Workplace Safety" regulation, found at 49 CFR part 214, defines roadway maintenance machine as "a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary." 49 CFR 214.7. FRA already requires some training for crane operators that is related to roadway worker safety, although FRA does not currently require operator certification. *See* 49 CFR 214.341 and 214.355.

The railroad industry's use of cranes is unique compared to general construction use, and therefore it may be very difficult or unnecessarily burdensome for the railroad industry to meet any of the four certification options provided for in OSHA's regulation. For example, OSHA's first option for crane operator certification would permit an operator to be certified by an accredited crane operator testing organization. 29 CFR 1926.1427(b). As many types of cranes used by railroads in roadway maintenance work are adapted specifically for railroad use, there may not be any accredited crane operator testing organization suitable for certification of operators on every type of machine. OSHA's second option is also premised on using written or practical tests developed or approved by either an accredited crane operator testing organization or an auditor who has been certified by an accredited crane operator testing organization, among other conditions. 29 CFR 1926.1427(c). Obviously, this second option poses some of the same obstacles as the first option for the railroad industry. OSHA's third option is only available to an operator who is an employee of the U.S. military and is thus not available to private companies.

29 CFR 1926.1427(d). Finally, OSHA's fourth option for crane operator certification is not especially useful to employees of railroads or contractors to railroads as it permits the licensing of such operators by a government entity. 29 CFR 1926.1427(e). A government entity, such as a State or local government, would only have the authority to license an operator for work within the entity's jurisdiction. As crane operators in the railroad industry that are engaged in roadway maintenance work may be dispatched to work on and off-track for hundreds of miles that cross through multiple states and jurisdictions, it would be logistically difficult to ensure that each crane operator is certified to operate in each jurisdiction along the railroad right-of-way. Consequently, OSHA's certification options are not viable options for the vast majority of the railroad industry's crane operators. The lack of logistically feasible options for many crane operators in the railroad industry to become certified under OSHA's Final Crane Rule could cause a shortage in the availability of such operators to conduct vital roadway maintenance work, which could have a significant detrimental effect on the safety of rail operations.

As FRA is proposing the creation of a new part 243 in this notice to address training standards for all safety-related railroad employees, FRA is solidly situated to propose a viable training alternative to OSHA's certification options for certain crane operators in the railroad industry. In particular, FRA believes it is especially well-suited to address the training and qualification requirement for operators of roadway maintenance machines equipped with a crane. FRA is proposing various requirements in part 243 that would require each employer of a safety-related railroad employee, which would include employers of one or more operators of roadway maintenance machines that are equipped with a crane, to submit a training program that explains in detail how each type of employee will be trained and qualified. However, part 243 is only intended to cover training of Federal standards and those railroad rules and procedures promulgated to implement the Federal standards. Consequently, FRA is proposing the addition of § 214.357 to those Federal standards which will include training and qualification requirements for operators of roadway maintenance machines equipped with a crane. The details of those proposed requirements are addressed below in the analysis for that particular section.

Foremost in FRA's decision to propose replacing OSHA's crane operator qualification and certification regulation found at 29 CFR 1926.1427 with respect to operators of roadway maintenance machines equipped with a crane is the premise that FRA's regulation must provide at least an equivalent level of safety of that provided by OSHA's existing requirements. FRA has various personnel that have significant experience operating an assortment of cranes for the railroad industry. In addition, OSHA has offered to permit FRA personnel to attend joint training sessions with OSHA personnel. FRA intends to utilize its experienced personnel to review employer training programs. The review would focus on ensuring that each employer's program covers the subjects necessary to qualify each crane operator. Furthermore, FRA has the personnel available to make regular inspections at places of railroad or contractor employment to ensure that training records for employees are being properly maintained, thereby ensuring that the crane operators addressed in FRA's regulations are appropriately trained and qualified.

Prior to November 8, 2010, the date OSHA's Final Crane Rule became effective, there were no Federal certification requirements for crane operators. FRA has reviewed its reportable injury data for calendar years 2001 through 2010. In reviewing the data, it is possible that some incidents may not have involved railroad operations; however, it would be difficult to make that determination without doing a resource intensive investigation of each incident. Certainly, the data shows a significant number of injuries each year and many of those accidents would fall into the category of railroad operations that could be addressed by this proposed rulemaking. Between 2001 and 2009, the number of reportable injuries involving cranes consistently totaled between 43 and 60 per year. In 2010, there was a significant drop in reportable injuries down to a total of 27. During the last decade, there were 7 fatalities attributed to accidents involving cranes; however, FRA emphasizes that it is not possible for FRA to determine how many of those accidents would fall into the category of railroad operations that could be addressed by this proposed rulemaking. FRA believes that the number of reportable injuries and fatalities could be reduced even further by implementing the proposed changes to parts 214 and 243. The proposed changes would institute more structure

and accountability to those employers' programs that are merely based on unstructured on-the-job training. FRA also believes that while OSHA's rule will work well for the general construction industry, FRA's proposal will have a greater impact on the railroad industry because it can be implemented by railroads on a system-wide basis.

FRA identified a fatality that occurred in 2003 that potentially could have been avoided with better training as required under OSHA's Final Crane Rule or as proposed for part 243. On January 14, 2003, a bridge mechanic had his hand crushed when he and other maintenance-of-way (MOW) workers were attempting to dismantle a crane's rear counter weight and boom. The crane operator working with that bridge mechanic could not recall the proper procedure for removing the crane's counter weight. Although the bridge mechanic had successful hand surgery, he died after being taken from the operating room. FRA produced a summary of this incident, which is available on FRA's Web site in a document summarizing fatalities that occurred in 2003. [http://www.fra.dot.gov/rrs/pages/fp\\_1662.shtml](http://www.fra.dot.gov/rrs/pages/fp_1662.shtml); (summarizing FE-01-03). In the report, FRA identified three possible contributing factors: (1) The MOW crew failed to use proper procedures for the safe dismantling of the crane's rear counter weight and boom; (2) crane manuals, which were available to the crew, lacked instructions on the proper removal of the crane's counter weight; and (3) the crew received inadequate training in the maintenance and safe operation of the crane. Adequate training and appropriate training manuals are both subjects of this proposed rule and would directly address the possible contributing factors of this incident.

In reviewing the available alternatives, FRA has been mindful of the recent Executive Order (EO) 13563, "Improving Regulation and Regulatory Review," which requires "[g]reater coordination across agencies" to produce simplification and harmonization of rules so as to reduce burdens, redundancy, and conflict, whenever possible, while promoting predictability, certainty, and innovation. To that end, EO 13563 demands better coordination among agencies to reduce regulatory requirements that are redundant, inconsistent, or overlapping. In accordance with this EO, FRA is coordinating with OSHA to maintain an equivalent level of safety in replacing OSHA's training and certification requirements for operators of roadway

maintenance machines equipped with a crane who work in the railroad environment. OSHA has been supportive of FRA's actions.

#### Section 214.7 Definitions

The proposed rule would add a definition for *roadway maintenance machines equipped with a crane* in order to address a term used in proposed § 214.357. The definition of this term would mean any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

#### Section 214.341 Roadway Maintenance Machines

FRA is proposing to amend paragraph (b)(2) to address two issues. First, FRA proposes to delete the requirement that the operator of a roadway maintenance machine have "complete" knowledge of the safety instructions applicable to that machine. Based on informal feedback received from the regulated community, FRA has been informed that requiring that the knowledge be "complete" suggests that a roadway worker operator have instant recall of every instruction contained in the manual. This reading of the rule is not FRA's intention. FRA intends each operator to have sufficient knowledge of the safety instructions so that the operator would be able to safely operate the machine without reference to the manual under routine conditions, and know where in the manual to look for guidance when operation of the machine is not routine.

The second proposed change to paragraph (b)(2) is intended to address what is meant by "knowledge of the safety instructions applicable to that machine." FRA's intent is that this term means the manufacturer's instruction manual for that machine. However, it has come to FRA's attention that some portion(s) of a manufacturer's instruction manual may not be applicable to a particular machine if the machine has been adapted for a specific railroad use. In that case, FRA proposes that the employer have a duty to ensure that such instructions be amended or supplemented so that they shall address all aspects of the safe operation of the crane and be as comprehensive as the manufacturer's safety instructions they replace. The purpose of this requirement is to ensure that the safety instructions provided address all known safety concerns related to the operation of the machine. If some type of functionality is added to the machine through adaptation, the safety instructions would need to address the known safety concerns and proper operation of that additional function. On the other hand,

if the adaption removes an operational functionality, the safety instructions would no longer need to address the function that was removed, although it could be possible that the removal of a device could create other safety hazards that may need to be addressed in the safety instructions in order to be considered comprehensive. In order to ensure that the safety instructions for a machine are comprehensive, some employers may choose to provide a completely new safety instruction manual for adapted equipment; however, other employers may choose to simply void certain pages or chapters of the manufacturer's manual, and provide a supplemental manual to address the safety instructions related to the adapted functions of the equipment.

#### § 214.357 Training and Qualification for Operators of Roadway Maintenance Machines Equipped With a Crane

As mentioned in the introductory discussion of this proposed part, FRA is proposing the addition of this section in order to ensure that each railroad or contractor (or subcontractor) to a railroad ensures that operators of roadway maintenance machines equipped with a crane are adequately trained to ensure their vehicles are safely operated. The training requirements are intended to address both safe movement of the vehicles and safe operation of the cranes. If this section is adopted in a final rule, FRA regulations would then apply to operators of roadway maintenance machines equipped with a crane, rather than OSHA's regulation related to crane operator qualification and certification found at 29 CFR 1926.1427.

Paragraph (a) clarifies that this section proposes new training requirements in addition to the existing requirements already contained in this subpart. Paragraph (a) also proposes a requirement that each employer adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines. If proposed part 243 is finalized, the requirement in proposed paragraph (a) to "adopt" and "comply" with a training and qualification program may seem redundant; however, these requirements are intended to remind each employer that it will need to both "adopt" such a program and "comply" with its own program. Failure to adopt or comply with a program required by this section will be considered a failure to comply with this section.

Paragraph (b) proposes that each employer's training and qualification

program address initial and periodic qualification for each operator of a roadway maintenance machine equipped with a crane. Both initial training and periodic refresher training must, at a minimum, include certain procedures for addressing critical safety areas. Paragraph (b)(1) proposes that each employer develop procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate. FRA would expect that those procedures would include demonstrated proficiency as observed by a qualified instructor or supervisor. Paragraph (b)(2) proposes that each employer develop procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. As explained in the analysis to the proposed amendments to § 214.341(b)(2), an operator must have knowledge of the safety instructions applicable to that machine, regardless of whether the machine has been adapted for a particular railroad use. Implicit in this proposal is the requirement that the employer must supply the safety instructions for the crane. If the crane has been adapted for a specific use, the employer must ensure that the safety instructions are also adapted. FRA would expect the employer to employ or contract out for a qualified person to adapt the safety instructions, but in any case the employer is responsible for ensuring that the instructions address all aspects of the safe operation of the crane. When equipment has been adapted, the employer has a duty to provide revised safety instructions that comprehensively address each adapted feature as well as any feature supplied by the manufacturer that was not removed during the adaptation.

Paragraph (c) proposes that each employer maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. If proposed part 243 is finalized, this requirement would repeat the requirement in § 243.203 to maintain records. However, it is useful to repeat the requirement as a reminder to employers. In repeating this requirement, FRA does not intend the proposed requirement to cause an employer to duplicate records kept in accordance with proposed part 243. Similarly, paragraph (d) proposes that each employer is required to make all records available for inspection and copying/photocopying to representatives of FRA, upon request

during normal business hours, as is also proposed in part 243.

In paragraph (e), FRA proposes that training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) may be used to satisfy the training and qualification requirements of this section. The purpose of this paragraph is to allow an employer to choose to train and certify an employee in accordance with OSHA's Final Crane Rule and opt out of the other proposed requirements of this section for that employee. As explained in the introductory analysis to part 214, if the crane equipment is modified for railroad operations there may not be an accredited crane operator testing organization that could certify the operator in accordance with OSHA's Final Crane Rule. 29 CFR 1926.1427(b). However, there are some roadway maintenance machines equipped with a crane that are considered standard construction equipment and thus it would be possible to certify operators of that equipment through such an accredited organization. For this reason, FRA does not want to preclude the option for a person to be trained by the accredited organization and meet OSHA's requirements in lieu of FRA's requirements. Similarly, FRA envisions that some railroads or employers may employ some operators on roadway maintenance machines equipped with a crane who could be used exclusively within State or local jurisdictions in which the operators are licensed. Under those circumstances, the operator would be in compliance with OSHA's fourth option for certifying crane operators as it permits the licensing of such operators by a government entity. 29 CFR 1926.1427(e). FRA has no objection to the use of crane operators who meet OSHA's requirements and does not intend, by the addition of this section, to impose any additional regulatory requirements on such operators. Although the purpose of this section is to provide an alternative method of training and qualification that is tailored to the unique circumstances faced by most operators of roadway maintenance machines equipped with a crane working for the railroad industry, the purpose of paragraph (e) is to permit an employer to opt out of the alternative FRA requirements as long as the operator has met OSHA's training and certification requirements.

*Part 232—[Amended]*

## Section 232.203 Training Requirements

FRA modeled some aspects of proposed part 243 after the training requirements found in this section. Meanwhile, when reviewing this section, FRA discovered that several minor corrections to the section are necessary.

It is proposed that existing paragraph (b)(6)(iv) be revised to provide some context to the paragraph and to reiterate FRA's intent. The proposed revision would add a phrase to the end of the current provision. The proposed phrase explains that any combination of the training or testing contained in paragraphs (b)(6)(i) through (b)(6)(iii) of this section and paragraphs (b)(3) through (b)(5) of this section "may be used to satisfy the training and testing requirements for an employee in accordance with this paragraph." Without the addition of the proposed quoted language, the requirement appears incomplete.

FRA proposes clarifying amendments to paragraphs (e)(6) through (e)(8). The proposed revisions relocate a misplaced "and" at the end of paragraph (e)(6) to the end of paragraph (e)(7), and correct two incorrect citations to paragraph (e)(7) when the correct citations should be to paragraph (e)(6).

*Part 243—[Proposed]*

## Subpart A—General

## Section 243.1 Purpose and Scope

As previously explained in the supplementary information, FRA is required by RSIA to address minimum training standards for safety-related railroad employees. Paragraph (a) is consistent with the specific statutory language and captures Congress' intent to ensure that any person doing work covered by the Federal railroad safety laws, regulations, and orders, regardless of whether the person is employed by a railroad or a contractor, is properly trained and qualified. This proposed regulation meets the statutory requirement as it intends to cover each employee that does work required by a Federal mandate, regardless of the employer.

Paragraph (a) provides the scope of the training required by this proposed regulation. FRA is only requiring training for an employee to the extent that the employee is required to comply with a Federal mandate. Furthermore, the training that would be required by this proposed part would be limited to any training necessary to ensure that the employee is qualified to comply with all

Federal railroad safety laws, regulations, and orders that would be applicable to the work the employee would be expected to perform. Thus, it is proposed that an employer that chooses to train employees on issues other than those covered by Federal railroad safety laws, regulations, and orders would not need to submit such training to FRA for review and approval in accordance with this part.

Given the limited scope of this proposed rule, not every person that works on a railroad's property should expect that this proposed rule will require that an employer provide that person with training. Some employees of a railroad or a contractor of a railroad may do work that has a safety nexus but is not required by any Federal railroad safety laws, regulations, or orders. For example, a person may be hired to clean passenger rail cars by a railroad's maintenance division for other than safety purposes. However, as there are no Federal requirements related to the cleaning of passenger rail cars, this proposed rule would not require an employer to ensure that this person is trained to clean passenger rail cars. On the other hand, if the person is expected to perform any of the inspections, tests, or maintenance required by 49 CFR part 238, it is proposed that the person would be required to be trained in accordance with all applicable Federal requirements. See *e.g.*, §§ 238.107 and 238.109.

If the employer's rules mirror the Federal requirements, or are even more restrictive than the Federal requirements, the employer may train to the employer's own rules and would not be required to provide separate training on the Federal requirements. During the RSAC process, some employers raised the concern that it would be confusing for employees if FRA required that training be made directly on the Federal requirements as that would pose potential conflicts whenever an employer's rule was stricter than the Federal requirement. FRA agrees with this concern, and this NPRM does not require that employers provide separate training on both the Federal requirements and on employer's rules. As long as the employer's rules satisfy the minimum Federal requirements, an employer's training on its own rules will suffice.

Although FRA does not want to confuse employees, FRA encourages employers to emphasize when compliance with the employer's rules is based on a Federal requirement so that employees can learn which duties are being imposed by the Federal government. When an employee is put

on notice that an employer's rule is based on a Federal requirement, the notice that the Federal government deems the issue important enough to regulate may provide further incentive for the employee to comply with the rule at every opportunity. Additionally, in response to concerns raised by RSAC members during the Working Group meetings, FRA wants to be clear that the requirements in this proposed part would not require an employee to be able to cite the volume, chapter, and section of each Federal railroad safety law, regulation, or order that is relevant to the employee's qualification. FRA will not take enforcement action against individual safety-related railroad employees who cannot correctly quote Federal rules that govern the employee's safety-related work.

Often, a railroad or contractor will train employees on the employer's own safety-related rules, without referencing any particular Federal requirement. There may also be instances where the Federal requirement is generally stated with the expectation that the employer will create procedures or plans that will implement the conceptual requirement of the Federal requirement. Proposed paragraph (a) makes clear that this part covers both types of training; *i.e.*, training that either directly or indirectly is used to qualify safety-related railroad employees on the Federal railroad safety laws, regulations, and orders the person is required to comply with to do his or her job. As an introductory matter, FRA also wishes to make clear that not all training is task-based. Some Federal requirements include prohibitions and the relevant training must impart that information so that employees know how they can comply. For example, employees need to know when they may use cell phones and when they are prohibited from using them.

Proposed paragraph (b) explains that this part contains the general minimum training and qualification requirements for each type of safety-related railroad employee. As these are minimum requirements, it is presumed that an employer may implement additional or more stringent requirements for its employees. Consistent with the statutory mandate, FRA makes clear that the proposed regulation is intended to cover employees performing safety-related tasks regardless of whether they are employed by a railroad or a contractor. Covering employees of both railroads and contractors is consistent with other FRA regulations and the general trend in the railroad industry. In many instances, employees doing safety-related tasks for a railroad may be employed by a company other than the

railroad upon which the person is working. On a large scale track maintenance project, it may be possible for the railroad's employees to be working side-by-side with workers employed by multiple contractors; in such situations, it is vital that all the workers doing safety-related work are properly trained and qualified.

Proposed paragraph (b) also stresses that each contractor will have a duty to comply with the training requirements of this proposed regulation, including any aspect of training that may be specific to the contracting railroad's rules and procedures. For example, the contractor may arrange universally necessary training for an employee who is a roadway maintenance machine operator so that the person understands how to safely operate the equipment and the Federal requirements associated with its operation on any railroad. In addition, the contractor will need to arrange with each railroad it works for so that any railroad specific training is properly arranged, completed, and recorded. For example, both the railroad and contractor are responsible for knowing how the operator will be trained on the specific railroad rules that govern the operation of on-track roadway maintenance machines, to and from a work site. Depending on a variety of factors, including the ability of the contractor to replicate the railroad's training, the contractor and railroad will need to decide which company will handle this training. For example, a railroad could train one or more of the contractor's supervisors who could then train those contractor employees who need the training. In other instances, the contractor may be too small or inexperienced to conduct such training and the railroad will offer to have its instructors train and qualify the contractor's employees. Such training details would likely be part of a work order or contract between these private parties.

Proposed paragraph (c) states that the requirements in this part do not exempt any other requirement in this chapter. The purpose of this statement is to acknowledge that there are other training and qualification requirements in this chapter and that FRA is not intending to nullify any of those other requirements by implementing this proposed part. FRA has previously promulgated well-established regulations by subject matter and it would be confusing to the regulated community if FRA were to move all of the training and qualification requirements located in this chapter into this proposed regulation. Consequently, FRA is adding this

statement to the purpose and scope section to notify any relevant person who is required to comply with training and qualification requirements contained elsewhere in this chapter that the person will need to continue to comply with those existing requirements.

Similar to paragraph (c), proposed paragraph (d) acknowledges that there are other training and qualification requirements in this chapter and that this part augments those other training and qualification requirements, unless otherwise noted. FRA has training and qualification requirements scattered throughout the existing regulations. Many of these regulations do not contain a requirement that an employer submit a plan or program to FRA for review. Others may lack a requirement for a structured on-the-job training (OJT) component. This proposed regulation would leave the existing requirements intact, but would require that the existing training requirements be incorporated in a program required under this proposed part—as well as comply with any additional requirements imposed by this part. Similarly, FRA may add other training and qualification requirements elsewhere in this chapter after this proposed rule is made final; in those instances, the requirements in this proposed part would also augment regulations promulgated at a later date.

#### Section 243.3 Application and Responsibility for Compliance

The extent of FRA's jurisdiction, and the agency's exercise of that jurisdiction, is well-established. *See* 49 CFR part 209, app. A. The proposed application and responsibility for compliance section is consistent with FRA's published policy for how it will enforce the Federal railroad safety laws. The proposed rule is intended to apply to all railroads (except those types of railroads that are specifically listed as exceptions), contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees.

In paragraph (a)(1), FRA has exempted plant railroads as defined in this proposed regulation. In other regulations, FRA did not define plant railroad because it was assumed that FRA's jurisdictional policy statement provided sufficient clarification. In 2010, FRA became aware of certain operations that called themselves plant railroads but that were exceeding the limitations required to maintain plant railroad status in accordance with FRA's policy statement. FRA would like to avoid any confusion as to what it means

to be a plant railroad by defining it in the proposed rule, thereby saving interested persons the effort necessary to cross-reference FRA's jurisdictional policy statement. A further discussion of what is meant by the term "plant railroad" is offered in the section-by-section analysis for section 243.5.

In paragraph (a)(2), FRA proposes to exclude "tourist, scenic, historic, and excursion operations that are not part of the general railroad system of transportation" (as defined in § 243.5) from compliance with this rule. In section 243.5, FRA defined these operations as "a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track)." Excluding these types of operations from this proposed rule is consistent with FRA's jurisdictional policy that already excludes these operations from all but a limited number of Federal safety laws, regulations, and orders.

In paragraph (a)(2), FRA is excluding tourist, scenic, historic, or excursion operations that are not part of the general system. These would include such operations regardless of whether they are "insular" or "non-insular." FRA decided to exclude each of these generally small operations from the burden of producing training programs for relatively few employees on the limited number of Federal requirements that are applicable to these operations.

Proposed paragraph (a)(3) captures FRA's long held view that its jurisdiction does not extend to self-contained urban rapid transit systems that are not connected to the general railroad system of transportation. *See* 49 CFR part 209, app. A.

Proposed paragraph (b) contains a statement clarifying that each person who performs the duties of this part is responsible for compliance, even if that duty is expressed in terms of the duty of a railroad.

#### Section 243.5 Definitions

This section defines a number of terms that have specific meaning in this proposed part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter. Definitions may differ from other parts of this chapter because a particular word or phrase used in the definition in another chapter does not have context within this proposed part.

The definitions of *Administrator* and *Associate Administrator* are standard definitions used in other parts of this

chapter. In this part, the term *Associate Administrator* means the Associate Administrator for Railroad Safety/Chief Safety Officer. When the RSAC Committee voted for certain recommendations, the recommendations did not address the role of the Associate Administrator for Railroad Safety/Chief Safety Officer. FRA decided to add this definition and change some of the proposed program review processes so that it is clear that these functions will be delegated to the Associate Administrator. The agency's expertise in reviewing training programs lies within its Office of Railroad Safety, and the decision-making on these issues will routinely be decided by the Associate Administrator. If a person were to have a material dispute with a decision of the Associate Administrator, it would be expected that the person could bring that dispute to the Administrator's attention and request final agency action. FRA is considering whether the final regulation should refer to FRA or the Administrator, instead of the Associate Administrator. Although the issue of the Associate Administrator's role is an internal procedure or practice, FRA invites comments regarding this issue.

FRA is proposing to define the term *calendar year*. FRA does not believe the term is confusing but has defined it as "the period of time beginning on January 1 and ending on December 31 of each year." FRA is defining the term to distinguish it from terms used in other regulations that have been considered vague. For example, if FRA required that a person complete a particular type of training "annually," some people might interpret that to mean "once each calendar year" and others might interpret it to mean "within one year of the last training." By using the more descriptive term and defining it, FRA intends to avoid ambiguity.

FRA is proposing a definition of *contractor* in order to clarify the standard definition. A contractor is typically considered one who contracts to do work or provide supplies for another. In FRA's definition, the agency is specifically only concerned with "a person under contract with a railroad." Furthermore, the definition states that it includes, but is not limited to, a prime contractor or a subcontractor. A prime contractor, sometimes referred to as a general contractor, is a person who contracts for the completion of an entire project, including purchasing all materials, hiring and paying subcontractors, and coordinating all work. A subcontractor is a person who is awarded a portion of an existing

contract, typically by a prime contractor but potentially also by a subcontractor. Thus, regardless of how many times a contract is subcontracted, the term "contractor," as used in this part, is intended to include the prime contractor and all subcontractors responsible for performance of the contract.

FRA is defining *designated instructor* for essentially two purposes. First, when this term is used in the proposed rule, FRA expects that a person doing the work of an instructor would specifically be designated. That means the employer, training organization, or learning institution that employs the person must have a record reflecting that the person has been designated as an instructor for certain courses, subject matters, or tasks involving particular occupational categories or subcategories of employees. Second, FRA expects only qualified instructors will be designated, which explains why FRA is including in the definition that each designated person must have "demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training." By proposing to require that employers designate instructors, FRA intends to ensure that only qualified individuals instruct safety-related railroad employees.

FRA is defining the term *employer* to mean "a railroad or a contractor that employs at least one safety-related railroad employee." In this proposed rule, each employer is responsible for filing a training program and deciding how it will train its own employees. FRA is expecting all safety-related railroad employees to be trained, regardless of whether employed by a railroad or a contractor of such a railroad. The term "contractor" is defined in this proposed rule and includes subcontractors.

The proposed rule defines the term *formal training* mainly to distinguish it from informal, less structured training that may be offered by employers. Generally, a briefing during a "safety blitz," in which an employer quickly tries to raise awareness of a safety issue following an accident or close call incident, would not be considered formal training. Formal training would typically be more structured than a safety blitz briefing and be planned on a periodic basis so that all eligible employees would continuously get opportunities to take the training. Formal training should contain a

defined curriculum, as it is not the type of training that can be hastily prepared and improvised.

Formal training may be delivered in several different ways. Many people first think of classroom training as synonymous with formal training, and certainly that is one acceptable way of delivering formal training. However, the proposed definition explains that "[i]n the context of this part, formal training may include, but is not limited to, classroom, computer-based, on-the-job, simulator, or laboratory training." During the RSAC process, some labor organizations explained that their members expressed a preference for classroom training over computer-based training. One valid concern expressed was that computer-based training is often performed without a qualified instructor present to answer questions. It can be frustrating to a training participant if the person finds a subject confusing and cannot get immediate clarification. Meanwhile, the RSAC members recognized an equally valid concern that there could be circumstances when a qualified instructor cannot immediately answer a substantive question during classroom training—so mandating classroom training is not necessarily the remedy for addressing this problem. RSAC recommended, and FRA has agreed to propose, that formal training include an opportunity for training participants "to have questions timely answered during the training or at a later date." An employer, or other entity providing training, will need to establish procedures for providing participants the opportunity to have questions timely answered. For example, some course offerors may provide training participants with an email address to send questions and promise to respond within 5 business days. Certainly, there are a wide-variety of reasonable procedures that could be established by course offerors that could include registering a question by telephone, written form made available at the time of the training, or even instant-messaging (IM) during the training itself. However, in all such instances, procedures must be clear and provide the training participant an opportunity to have questions answered in a timely fashion.

In the proposed definition of formal training, FRA did not adopt the RSAC's recommendation entirely as the NPRM proposes using the term "training participants" rather than "employees." However, FRA believes the change more closely matches the intent behind the RSAC's recommendation. The basis for making the change is that a learning

institution may offer a course to someone who is not currently employed by a railroad or contractor. By making this change from the RSAC's recommendation, the proposed rule ensures that anybody taking a course covered by this NPRM would have the opportunity to have questions timely answered during the training or at a later date. The term "training participants" covers employees, trainees, learners and students.

The proposed rule defines the term *knowledge-based training* as a type of formal training. Knowledge-based training is clearly distinguishable from "task-based training" because, by definition, it is not task-based. For purposes of this part, the knowledge component is limited to any knowledge "intended to convey information required for a safety-related railroad employee to comply with Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders." Thus, knowledge-based training would include any formal training imparted to employees on complying with Federal hours of service laws. Another example would be training on Federal alcohol and drug prohibitions, or those railroad rules and procedures used to implement the Federal alcohol and drug prohibitions.

FRA has defined the phrase *on-the-job training (OJT)* to mean "job training that occurs in the workplace, *i.e.*, the employee learns the job while doing the job." This is the common meaning of this phrase. For purposes of this proposed rule, OJT is specifically identified as a type of "formal training." That means that, like other types of formal training, OJT must have a structured and defined curriculum that provides an opportunity for training participants to have questions timely answered during the training or at a later date. OJT is an essential component of most training curriculums and should add significant value for each employee participant. In FRA's experience, OJT is often the weakest aspect of current training programs because the OJT portion often is unstructured, without a defined curriculum, and its value is therefore difficult to assess. Because of these weaknesses, OJT requirements are proposed in § 243.101(d), and OJT training components must be identified in each program under § 243.103(a)(3) and (b). Under § 243.103(d), FRA considers OJT an essential program component of most task-based training and may require modifications to any

programs that do not contain or have an inadequate OJT component. FRA also proposes a requirement in § 243.201(f) that employees designated to provide OJT instruction to other employees must be qualified. Additionally, under § 243.203(b)(7), it is proposed that adequate records of OJT be maintained.

In this proposed part, *person* takes on the same meaning as it does in FRA's other safety rules. The definition makes clear that it is expansive and does not apply merely to individual persons. Instead, the term "means an entity of any type covered under 1 U.S.C. 1" and the definition goes into detail regarding the types of people and entities that are covered.

FRA proposes a definition of *plant railroad* to aid in the understanding of the application of this part pursuant to § 243.3(a)(1). The definition coincides with FRA's longstanding explanation of how the agency will not exercise its jurisdiction over a plant railroad that does not operate on the general system and does not move cars for other entities. *See* 49 CFR 209, app. A.

A proposed definition of *qualified* reflects RSAC's recommendation and FRA's expectations of what is expected of a qualified person under this part. The definition reflects that a person cannot be deemed qualified unless the "person has successfully completed all instruction, training, and examination programs required by both the employer and this part." Obviously, if a person fails to complete any of those aspects of the requirements in the employer's program, the person could not be reasonably expected "to proficiently perform his or her duties in compliance with all Federal railroad safety laws, regulations, and orders."

For purposes of this proposed part, FRA has defined *safety-related duty* to mean "either a safety-related task or a knowledge-based prohibition that a person meeting the definition of a safety-related railroad employee is required to comply with, when such duty is covered by any Federal railroad safety law, regulation, or order." The proposed term is used when referring to legally mandated responsibilities. It refers to both task-based duties and prohibitions unrelated to specific tasks.

The proposed definition of *safety-related railroad employee* is mainly derived from the statutory definition of the same term found in 49 U.S.C. 20102, which was cross-referenced in the statute requiring this rulemaking. *See* 49 U.S.C. 20162(a)(1). The proposed definition makes clear in the introductory phrase that it applies to employees of both railroads and contractors by stating that the term

"means an individual who is engaged or compensated by an employer." However, for a person to be a safety-related railroad employee the person must be more than merely employed by a railroad or contractor; that is, the person must also meet at least one of the eight listed items. Item (1) includes an employee who performs work covered under the hours of service laws, which is also the first item in the statutory definition. Item (2) includes an employee who performs work as an operating railroad employee who is not subject to the hours of service laws, which is also the second item in the statutory definition. Item (2) most often refers to railroad officers who are not typically called to duty to perform work under the hours of service but during a tour of duty end up doing work covered by the hours of service laws.

Item (3) is also derived from the statutory definition of safety-related railroad employee, but has been refined to more closely describe the types of employees that the industry recognizes as responsible for "maintain[ing] the right of way of a railroad." 49 U.S.C. 20102(4)(C). The description in item (3) is intended to cover any person that would be included in the definitions of "roadway worker" and "railroad bridge worker" found in 49 CFR 214.7. Included within the definitions would be a person who is engaged or compensated by an employer to inspect, install, repair, or maintain track, roadbed, and signal and communication systems of a railroad. By referencing "[i]n application of parts 213 and 214 of this chapter," RSAC recommended, and FRA agreed, to clarify that the proposed rule is intended to cover those workers, whether employed by a railroad or contractor, who have responsibilities for compliance with Federal regulations applicable to railroad workplace safety and track safety standards. If a person does not have responsibilities for compliance with 49 CFR parts 213 and 214, the person would not be covered by item (3) within the definition of safety-related railroad employee.

Item (4) includes an individual who is engaged or compensated by an employer to inspect, repair, or maintain locomotives, passenger cars or freight cars. The inclusion of this proposed item is intended to mirror the statutory item in the definition of safety-related railroad employee. It is essential that individuals doing such safety-sensitive work are trained to comply with those laws or rules mandated by the Federal government for keeping those locomotives and cars in safe order.

Item (5) includes an individual who is engaged or compensated by an employer

to inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter. RSAC recommended that FRA include such on-track equipment because such equipment poses the same sorts of danger that locomotives and cars do. FRA agrees with the RSAC consensus that, although the statutory definition does not include employees who do such safety-sensitive work to the on-track equipment, the proposed training rule would be deficient without including such employees in training plans. The RSAC members do not believe that Congress intentionally left these workers out of the statutory definition so that they would be excluded from training even though they need to comply with certain Federal requirements.

In the statutory definition of safety-related railroad employee, paragraph (F) is a "catch-all" phrase that allows the Secretary of Transportation to include "any other employee of a railroad carrier who directly affects railroad safety." FRA has identified three items within the proposed regulatory definition that flow from this catch-all provision. Item (6) of the proposed definition includes an individual who is engaged or compensated by an employer to determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition. The issue identified in item (6) is that sometimes a supervisor or other person who is not a roadway worker [and therefore, not otherwise included in the definition of "safety-related railroad employee"] makes the decision that an on-track roadway maintenance machine or hi-rail vehicle is safe to use and may continue to be operated in accordance with the requirements for scheduling repairs of such vehicles. See 49 CFR §§ 214.531 and 214.533. The person may learn about the condition of the equipment from a roadway worker making a good faith challenge that the equipment is unsafe to operate or otherwise does not comply with the safety requirements for that equipment. See 49 CFR 214.503. A person cannot make such a decision without having been trained and therefore having the knowledge necessary to know the roadway worker's rights, whether the equipment is in compliance or safe to use, and how quickly the equipment must be repaired.

Item (7) also flows from the statutory catch-all provision. It covers railroad and contractor employees who directly instruct, mentor, inspect, or test, as a

primary duty, any person while that other person is engaged in a safety-related task. The bottom line here is that even though an instructor, mentor, supervisor, or other manager may not be directly performing a safety-related task, that person performing an oversight role must be qualified to perform that oversight role. By including those who perform oversight in the definition of safety-related railroad employee, the proposed rule is requiring that railroads and contractors include these types of individuals within the scope of the training programs required under this part.

Regarding item (7), RSAC recommended that the definition make clear that it was only including those who "directly instruct, mentor, inspect, or test, as a primary duty." For example, many supervisors are expected to perform operational monitoring or efficiency testing as part of their regular duties; those supervisors would clearly be covered by item (7). Conversely, other supervisors or managers may have the authority to instruct employees if unsafe or non-complying actions are observed, but instructing employees is not part of that person's "primary duty." For instance, suppose a System Road Foreman of Engines is visiting one of many of the railroad's yards and observes one or more employees failing to establish proper point protection in accordance with 49 CFR 218.99 and the corresponding railroad operating rules, and so instructs the employee(s) on the appropriate action. Although the System Road Foreman of Engines would normally be expected to know those rules and be able to instruct employees on them, instructing employees in this manner would not typically be considered one of the person's primary duties. Thus, although FRA would hope that each System Road Foreman of Engines would continuously keep current on all the applicable requirements, this proposed rule does not intend to cover those supervisors or managers who happen to instruct, mentor, inspect, or test on rare occasions, such as when they happen upon a situation that needs to be addressed, but the person's involvement is not a primary duty of the job.

Item (8) also flows from the statutory catch-all provision. It covers railroad and contractor employees who directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with proposed 243.205. It will likely be rare that a person is not covered by item (7) of the definition but is covered by item (8). However, FRA wants to ensure that if a person is performing an oversight

function under this proposed part, that person is considered a safety-related railroad employee who must be included in the employer's training program required under this part.

Furthermore, although the statutory definition of safety-related railroad employee covers a hazmat employee of a railroad carrier as defined in 49 U.S.C. 5102(3), RSAC recommended that the proposed rule not address the training of hazmat employees. FRA concurs. The training of hazmat employees is already extensively covered by DOT regulations promulgated by the Pipeline and Hazardous Materials Safety Administration (PHMSA). See e.g., 49 CFR part 172, subpart H. FRA is satisfied that the training requirements are sufficiently addressed by PHMSA and does not believe that Congress intended for FRA to overcomplicate the existing rules governing hazmat training.

The rule proposes a definition for *safety-related task* because a significant portion of the training given to most safety-related railroad employees involves learning to perform tasks that are required by a Federal railroad safety law, regulation, or order. By defining this term, the proposed regulation does not have to explain each time that a safety-related task has a specific connotation tied to other Federal requirements. Meanwhile, if there is no Federal requirement that applies to a specific task, the task would not be considered a "safety-related task" pursuant to this proposed rule even if the task arguably has a safety nexus.

As previously described, *task-based training* is distinguishable from knowledge-based training. Task-based training means a type of formal training with a primary focus on teaching the skills necessary to perform specific tasks that require some degree of neuromuscular coordination. While OJT is nearly always task-based training, other types of formal training may also be task-based. For example, mechanics can work on several different types of locomotive engines in classroom or laboratory training. Similarly, signal and grade crossing workers can also learn their craft in the classroom with training that allows the training participants to work on models of signal systems, as well as actual signal and grade crossing warning systems and components. Other task-based training may occur for employees at training facilities that have mock yards in which to practice the tasks. Apprentice welders may be required to perform practice welds in a facility that allows a trainer to monitor the work of multiple training participants. Again, FRA has chosen to

define task-based training in order to distinguish it in the proposed rule from that training which teaches concepts unrelated to learning a specific task.

The proposed rule offers a definition for the phrase *tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation* in order to explain the plain meaning of that phrase in the proposed applicability section. See § 243.5. The phrase means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track). If there was any freight, intercity passenger, or commuter passenger railroad operation on the track, the track would be considered part of the general system. See 49 CFR part 209, app. A. In the analysis for the applicability section, there is an explanation for why FRA is proposing not to exercise its jurisdiction over these types of railroad operations.

#### Section 243.7 Waivers

This section provides the proposed requirements for a person seeking a waiver of any requirement of this rule. After review, however, FRA believes this section may be unnecessary because 49 CFR part 211 sufficiently addresses the waiver process. FRA welcomes comments as to whether this proposed section should be removed.

#### Section 243.9 Penalties and Consequences for Non-compliance

This section provides minimum and maximum civil penalty amounts determined in accordance with the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410 Stat. 890, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996 Public Law 104-134, April 26, 1996, and the RSIA.

#### Section 243.11 Information Collection Requirements

This section lists the sections of the proposed rule which contain information collection requirements.

#### Section 243.101 Employer Program Required

Proposed paragraph (a) contains the general requirement for each "employer," as that term is defined in this part, which is conducting operations subject to this part as of one year and 120 days after the effective date of the final rule to submit, adopt, and comply with a training program for its safety-related railroad employees. An employer's program must be submitted

and approved by FRA in accordance with the process set forth in proposed §§ 243.107, 243.109, and 243.113. However, an employer's duty is not complete upon submission of a program to FRA. The employer will also be required to adopt and comply with its program. By using the term "adopt," FRA is expecting each employer to implement its training program. Furthermore, FRA approval of a program comes with the expectation that an employer will comply with its program. Potentially, FRA could take enforcement action if an employer failed to comply with its approved training program. As with any potential enforcement action, FRA will use its discretion regarding whether to issue a warning, a civil monetary penalty, or other enforcement action. See 49 CFR part 209, app. A.

Paragraph (b) contains the proposed general requirement that an employer commencing operations subject to this part more than one year and 120 days after the effective date of the final rule shall submit its training program and request for approval at least 90 days prior to commencing operations. FRA anticipates using the proposed 90-day period to evaluate the completeness of the program and approve it prior to the employer commencing any operation that requires a safety-related railroad employee. After FRA approves the training program in accordance with the proposed submission, review, and approval process, the employer is required to adopt and comply with the training program for the same reasons as explained in the analysis for paragraph (a).

Paragraph (c) proposes a list of overarching organizational requirements for each employer's training program. For example, paragraph (c)(1) proposes a requirement that the employer classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology. This requirement is derived from the statutory requirement in 49 U.S.C. 20162(a)(1) which states in part that "[t]he Secretary of Transportation shall \* \* \* establish minimum training standards for each class and craft of safety-related railroad employee." Although FRA agrees with Congress that most railroads could identify safety-related railroad employees by craft or class, there could be problems if FRA were to define those categories because the same class or craft identifier could have different meanings based on different collective bargaining agreements or usage by the employer. For example, in the RSAC working group meetings, FRA learned

that some railroads may have only one type of "carmen" and others may have 10 different types of carmen. By requiring that each railroad define its employees in occupational categories or subcategories, FRA is giving each railroad the maximum flexibility it needs to shape the structure of its training program by what it wants each type of employee to do. In that way, employers will not be required to train some employees on subjects or tasks that exceed what the employee will actually be required to do. Similarly, some railroads may wish to categorize employees by occupational categories that do not easily fall into an established craft or class. Thus, FRA proposes to also allow for an employer to classify its safety-related railroad employees in occupational categories or subcategories by task or any other terminology the employer deems suitable.

During the RSAC process, the working group considered including a list of potential occupational categories or subcategories. After adding and amending that list, the RSAC decided that having the list in the regulatory text might be confusing. The list was never intended to include every conceivable category of employee, but instead was aimed at providing employers with a list of suggested categories that could be used or modified as necessary to describe each type of employee. Thus, in order to provide some ideas of the types of categories FRA is referring to in this paragraph, the following is a list of possible categories of employees that an employer may choose to use: brakeman; bridge tender; carman; conductor; communication worker; electrician; fireman; hostler; hump operator; laborer; locomotive servicing engineer; machinist; pipe fitter; roadmaster; roadway worker; sheet metal worker; signalman; switch tender; ticket taker; tower operator; track inspector; track worker; track welder; train dispatcher; train, yard, and engine (TY&E) employees; train service locomotive engineer; utility worker; yardmaster; any person who performs certain railroad inspection, maintenance, and construction activities while fouling a track; and any person who directly performs safety-related task supervision, instruction, or OJT coaching of railroad or contractor employees (i.e., including railroad officers and employee colleagues, potentially categorized by department or by the person's authority to supervise, instruct, or OJT coach specific occupational categories or subcategories of safety-related railroad employees).

Proposed paragraph (c)(2) relates to paragraph (c)(1), as once the categories

of employees are identified, the categories will also need to be defined. In this case, the definition of each category is based on the Federal requirements that the category of employee will need to comply with. The proposed paragraph explains the amount of detail necessary to adequately describe each Federal requirement.

Paragraph (c)(3) proposes that each employer create a table summarizing the information required by paragraphs (c)(1) and (c)(2) of this section, segregated by major railroad department (e.g., Operations, Maintenance of Way, Maintenance of Equipment, Signal and Communications). Although each employer should find such a summary document useful, such a compilation will aid FRA in its review of the program and likely lead to speedier approvals. While FRA strongly suggests that tables be used, some RSAC members suggested that some employers might want to use other formats and the regulation should not be so particular about the format being used. FRA agrees with this feedback and proposes to accept other suitable formats.

Paragraph (c)(4) proposes a requirement for each employer to submit, as part of its training program, a description of procedures used to design and develop key learning points for any task-based or knowledge-based training. The purpose of submitting this description is to allow FRA to understand how the employer identifies key learning points for any type of training. FRA personnel that will be reviewing these programs have received specialty training in how to be a trainer and how people learn. FRA is concerned that without this proposed requirement, FRA will not have enough insight into whether an employer is going through all the necessary thought processes to develop comprehensive learning points for any particular task or knowledge-based training.

Proposed paragraph (c)(5) addresses two different concerns. First, FRA is not proposing to dictate how training shall be structured, developed, and delivered; instead, the proposed rule requires that each employer make that determination. This proposed requirement correlates to § 243.103(a)(2)(iv), which requires that each course outline include the method of course delivery. FRA expects that an employer will use an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. As explained in the analysis for the definition of "formal training," classroom training is not the only effective method of course delivery. However, during the approval

process, FRA may be particularly critical of task-based training that fails to contain an OJT, laboratory, or other hands-on type component. Second, FRA proposes that the curriculum be designed to impart knowledge of, and ability to comply with, applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. During the RSAC process, many employers argued that it would be confusing for employees to be trained to both Federal standards and the railroad's rules. The proposed rule is written so that employers may design training on the railroad's rules that implement the Federal standards without teaching to the Federal standards directly. However, there should be no doubt that the training should cover all the Federal standards applicable, or the equivalent or more stringent railroad rules and procedures that were promulgated to implement those Federal standards. This proposed rule does not require training beyond what is required by the relevant Federal standards.

Paragraph (d) contains proposed OJT training requirements that are essential to ensuring that OJT successfully concludes in learning transfer. As FRA alluded to in the analysis for the definition of OJT, too much OJT is currently unstructured and does not lead to learning transfer. OJT should not vary so much that one person can have a good mentor who is able to give the employee all the hands-on instruction the employee will need while another mentor makes the person simply watch the mentor do the job without any feedback, instruction, or quality hands-on experience.

Paragraph (d)(1) contains the three key proposed components of any OJT training that must be included in an employer's program. One, those individuals designing the training must give some thought as to the tasks and related steps the employee learning the job must be able to perform by the time the OJT is concluded and capture those thoughts in a brief statement. Two, the training program designers must provide a statement, or list, of the conditions necessary to ensure that learning can be successfully accomplished. For example, a person may need to be taught the theory behind the practice prior to attempting any tasks. Additionally, OJT needs to be planned so that the training participant is provided with all the equipment needed to successfully complete the task. One of the conditions in such a

statement could be that the mentor/instructor must demonstrate the proper way to do the task, including all related steps, prior to requiring that the participant attempt to complete the task. Three, each OJT training portion of an employer's program must contain a statement of the standards by which proficiency will be measured through a combination of task/step accuracy, completeness, and repetition. This proposed provision would require an employer to determine, for example, how many times the mentor/instructor must observe the training participant successfully complete the task before learning transfer is considered complete. There may be issues of a participant successfully completing some, but not all of, the steps necessary on each attempt. There may also be issues of whether the participant was aided by the mentor/instructor and whether the help received indicates that the participant did not fully learn how to complete the task. It is proposed that each OJT portion of a training program address these issues so that proficiency can be objectively measured.

Paragraph (d)(2) proposes a requirement that employers make any relevant information or reference materials available to the employees involved in OJT prior to beginning the initial safety-related tasks associated with OJT exercises. Such reference materials would include, but are not limited to, any relevant operating rules and safety rules. An employer's rules are subject to changes and updates, and each employee participating in OJT needs to be provided with the employer's currently applicable rules before attempting a task in OJT. Of course, it is unrealistic for employers to expect an employee to comply with one of the employer's rules if the employer has not provided the employee with a copy of the rule. FRA is not suggesting that all relevant rule books must be brought to the worksite where OJT will take place. However, it is proposed that an employee who is learning a new task must have the rule books made available for referencing with the expectation that the employee will be trained on the applicable rules and how to use the reference materials prior to beginning the OJT exercise.

Paragraph (d)(3) proposes another key component of any OJT portion of a training program. FRA proposes that an employer must compile all of the tasks and related steps associated with OJT exercises for a particular category or subcategory of employee in one manual, checklist, or other similar document. Such a manual or checklist is useful for employees and instructors in reviewing

what an employee is expected to learn. Although not proposed, FRA or an employer may want to require that each employee prove a certain level of familiarity with these documents as a prerequisite to OJT. The manual or checklist also has the potential to be used after completing OJT, to review whether all the required tasks and related steps were properly completed. Regardless of the form of the document, this additional requirement for OJT should not be difficult to produce as any compliant training course would have already identified the tasks and related steps necessary for successful task completion.

A checklist potentially could have more utility than a manual if an employer expects employees to carry the document into the field and reference it during OJT. In order to properly use a checklist, the learners and instructors must be able to understand the underlying conditions for the series of tasks given the abbreviated description of each item. For that reason, some employers may choose to produce a manual and a checklist, with the manual viewed as the long version of the checklist.

The reference to "other similar document" is based on an RSAC recommendation and is intended to provide employer's with the discretion to satisfy this requirement with a document that may be something other than a manual or checklist. However, when FRA reviews that similar document, the issue to be addressed will be whether that similar document maintains the tasks and related steps associated with OJT exercises for a particular category or subcategory of employee. Additionally, employees, whether they are learners, mentors, or instructors, would benefit from having such a document made available to them so that everyone involved in a particular OJT program will have an understanding of what the expectations will be for that program.

With regard to paragraph (d)(3), FRA is only proposing that one document be required. Because a manual and a checklist provide similar, but not identical purposes, RSAC recommended that FRA only require one or the other, or another similar document. By requiring only one document, the proposed requirement is less burdensome. However, FRA seeks comment on the distinctions between these types of documents and whether both a manual and a checklist should be required.

FRA intends to make clear that with regard to the proposed requirements in paragraphs (d)(2) and (d)(3), the

materials that are required to be made available could be made available electronically. For example, rather than providing printed copies of all the materials, some employers could choose to put some or all of the materials on a CD or DVD, which potentially would make the materials easier to transport and potentially less expensive to duplicate. Another option is that an employer could make all of the relevant materials accessible at one internet or company intranet location. Of course, if electronic materials are the only ones offered, employees and trainers of OJT would need access to computers at convenient and suitable locations. Thus, employers considering compliance with these proposed requirements through electronic medium should consider whether the electronically provided materials would be as accessible as printed materials.

Paragraphs (e) and (f) contain corresponding proposed requirements for contractors and railroads to ensure that each party understands who is responsible for training. Paragraph (e) places the burden on each contractor that trains its own employees to notify each railroad in writing that its safety-related employees are trained according to an FRA-approved program. The contractor may provide the document in writing or electronically. The contractor may need to indicate that some of the contractor's employees are fully trained while some need additional training that must be provided by the railroad. FRA would consider a contractor's written misrepresentation of approved training as a serious violation of the proposed rule that would likely result in the agency taking enforcement action. Paragraph (f) requires that each railroad that relies on the training performed by a contractor must retain the contractor's document notifying the railroad that the contractor's training program was approved by FRA. It is important that a railroad retain the contractor's document in order to verify that the railroad did not need to provide training directly to the contractor's employees.

#### Section 243.103 Training Components Identified in Program

Unlike § 243.101, which focused on the general requirements for an employer's training program, this section details the proposed component requirements for each program. The main purpose for this proposed section is to ensure that an employer provides sufficient detail so that FRA would be able to understand how the program works when the agency reviews the program for approval. It is expected that a failure to include one or more

component requirements would result in disapproval of the program. In § 243.111 FRA also proposes that training organizations and learning institutions must include all information required for an employer's program in accordance with this part, and this mainly means the information required in this section. Thus, each program submitter should ensure that each component requirement proposed in this section is addressed.

Paragraph (a) lists the five proposed training components. The first component is the requirement that the program contain a unique name and identifier for each formal course of study. The unique name and identifier would thus make up the course title. It is expected that these unique names and identifiers would be sufficiently descriptive so that the course title alone would provide a good idea of what subjects the course would cover. For example, the unique name could be "Introduction to Operating Rules for Operating Employees" and the unique identifier could be "OP RULES 101 BCE." In this example, "BCE" refers to the occupational categories of employees that would be suitable to take this course; *i.e.*, brakemen ("B"), conductor ("C"), and locomotive engineer ("E"). While it is not a proposed requirement that each course title identify the names of the occupational categories and subcategories of employees that would be required to take the course, it is one method for creating meaningful unique identifiers. FRA is aware that many employers with existing training programs will already have a unique name and identifier for each course and FRA is not suggesting that all of those course titles will need to be amended in order to comply with this rule.

Paragraph (a)(2) contains the proposed requirement for a course outline. The rule delineates specific requirements for that course outline. Each specific requirement is not intended to place a heavy burden on the person developing the program as the proposed requirements would be expected to be developed as part of formal training. To reiterate a previous point made in this analysis, formal training, by definition, is structured training that differs from an informal briefing. By addressing the items required in this paragraph, the person developing the training would be answering the fundamental questions necessary to decide the purpose and scope of that training.

Within paragraph (a)(2), FRA has listed two requirements that may need to be differentiated from one another.

Paragraph (a)(2)(ii), which proposes that the course outline include a brief description of the course, including the terminal learning objectives, is written with the expectation that FRA would receive information akin to a course catalog. Paragraph (a)(2)(vi), which proposes that the course outline include a syllabus of the course to include any applicable Federal laws, regulations, and orders covered in the training, is written with the expectation that FRA would receive information akin to a syllabus. The syllabus is normally specific to and written by the instructor; the course description in the course catalog is more generic and would describe the course regardless of the specific methods of teaching that the instructor might choose. Meanwhile, for both proposed requirements, FRA does not want the submission of actual lesson plans or any supplemental lesson plan materials such as rule books, handouts, or other job aids; if FRA needs those types of information in making a program approval determination or during an audit or investigation, FRA will make a specific request for those additional materials.

Paragraph (a)(3) contains the proposed requirement that the employer's program include a document for each OJT program component. As previously discussed in this analysis, one of FRA's objectives in this rulemaking is to improve OJT. The OJT document for each program component would contain three subparts. The first subpart, in paragraph (a)(3)(i), proposes that the document contain certain types of background information that would provide a roadmap for understanding how the OJT program is intended to be administered. It is essential that this subpart of the document contain a description of the roles and responsibilities of each category of person involved in the administration and implementation of the OJT program. The roles and responsibilities subpart would explain the duties and expectations of each type of trainer, senior manager, first-level supervisor, mentor, trainee, or any other category of person involved in administering the OJT. It is proposed that the document contain implementation guidelines that address how the program will be coordinated. Program coordination must include a complete description of the minimum requirements necessary in connection with performance and repetition, and recording the successful completion of performance and repetition. Additionally, it is proposed that the document satisfactorily describe whether there will be a specific order of task learning for employees to progress through in order to advance through the OJT program for a particular occupational category or subcategory of employee (i.e., the progression of the OJT). Finally, it is proposed that the document satisfactorily describe the level of proficiency expected of a trainee before the trainee is considered

successful in any given task (i.e., the application of the OJT).

The second proposed subpart, paragraph (a)(3)(ii), requirement in the OJT document for each program component is a listing of the occupational categories and subcategories of employees for which the OJT program applies. One OJT program component may apply only to conductors and another only to carmen. Some OJT components may apply to a broader range of employees, such as all those employees designated to throw switches.

The third proposed subpart, paragraph (a)(3)(iii), required in the OJT document for each program component requires details of the safety-related tasks and subtasks, conditions, and standards covered by the program components. This last subpart will provide the scope of the particular OJT component, the conditions under which the OJT must be performed, and the standards for measuring whether an employee has successfully completed any particular OJT requirement.

Paragraph (a)(4) proposes a requirement that the course outline for each course include the job title and telephone number of the employer's primary training point(s) of contact, listed separately by major department or employee occupational category if applicable. The purpose of this requirement is to provide general contact info so that FRA has a point of contact in case any questions or concerns arise. As long as the responsible person's job title and telephone number are provided, it is unnecessary to list the person's name as individuals often move in and out of particular job positions on a regular basis and this information can get stale quickly. FRA requests comment on whether an email address should be required, or listed as optional.

Paragraph (a)(5) proposes additional requirements for employers that utilize training organizations or learning institutions to develop or deliver any portion of the training required by this part. FRA needs some basic information from the employer so that the agency may properly evaluate the program under the review and approval process. Thus, the program must indicate the scope of the training that will be contracted out, the name of the contracted organization that developed the training (and the name of the organization that will deliver the training, if different), and basic contact information for the contracted organization so FRA can follow-up with questions or concerns. FRA

acknowledges that when RSAC discussed this issue, it was assumed that a training organization or learning institution would both develop and deliver the training. Upon further review, some training organizations or learning institutions may only develop training or deliver training, but not both. In those instances, FRA believes it will still need the information required by this paragraph.

Paragraph (b) provides an option for an employer to avoid submitting one or more similar training programs or plans when the employer has a separate requirement, found elsewhere in this chapter, to submit that similar program or plan to FRA. In order to take advantage of this option, an employer must choose to cross-reference any program or plan that it wishes not to submit in the program required by this proposed part. Although some employers may choose to incorporate a training program previously submitted to FRA under a different rule, this provision permits the option to reduce redundancy. This proposed option is based on the statutory provision allowing the agency to "exempt railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which [FRA] has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008." 49 U.S.C. 20162(c). However, FRA notes that this proposed exemption does not go as far as the statutory authority allows. FRA is only exempting an employer from submitting a program or plan if the existing training regulation requires submission of that program or plan. For purposes of this proposed requirement, FRA considers "submission" to have the broader meaning of including those programs or plans that are required to be maintained on an employer's property for review and inspection by FRA representatives. FRA is reluctant to consider exempting employers from submitting training programs or plans required by existing training regulations that lack some kind of "submission" requirement as doing so could compromise the quality of submissions under this proposed rule. Additionally, some of those programs or plans that were previously submitted may be missing an OJT component. If so, this proposal specifies that "[w]hen any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information." As mentioned earlier, OJT is one of the

weakest parts of most training programs, and FRA will focus its review of training programs to ensure that the OJT components are well-thought out and structured. Examples of other FRA training requirements that an employer may choose not to resubmit are those located in §§ 214.307, 217.9, 217.11, 218.95, 236.905, and 240.101.

Paragraph (c), as proposed, would require that an employer include a description in the program if it arranges job-related practice and practice related feedback sessions. These types of practice and feedback sessions are not as structured or comprehensive as OJT, but these sessions could provide useful additional experience. Depending on the job, job-related practice and practice related feedback sessions may be safely conducted with or without qualified instructors or mentors to assist the training participant. An employer who utilizes such practice is required to address the practice in the training program required under this proposed part.

Please note that FRA is concerned that some employers may currently believe that job-related practice and practice related feedback sessions are the same thing as OJT; for purposes of this proposed rule, they are not. This rule includes specific requirements for OJT that puts it in the formal training category, *i.e.*, with a structured and defined curriculum. Job training that occurs in the workplace without meeting the specific proposed regulatory requirements for OJT may still be adequate for some training purposes. This type of informal job training is what FRA considers job-related practice and practice related feedback sessions. Although job-related practice and practice related feedback sessions may have some formality to them and would add value to the training participant's experience, these informal practice sessions should not be confused with OJT as defined and required under this proposed rule.

Finally, paragraph (d) serves as a reminder to any employer submitting a program that FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate. Generally, FRA will require hands-on training if the training participants are expected to learn how to perform a safety-related task. The hands-on portion of the training could occur in a classroom, on a simulator, in a laboratory, or as OJT. Arranged practice and feedback is often an

integral part of classroom, laboratory, and simulator training. For some occupational categories or subcategories, lecture that incorporates practice and feedback sessions may provide enough training to consider the person trained. For occupational categories and subcategories where OJT is required any person submitting a program that does not contain an OJT component meeting the proposed requirements is likely to receive feedback from FRA that the program is inadequate in this regard.

#### Section 243.105 Optional Model Program Development

During the RSAC process, FRA expressed that it wanted to encourage the development of model training programs that could be used by multiple employers. There are several reasons why model programs are desirable as an option. Smaller entities may struggle with the costs and burdens of developing a program independently; thus, a model program could reduce the costs, especially for smaller businesses. For instance, in the context of locomotive engineer training and certification programs required pursuant to 49 CFR part 240, FRA has worked with ASLRRRA in developing model programs for use by short line and regional railroads. Furthermore, there are economies of scale that benefit FRA in helping organizations, associations, and other businesses to develop model programs that may be adopted by other entities. That is, the more businesses that adopt model programs, the fewer the number of programs FRA would need to closely scrutinize in the review process. FRA is willing to provide early and frequent feedback to any entity producing a model program. In that way, FRA can ensure that each model program will contain all of the necessary components to a successful program and can be implemented by multiple businesses with little fear of rejection during the program submission and approval process.

Paragraph (a) proposes an option that would permit any organization, business, or association to submit one or more model programs to FRA for later use by multiple employers. In addition to short line and regional railroads, FRA encourages similar types of contractors to submit model programs possibly developed by a common association. In some instances, FRA could foresee that several employers may hire an organization, such as a training organization or learning institution, to develop a model program for those multiple employers to submit to FRA. FRA notes that the model program

would be the program for any employer that chooses to submit it, and it is not a program submitted on behalf of the training organization, business, or learning institution that developed the program. Another possibility is that one railroad or contractor develops a program for its own use that it later allows other entities to copy. FRA expects that some organizations, businesses, and associations may take a proprietary interest in any model program it develops; however, FRA would hope that the costs imposed on small entities would be reasonable. Although FRA does not intend to draft and develop programs for employers to use, FRA intends to provide guidance to any person or entity in the development of model or individual employer programs.

Paragraph (a)(1) proposes a requirement that each model program be submitted with a unique identifier associated with the program. If no unique identifier is submitted, FRA proposes that it will assign a unique identifier. FRA proposes this requirement so that it will be easier for FRA to track which railroads and contractors have adopted specific model programs. For example, a model program identifier may include the abbreviation or acronym of the organization, business, or association that developed it and a number or descriptive phrase that helps identify it. Examples of unique identifiers could be: ASLRRRA-1, ASLRRRA-Part 240, ASLRRRA-Conductor, ASLRRRA-Short line, ASLRRRA-Regional Railroad, NRC-Signal Maintenance, NRC-Locomotive Repair, or NRC-Track Maintenance.

Paragraph (a)(2) proposes to require that each model program associated with the organization's unique identifier shall include all information required by § 243.103. This requirement means that each model program must be able to stand on its own and contain all of the same training components as required for an employer's program.

In paragraph (b), FRA proposes that each employer submit the unique identifier for the model program along with all other information that is specific to that employer or deviates from the model program. FRA would prefer that each model program standardize as many of the components as possible and that each employer that adopts a model program would try to limit the number of provisions it deviates from the model program to a minimum. FRA understands that some components of a model program could be left blank so that each employer may enter information that individualizes

the program to suit that employer's training regimen. In other instances, an employer may want to customize a portion of a model program. FRA would like to encourage an employer that submits a program based on a model program previously approved by FRA, not to submit the entire program to FRA; doing so would be duplicative and defeat part of the purpose of approving model programs.

#### Section 243.107 Training Program Submission, Introductory Information Required

In proposed paragraphs (a) through (c), FRA requests specific information from each employer submitting a program. The information requested is intended to give FRA some introductory information that the agency will need to understand the employer's approach to training. The information required in these paragraphs is intended to help put the training components in the program in some context before a reviewer reads the finer details of each component. For example, FRA might want to more closely scrutinize a small railroad's training program if the program states that the employer primarily conducts the training of its own safety-related railroad employees using its own resources. The reason that information may raise a concern is that smaller railroads would not always have qualified instructors to implement all the different types of training required by the Federal laws, regulations, and orders.

The RSAC members will recognize that this section follows their recommendation and that the rest of the RSAC's recommended § 243.107 has been placed in § 243.109 in order to improve the organization and readability of these proposed requirements. Because the RSAC's recommended § 243.107 was split into two sections, FRA renumbered the remaining RSAC recommended sections found in this proposed subpart.

#### Section 243.109 Training Program Submission, Review, and Approval Process

As mentioned at the end of the analysis to the previous section, FRA accepted the intent of the RSAC recommendation that forms the basis for this section; however, FRA has not accepted the RSAC recommendation verbatim. There were several undefined terms that a more general audience than the RSAC membership that helped devise the recommendation might find ambiguous. For instance, in drafting this proposed rule, FRA found that it was confusing to understand the difference

between what RSAC and FRA meant by a "new program" versus an "initial program." Another example of an undefined term in the RSAC recommendation was "informational filing;" there were discussions about what that term meant, but the RSAC did not define the term in its recommendation. Thus, FRA has given meaning to the term "informational filing" in the proposed regulatory text and set it apart from other types of revisions to an existing program.

Additionally, FRA attempts to improve on the clarity of the RSAC recommendation by reorganizing the regulatory text. Anyone who has reviewed the RSAC recommendation will recognize that most of the language in this proposed section is derived directly from that recommendation, but that the order of the regulatory text differs. FRA seeks comment on whether the section is easier to understand and whether the section adequately addresses each possible scenario for employers filing initial or revised programs. In the analysis of each paragraph, FRA describes the relationship of the proposed paragraph to the RSAC recommendation to help anyone who has reviewed the RSAC recommendation understand how the proposed section was derived from that recommendation.

Paragraph (a) proposes three processes for approving different types of initial programs. First, paragraph (a)(1) addresses the issue of how employers must address apprenticeship, or similar intern programs, that have begun prior to submission of the employer's initial program filed in accordance with this part. RSAC recommended that FRA address this situation so that those persons who had already started an apprenticeship-type training program would not know that their training would not be mooted by this proposed regulation. During the RSAC deliberations, there were general concerns raised that some long term training might be initiated prior to a training program submission and that, when reviewed in the context of the rest of the employer's initial program, the long term training would not meet the employer's program requirements. In some instances, it may be possible to revise an apprenticeship or similar long term intern program that has already begun; in other instances, changing the apprenticeship program would be prohibitively expensive or logistically difficult. RSAC recommended and FRA accepts the premise that as long as the apprenticeship-type training program is described in the employer's initial program, that apprenticeship or similar

intern program may continue unless FRA advises the employer of specific deficiencies. FRA also accepts the RSAC recommendation regarding what action should be taken when specific deficiencies are found; however, instead of a reference to another paragraph in this section, FRA proposes that the process be contained in this paragraph so that it is easier for readers to follow. Thus, the paragraph includes the provision that the employer must take action to resubmit the portion of its program that FRA found deficient within 90 days of notification and that a failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. Furthermore, FRA may extend this 90-day period based on a written request. The purpose of creating a deadline for action is to ensure that training programs are eventually corrected to address deficiencies found by FRA. There may be instances when an employer disagrees with an FRA finding of a deficiency and 90 days will typically provide sufficient time for the employer to set up a meeting with FRA to try and resolve any differences. If more than 90 days are needed, FRA could unilaterally extend the deadline or entertain a written request from the employer. Paragraph (a)(1) is modeled after § 243.107(f) and (g) of the RSAC recommendation.

Paragraph (a)(2) proposes to consider an employer's initial training program, as required by § 243.101(a), approved immediately upon submission to the Associate Administrator. The § 243.101(a) programs will be the first programs submitted by each employer in operation one year and 120 days after the effective date of this final rule. Hence, once this type of program is submitted, it is proposed that the employer may implement the initial program without waiting for approval. RSAC recommended, and FRA agrees, that there is a legitimate expectation that there will likely be few programs that will be completely unacceptable. Instead, the expectation is that some programs will be missing pieces of information or lacking in some required components. Those employers who FRA determines will need to improve a program to address a deficiency will do so through a proposed process of resubmission with the Associate Administrator. FRA rejected the option to require implementation only after FRA approval as many RSAC members explained that it would be economically and logistically difficult to comply with such a requirement. FRA also does not

want to hold up the implementation of an entire training program for problems that may only affect some occupational categories of safety-related railroad employees, or may be a minor issue that can be addressed and corrected at a later date. Paragraph (a)(2) is modeled after § 243.107(d) and (g) of the RSAC recommendation.

Paragraph (a)(3) proposes to consider an employer's initial training program, as required by § 243.101(b), differently than those initial programs filed under § 243.101(a). The differences between these two types of initial programs are that § 243.101(b) employers are those that commence operations one year and 120 days after the effective date of this final rule (instead of before that date) and § 243.101(b) requires submission of the program at least 90 days prior to commencing operations (while § 243.101(a) applies to employers already in operation). Paragraph (a)(3), which is modeled after § 243.107(e)(2) and (h) of the RSAC recommendation, proposes a precautionary approach with employers commencing operation significantly after the effective date of this rule to ensure each training program meets the regulatory requirements prior to implementation. As the employer will be required to file the program at least 90 days prior to commencing operations, FRA should have sufficient time to review the program before the employer would have a great need to implement its training program. Employers who need FRA to expedite review of a training program may contact FRA and alert the agency to the employer's reasons for requesting that FRA's review be completed by a certain date. Although FRA is under no proposed requirement to complete its review by any deadline, FRA has no intention of delaying the employer's anticipated date of commencing operations and will attempt to meet all reasonable requests for expedited review.

Paragraph (b) introduces the proposed concept of an annual informational filing requirement. The concept is modeled after § 243.107(i) of the RSAC recommendation. FRA accepts this RSAC recommendation over the alternative option which would require programs to be constantly revised, resubmitted, and reviewed for approval on many routine matters. For instance, FRA expects that nearly every year there will be new safety-related Federal railroad laws, regulations, or orders issued, or new safety-related technologies, procedures, or equipment that are introduced into the workplace. Each of these circumstances would create new knowledge requirements or

safety-related tasks that would need to be addressed by amending a previously approved program. FRA proposes that an employer that modifies its training program for these reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise either to individual employers, one or more group of employers, or the general public. Depending on the situation, FRA may decide that an information filing is unnecessary and may advise individual employers or groups of employers through an association of that decision when contacted by the employer or association. At other times, FRA may want to publish a statement on its Web site, or as a safety advisory or other guidance document in the **Federal Register**. Informational filings will be considered approved upon modifying the program and may be implemented immediately without explicit FRA approval. However, FRA expects to audit programs occasionally and proposed paragraph (b) puts employers on notice that FRA may disapprove an informational filing in the same manner as specified in paragraph (a)(2) of this section. Although this annual requirement would have costs of its own, it is expected that this option would save employer and agency resources over the alternative option.

Furthermore, paragraph (b) proposes requirements for what information must be included in an informational filing. In addition to including any substantive changes, which may include pages to be substituted in the previously approved program, FRA proposes a requirement that the filing contain a summary description of sufficient detail that FRA can associate the changes with the employer's previously approved program. The summary description should be considered the equivalent of an executive summary or roadmap to the changes made to the program.

Proposed paragraph (b)(4) is intended to address the circumstances where a previously approved model program is revised through an information filing. The RSAC agreed to FRA's recommendation that a process be required to revise a model program without causing each user of that model program to submit a similar filing. FRA is not looking to take enforcement action against developers of model programs; e.g., FRA does not intend to impose a liability on an organization, business, or association that has an approved model program on file with FRA but fails to inform each employer who requested the right to use the

affected training program of the changes and the need for the employer to comply with those changes that apply to its operation. However, FRA would like the developers of model programs to describe how they informed their clients or constituents of the informational filing so that FRA can gauge whether the notification was adequate under the circumstances. Without adequate notification, compliance cannot be expected, and individual employers may not have sufficient opportunity to inform FRA of a different approach.

FRA seeks comment on whether the regulation should address any issues arising from model program developers that are no longer actively updating their programs. For instance, an organization, business, or association that has an approved model program on file may voluntarily decide that it is too great a burden to continue updating the program, or may go out of business or disband. Each employer that has relied on the model program for its submission is ultimately responsible for its program and will need to ensure that any required updates are made. In some instances, the employers relying on the model program may band together and find an alternative way to continue updating the model program.

Paragraph (c) proposes how an employer can revise a training program that has been previously approved. The proposed requirement would allow substantial additions or revisions to a previously approved program to be considered approved and implemented immediately upon submission. For example, a program is considered revised if the employer adds any occupational categories or subcategories of safety-related railroad employees to the training program. Most other changes to an existing program would not be considered a substantial addition or revision but instead would likely require only an "informational filing" under proposed paragraph (b). FRA has adopted the RSAC's recommendation that there is no reason to hold up implementation of new portions or revisions to an approved program as FRA can require problems to be fixed after submission. The process for review following submission is the same process for initial programs filed under paragraph (a)(2) of this section. Paragraph (c) is modeled after § 243.107(e) and (e)(1) of the RSAC recommendation.

In several paragraphs in this section, FRA proposes a process for review that allows immediate implementation upon submission but explains that FRA will inform the employer as to whether the program or program revisions conform

to this regulation. Once specific deficiencies are identified by FRA, it is proposed that the employer will be required to take action to correct the deficiencies within 90 days. As some training that has already been initiated may have deficiencies, FRA accepts the RSAC's recommendation not to nullify that training. Thus, the proposed process would permit the deficient portions of the non-conforming program to remain in effect until approval of the revised program, unless FRA provides notification otherwise. Presumably, FRA may take exception to large gaps or deficiencies in training and require the nullification of such seriously deficient training. However, in most instances, FRA would expect the deficiencies to be more minor in nature such that nullification of training would be too severe a reaction. Where the deficiencies are more minor in nature, FRA may ask that an employer simply plug any gaps in training identified rather than nullify the training already conducted.

Another issue involving the review process that is proposed in several paragraphs in this section is that a failure of an employer to resubmit a program with the necessary revisions shall be considered a failure to implement a program under this part. FRA would consider this to be a serious issue of non-compliance if the employer is continuing to train safety-related railroad employees using the rejected portion(s) of the program. The process FRA is proposing allows for a 90-day period for an employer to respond with a program resubmission if FRA receives a written request. FRA will liberally exercise discretion in granting reasonable requests for an extension. FRA would expect reasonable extension requests to include any basis for requesting the extension and a new deadline by which the employer expects to be able to resubmit. FRA is requiring that the extension be in writing so that the parties can establish when the request was made.

Proposed paragraph (d) is modeled after § 243.107(j) and (k) of the RSAC recommendation and flows from the intention to include representatives of railroad labor organizations involved in the program approval process. The proposed requirement is for railroads only, not contractors. By requiring that the president of each labor organization that represents the railroad's employees be simultaneously served with a copy of any submission, resubmission, or informational filing, the regulation is ensuring that employee representatives will have a timely opportunity to participate in FRA's review and

approval process. To ensure that this requirement is met, FRA has proposed that the railroad include a statement affirming that service has been completed and the details of who was served. Commenters may wish to address whether this requirement is necessary or should be expanded to include contractors.

Proposed paragraph (d)(2) requires that each railroad labor organization has up to 90 days to file a comment. The reason for the 90 day deadline is that FRA would like to send approval notification to railroads in a timely fashion. Without a deadline for comments, the approval process would seem open ended. However, FRA realizes that, from time-to-time, a labor organization may find something objectionable in a previously approved program, and FRA encourages those types of comments as they are discovered. When a labor organization discovers an objectionable issue outside of the required 90 day window, FRA would still accept the comment and review the issue to see whether a revision to the training program is warranted. Depending on when the comment is raised outside of the 90 day review cycle, FRA could consider whether to grant the employer some leeway in revising and implementing any necessary conforming change to the program. For example, if training is well under way for that year, it may be suitable to allow the employer to accommodate the late comment in its training for the next year, if any accommodations are required.

#### Section 243.111 Approval of Programs Filed by Training Organizations or Learning Institutions

Although the statutory mandate in 49 U.S.C. 20162 does not mention how to treat training organizations or learning institutions that train safety-related railroad employees, FRA accepts the RSAC's recommendation in proposing requirements for FRA to review and approve programs from such organizations or institutions. As proposed, employers will always have the obligation to submit training programs to FRA for approval and will not be relieved of that obligation just because the employer uses a training organization or learning institution with an approved program. Some of those employers may choose to have one or more training organization or learning institution train one or more type of occupational category or subcategory of employee. Other employers may use such outside trainers only for particular training courses while providing other courses "in-house," i.e., training by

designated instructors directly employed by the employer. Additionally, other employers may intermittently or regularly hire safety-related railroad employees who have been previously trained by training organizations or learning institutions and view such hiring as a cost-effective or efficient way to avoid the burden of providing initial training. Furthermore, some individuals may wish to pay their own way to get trained in a particular occupational category or subcategory of safety-related railroad employee—most likely with the hope that the training will boost the person's chances of gaining employment.

FRA's purpose in proposing this section is to facilitate the option of using training organizations or learning institutions. An employer that intends to implement any training programs conducted by some other entity [such as a training organization or learning institution], or intends to qualify safety-related railroad employees previously trained by training organizations or learning institutions, has a proposed obligation to inform FRA of that fact in the employer's submission. If FRA has already approved the training organization or learning institution's program, an employer could reference the approved program in its submission, avoid lengthy duplication, and likely expect a quick review and approval by FRA.

Individuals or employers that use training provided by training organizations or learning institutions need assurances that the training will meet or exceed FRA's requirements prior to incurring any training expense. Without such assurances, an individual or employer may determine that paying for such training is not worth the risk. Meanwhile, FRA would benefit from approving this type of training program as it will lead to greater efficiencies in FRA's review and approval process. Thus, proposed paragraph (a) requires that a training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program for review and approval.

Although paragraph (b) proposes a one year grace period for an existing training organization or learning institution, FRA deems it essential that each training organization and learning institution obtain FRA approval prior to the expiration of that grace period. FRA

hopes that extensions of this grace period will not be necessary, but it has proposed an explicit process for granting such an extension rather than merely relying on the waiver process proposed in § 243.7. It is proposed that entities that intend to request extensions do so in writing and include an explanation of any factors that the entity wants FRA to consider before deciding whether to approve the request.

FRA has had significant interaction with some of the largest training organizations and learning institutions that currently train safety-related railroad employees. These large organizations are mainly training facilities found within an accredited college or run by a major railroad. In FRA's experience, the training provided at these types of large organizations is of a high caliber. Although FRA can foresee some minor deficiencies with the approval of individual components within the training programs that would be filed by some of these large organizations, FRA does not anticipate significant deficiencies because these programs are currently well-developed and comprehensive.

In contrast, FRA has less experience and greater concern with smaller organizations or new businesses that may start-up in response to any demand for training services as a result of promulgation of this rule. Prior to approval, FRA may want to tour an organization's facilities and discuss the details of program implementation with the organization to ensure that compliance with the program can be reasonably accomplished. A smaller organization will have a greater chance of program approval if it accurately characterizes its ability to offer training services.

Paragraph (c) proposes that a program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. This sentence mainly refers to the requirements found in §§ 243.101 and 243.103. In addition, this paragraph contains a list of proposed requirements that only pertain to a training organization or learning institution's program. The list of proposed requirements is intended to ensure that FRA can: contact and audit the organization; review the names and resumes of any designated instructors; gauge the training organization's or learning institution's experience in the training field by contacting references of previous or current employer customers; and understand the methodologies the training organization or learning

institution used during development of the training courses. Without this additional information, it would be difficult for FRA to evaluate whether the organization could effectively implement its training program.

Paragraph (d) proposes that, except for the grace period allowed in paragraph (b), FRA will not consider training by a training organization or learning institution to satisfy the requirements of this part until FRA has approved the training organization's or learning institution's program. With the grace period provided, each of these organizations should have sufficient time to submit a training program and have it reviewed by FRA without disrupting its training business. Because these organizations may train employees for multiple employers, there could be a substantial negative impact on the industry if these organizations were allowed to train employees prior to FRA completing its review and approval process. That is, many employees could be trained ineffectively, or without covering all the Federal requirements, if FRA were to allow program implementation immediately upon submission; once such initial defective training occurred, it would take years to correct through refresher training and could potentially lead to unsafe actions. Furthermore, once each of these organizations have had a training program approved, employers that rely on any of these organizations' training will greatly benefit from being able to rely on the approved program in the employer's own program submission.

In accordance with paragraph (b) and (d), a training organization or learning institution that offers one or more apprenticeship or similar intern programs to individuals not associated with an employer will need to assess the viability of those programs in progress as of the effective date of this rule. The paragraph (b) exception proposes to allow apprenticeship or similar intern programs to continue, prior to acceptance by FRA, for a period not to exceed one year. It is expected that any such apprenticeship or similar intern programs would be described in the training organization's or learning institution's program submission so that it could be explicitly approved and continued. If an apprenticeship or similar intern program that began prior to the effective date of the rule is scheduled to continue for a period to exceed one year after the effective date of the rule, the proposed rule would require the training organization or learning institution to address any deficiencies raised by the Associate Administrator prior to concluding

completion of such an apprenticeship or similar intern program. FRA would appreciate comments on this proposal and whether other approaches may offer better alternatives. For example, FRA is willing to consider an option similar to the one offered in § 243.109(a). Paragraphs (e) and (f) propose requirements for each training organization or learning institution that has an existing training program approved by FRA but wants to modify, revise, or add to it. The procedures in paragraph (e) propose criteria for when an informational filing is required and provide procedures that mirror the procedures required for employers under similar circumstances as found in § 243.109(b). Thus, the many listed reasons to update existing training courses and program information will only require an annual information filing and will not require that each training organization or learning institution file a modification to a program each time it makes one of these types of modifications to its program. The RSAC recommended that FRA allow each training organization or learning institution to use this type of informational filing concept, but the wording differs from the recommendation in order to conform to the applicable language required of each employer.

Paragraph (f) is largely based on a recitation of paragraph (d) of this section. The concept behind paragraph (f) is that when a training organization or learning institution makes one or more substantial revisions to a program of the type that cannot be considered an informational filing, the revision should be treated in the same manner as an unapproved program. FRA believes that the RSAC recommendation unintentionally neglected to distinguish between informational filings and non-informational filing modifications. For example, if a training organization or learning institution with an approved plan decided to train a category of employee not previously covered in its program, that modification would be considered the equivalent of an employer submitting a "new or revised" program. FRA does not want to consider such substantial modifications to be deemed automatically approved upon filing as it does for informational filings. Without such additional scrutiny, a training organization or learning institution could file a program for initial FRA approval covering training for a single occupational category or subcategory of safety-related railroad employee and add an infinite number of training courses for any number of other

categories of employee without having to acquire specific FRA approval. FRA never intended to provide that much discretion to each training organization or learning institution because FRA is concerned that some of these organizations and institutions are unfamiliar to FRA and would demand greater scrutiny to ensure these businesses have the capability to achieve their stated goals.

In paragraph (g), FRA adopts an RSAC recommendation to require each training organization and learning institution subject to this part to maintain records for each safety-related railroad employee that attends the training, in accordance with the recordkeeping requirements of this part. This requirement means that these organizations must keep the same information required in § 243.203. The information should be shared directly with the employer, so that the employer can maintain its own records adequately. However, in the event of an FRA audit, FRA would be able to ensure that the employer's records matched with the training organization's or learning institution's records.

Paragraph (h) proposes that each training organization and learning institution subject to this part must provide a student's training transcript or training record to any employer upon request by the student. This provision would mainly apply to situations in which a person directly pays an organization for training outside of a normal employer/employee work relationship. In that type of situation, it is imperative that the organization cooperate with the [former] student so that the person can prove to prospective employers that he or she was trained. In the case of safety-related railroad employees currently employed by employers with approved programs, the employer is required pursuant to proposed § 243.203(d)(2) to make an employee's records available during normal business hours for inspection and copying/photocopying to that employee, former employee, or such person's representative upon written authorization by such employee.

#### Section 243.113 Option to File Program Electronically

This section proposes the option for any employer, training organization, or learning institution to which this part applies to file any program submissions electronically. FRA intends to create a secure document submission site and will need basic information from each company before setting up the user's account. The points of contact information in proposed paragraph (b)

are necessary in order to provide secure access.

Proposed paragraphs (c), (e), and (f) are intended to allow FRA to make the greatest use of an electronic database. It is anticipated that FRA may be able to approve or disapprove all or part of a program and generate automated notifications by email to an entity's points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the entity is consenting to receive approval and disapproval notices from FRA by email. Entities that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently.

Proposed paragraph (d) is necessary to provide FRA's mailing address for those entities that need to submit something in writing to FRA. For those entities requesting electronic submission, the list of information specified in proposed paragraph (b) is required. Otherwise, those entities that choose to submit printed materials to FRA must deliver them directly to the specified address. Some entities may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database; although this will be an acceptable method of submission, FRA would encourage each entity to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA can reject the submission.

FRA requests comments on whether this section should address the submission of proprietary materials or other materials that an entity wishes to keep confidential. FRA expects that it could develop its secure document submission site so that confidential materials are identified and not shared with the general public. However, FRA seeks comments on whether that extra step is truly necessary. FRA does not expect the information in a program to be of such a confidential or proprietary nature. For instance, each railroad is expected to share the program submission, resubmission, or informational filing with the president of each labor organization that represents the railroad's employees subject to this part. *See* 243.109(d). It would be expected that information that needed to be kept private would need to be removed prior to sharing that programmatic material with the labor organization. FRA suggests that entities consider this concern when drafting any programmatic material to be submitted to FRA and that each entity takes its

own steps not to share such private material with FRA. In that way, FRA may make such programmatic material available to the general public upon request.

Finally, FRA is considering whether to mandate electronic submission and only permit filing in writing based on a waiver request. FRA is strongly leaning toward finalizing this option because the agency will be devoting significant resources to develop the electronic submission process. It will be more costly for the agency to develop the electronic submission process and have to upload written submissions into the electronic database itself. FRA expects that there are few, if any, employers who do not have Internet access and an email address, or who cannot otherwise meet the minimum requirements for electronic submission. FRA requests comments on whether mandatory electronic submission is objectionable to any person or employer.

#### Subpart C—Program Implementation and Oversight Requirements

Once a program has been approved by FRA, it is proposed that each employer will have to comply with the requirements of this subpart. The subpart includes both implementation and oversight requirements. Some requirements apply only to railroads, and others to both railroads and contractors. Additionally, it is proposed that each training organization and learning institution will be required to maintain records as evidence of completed training.

#### Section 243.201 Employee Qualification Requirements

This proposed section includes an exemption for existing employees to be designated for a particular occupational category or subcategory without further training, provides procedures for qualifying those employees that are not exempted by the employer for a particular occupational category or subcategory, and requires each employer to deliver refresher training. Prior to the RSAC Working Group reaching the recommendation on which this proposed section is based, the Working Group had extensive discussions about other options. For example, FRA initially proposed to the Working Group that existing employees should not be exempted, *i.e.*, designated, without records proving the employee is trained or without checking that the employee is actually qualified to do the safety-related tasks. This option faced resistance from RSAC members representing both labor and management. Labor representatives

asked that FRA consider a straightforward exemption because the statute called for training regulations, not a certification rule that could be used by employers to disqualify those employees who are currently qualified. It was argued that, by requiring the passing of tests or observed compliance with certain safety-related tasks, FRA would be providing unscrupulous supervisors with a federally endorsed method of firing perfectly capable employees. The management representatives thought that, without a straightforward exemption, the designation requirements would be overly burdensome. The employers generally believed that they would not have training records for many employees that would be detailed enough to satisfy FRA's concerns, and they collectively believed that setting up knowledge and field tests to confirm each employee's qualification for each task would be an extensive undertaking.

In proposing this section, FRA agrees with the criticism leveled at the options discussed in the RSAC meetings. FRA's intention is to ensure that all safety-related railroad employees receive proper initial training if previously unqualified, and that all previously qualified employees receive refresher training at regular intervals to ensure continued compliance. FRA encourages each employer to find ways to provide remedial training and retesting of any employee that fails to successfully pass any training or testing. Under this proposed part, a failure of any test or training does not bar the person from successfully completing the training or testing at a later date. Of course, FRA does not regulate employment issues and will leave those issues to be settled in accordance with any applicable collective bargaining agreement or employment and labor law.

Paragraphs (a) and (b) propose requirements for each employer to declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that category or subcategory. The main difference between the two paragraphs is that (a) applies to each employer in operation as of one year and 120 days after the effective date of this rule and (b) applies to each employer commencing operations after that date. In the case of employers in operation pursuant to paragraph (a), the deadline for designation is two years after the effective date of this rule. In the case of employers commencing operations in accordance with paragraph (b), the deadline for

designation of employees existing at the time of commencing operations is prior to the commencement of those operations. Paragraph (a), proposes that FRA may specifically grant an extension for employers in operation to comply with the designation requirements as long as that request is in writing.

In order to close a potential loophole, a slight modification was made to paragraph (a) from the RSAC's recommendation. That is, the proposed rule adds language in paragraph (a) that makes this requirement applicable to each employer, in operation "as of [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE]." Without the addition of that language, if an employer began operations after the effective date of the rule but before 1 year and 120 days after the effective date of the rule, the employer would not have to comply with either paragraph (a) or (b). During the RSAC meetings, no member ever expressed the intention to create such a loophole and FRA would not have supported the recommendation if it had identified it during the RSAC process.

Paragraph (c) proposes two conditions for qualifying a safety-related railroad employee who, after the employer's designation in accordance with paragraphs (a) and (b), is newly hired or is to engage in a safety-related task not associated with the employee's previous training. The first condition can be summarized as successful completion of all training and examinations required to do the work. As each employer's program must identify the training components pursuant to 243.103, including course information and the kind of assessment, paragraph (c)(1) reinforces that compliance with the program is necessary for each safety-related railroad employee who is not previously trained. Similarly, paragraph (c)(2) reinforces that compliance with the OJT portion of the program is necessary for each safety-related railroad employee who is not previously trained, if the training curriculum for that occupational category or subcategory of employee includes OJT. This paragraph also proposes that not all tasks required by OJT need to be performed under the direct onsite observation of a qualified instructor. Instead, FRA proposes to accept the RSAC recommendation that OJT may generally be provided under the observation of a "qualified person," who obviously could be an instructor but does not have to be an instructor. In such instances, the qualified person must be advised of the circumstances and be capable of intervening if an unsafe act or non-compliance with

Federal railroad safety laws, regulations, or orders is observed. Without this flexibility, some employers might find it difficult to get employees a sufficient amount of OJT practice sessions as there may be a shortage of instructors available for all the direct observations necessary. However, it should be noted that the employee must demonstrate, to the satisfaction of a designated instructor, that OJT proficiency has been achieved before the employee is qualified. That demonstration cannot be performed by just any qualified person. Thus, this proposed requirement adds a significant safeguard to ensuring that OJT is completed to a measurably high level.

Unlike paragraph (c) which addresses employees not previously trained, paragraph (d) proposes methods for employer's to avoid retraining an employee who has received relevant qualification or training for a particular occupational category or subcategory through participation in a FRA-approved training program submitted by an entity other than the employee's current employer. The RSAC recommended that the regulation address situations where the current record of training from some other entity is obtainable and when that record is unavailable. Read in its entirety, if the employee has performed the relevant safety-related duties in the previous 180 days and has a current record of training obtained from another entity, retraining will not be required. Similarly, if the employee has previously received initial or periodic training from another entity, it is proposed that the previous training will satisfy the requirements of this part as long as the previous training occurred within the previous 180 days and the record of that training is obtained from that other entity. When records of previous training from another entity are unavailable or it has been more than 180 days since the employee was either last trained or performed the relevant safety-related duties, the current employer shall perform testing to ensure the employee has retained the knowledge necessary to remain a member of that occupational category or subcategory of safety-related railroad employee. Paragraph (d)(2) clarifies situations where an employee's records are unavailable and the employee is tested to determine that the employee has the knowledge necessary to be a member of a particular occupational category or subcategory of safety-related railroad employee under paragraph (d)(1)(ii) of this section. In such cases, there is no additional testing

requirement if more than 180 days have passed since the employee either performed the safety-related duties or received initial or periodic training for an occupational category or subcategory.

Paragraph (e) proposes that beginning on January 1, two years after the effective date of this rule (which would likely be January 1, 2015), each employer will be required to deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. FRA suggested to the RSAC that it could go through FRA's regulations and standardize the 3 calendar year refresher training requirement, but some RSAC members disagreed with this option. It was argued that there are some instances where the refresher training is so important that refresher training should be required more often than a 3 year cycle.

Refresher training may not always be a repeat of initial training. Employees participating in refresher training are expected to have had both initial training and significant experience applying the knowledge and skills previously acquired. Refresher training may include background materials that cover all the essential safety requirements, but place greater emphasis on more advanced areas or subjects that more often lead to accidents, injuries, or non-compliance. The proposed rule requires that each employer ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. This requirement emphasizes that, while the refresher training does not have to mirror the initial training, it still needs to be comprehensive.

Paragraph (f) proposes a requirement that an employee designated to provide formal training to other employees must be qualified on the safety-related topics or tasks as specified in accordance with the employer's training program and the requirements of this part. The purpose of this section is to ensure that unqualified employees are not tasked by their employers to conduct formal training. The term "formal training" is defined in proposed § 243.5 and includes OJT instruction; in order to eliminate redundancy, FRA did not include a reference to OJT instruction as

was recommended by RSAC. In addition, FRA does not believe RSAC intended to preclude an employer from using a "designated instructor" who, by definition, has "an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training." Consequently, the proposed requirement contains an exception for designated instructors. FRA also kept the intent of the RSAC recommendation that, in order to be qualified, an employee must meet the requirements found in the employer's training program as well as any requirements of this part; thus, FRA addressed this issue by adding corresponding language and did not accept the more vague language in the RSAC recommendation that only referred to "this section."

FRA seeks comments on paragraph (f) and whether it should continue to stand alone or should be combined with proposed paragraph (c)(2) of this section. That is, the proposed paragraph (f) requirement appears to relate directly to situations in which "as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed." In other words, paragraph (f) provides the context of what is a "qualified person" under paragraph (c)(2) of this section.

#### Section 243.203 Records

An essential requirement of any training program is the maintenance of adequate records to support that the training was completed. In paragraph (a) of this section, FRA sets forth the general requirements for each safety-related railroad employee's qualification status records and the accessibility of those records. First, in paragraph (a), FRA proposes that each employer maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs. The proposed rule does not specify how many years back the records must go as the requirement is only to keep those records necessary to prove the employee is currently qualified. In fact, some electronic recordkeeping systems may only permit the most recent date entered to be kept. Thus, the requirement does not include keeping all training records for each employee in perpetuity.

Paragraph (a)(1), proposes to require that each employer keep records for former safety-related railroad employees for a 6-year period after the employment relationship ends. Those records must be accessible at the employer's system headquarters. By requiring employers to keep former employee records, FRA will have adequate time to obtain records even when an audit and investigation takes place several years after the employment relationship has terminated. This recordkeeping requirement is also intended to aid former employees who want to access their records to prove to a prospective employer that they received prior training. This proposed record retention requirement may be especially helpful to any former employees that may leave the railroading industry for several years, but want to return to safety-related railroad work within the 6-year time frame.

Paragraph (a)(2), proposes to require that the records of current employees be accessible at the "employer's system headquarters." By using this term, FRA means the main headquarters for any employer, whether the employer is a railroad or a contractor. A railroad's system headquarters is defined elsewhere in this chapter as "the location designated by the railroad as the general office for the railroad system." 49 CFR 217.4. Railroads may choose to keep those records at the division headquarters where the employee is currently working, but it is not proposed as a requirement. For contractors, the records must also be accessible at the employer's headquarters, but each contractor may also choose to keep such records accessible at field or branch offices that have jurisdiction over a portion of the company for easy accessibility. FRA is requiring that an international employer that has its main headquarters located in a foreign country must maintain the records for its employees at whatever location the employer identifies as its "main headquarters" in the U.S. FRA anticipates that most employers that are not small entities will want to maintain these records electronically so that the records are accessible everywhere with a company computer loaded with the appropriate software and an Internet connection. FRA notes that this proposed section contains specific requirements for electronic recordkeeping in paragraph (e).

In paragraph (b), FRA proposes that certain core information be kept in the records for each current or former safety-related railroad employee. FRA requests comments regarding proposed paragraph (b)(5), which requires that the

records indicate whether the person passed or failed any tests associated with the training. Although this was an RSAC recommendation, FRA questions whether a person can be deemed to successfully complete a course as would be indicated in paragraph (b)(4) without passing the associated tests. If so, then the (b)(5) requirement may be unnecessary. There is also a question of how useful it is to keep information regarding test failures, especially after a person has eventually passed the associated test. FRA is also interested to receive comments on whether it would be burdensome to keep electronic records for test failures.

Paragraph (b)(6) proposes that when the employer accepts training not provided by the employer, it must keep a copy of the transcript or appropriate record. The training accepted must be from a business, a training organization, or a learning institution with an FRA-approved program. It is not enough to keep a record showing that the training was done by some other entity; a copy of the transcript or other appropriate record must be retained by the employer to ensure that the employer has reviewed the transcript or record, and determined that the employee took the appropriate courses and successfully completed them. The RSAC version of this paragraph did not include the reference to businesses that are not a training organization or a learning institution. FRA added this reference to other businesses mainly so it was clear that the obligation is on the employer to obtain and maintain each employee's training records. In the RSAC recommendation under the section titled "railroad maintained list of contractors utilized," RSAC had suggested that each railroad that trains some or all safety-related employees of a contractor must maintain a listing that includes a listing of all contractor employees trained and the courses taken. After further consideration, FRA has decided not to adopt that recommendation in § 243.209 and instead has placed the burden on the employer (e.g. the contractor in the previous sentence) to maintain the relevant records. FRA's reasoning is that the RSAC recommendation would have created a redundant recordkeeping requirement.

Proposed paragraph (b)(7) contains the requirements for recording OJT for each employee. Just as each course requires a unique name and identifier, when each OJT program component is recorded, it must include either a unique name or a unique identifier so that it is clear exactly which OJT program component was successfully

completed. Although the RSAC did not suggest it, FRA is adding the proposed requirement that the record include the date the OJT program component was successfully completed. Without the date requirement, questions could arise about whether OJT was held contemporaneously with other related course work. The RSAC agreed that a record should be kept identifying which trainers, instructors, or supervisors determined that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories for which the employee is designated in accordance with the program required by this part. During audits and investigations, FRA will want this information to verify that the person making the determination was qualified to do so.

Paragraph (b)(8) proposes a separate requirement for the employer to record the date that the employee's status is determined to be qualified and the employee is designated to perform the safety-related duties identified with any particular occupational categories or subcategories, in accordance with the program required by this part. Sometimes, this date will be the same date that the formal training course is successfully completed. In other instances, it will be the same date as the date that OJT or testing is completed. Whatever date it happens to be, each employer will need to decide when the person is qualified to do the work and record that date.

Paragraph (b)(9) proposes that if an employee's qualification status was transferred from another entity with an approved program, the employer must maintain a copy of the training record from that other entity. The RSAC proposed the same requirement, but mentioned each type of other entity such as "another employer or FRA-approved training organization or learning institution." The term "entity" is intended to include all these other types of businesses without creating a list that could potentially be under-inclusive.

Finally, paragraph (b)(10) proposes the catchall phrase that if any additional information is required by this part, the employer needs to keep that information in its records for each employee.

Paragraph (c) proposes a 3 year record retention requirement for any records that are not individual employee records. The records referred to here would mainly be those kept in accordance with periodic oversight (§ 243.205) and the annual review (§ 243.207). The proposed 3 year

window for retention would actually be a bit longer than 3 years because it would be measured as 3 calendar years after the end of the calendar year to which the event relates. Thus, if a test occurred on March 1, 2012, the record would need to be maintained through December 31, 2015.

Paragraph (c) also proposes a requirement that any records that are not individual employee records must be accessible at the system headquarters and at each division headquarters where the test, inspection, annual review, or other event is conducted. Although the language "system headquarters and at each division headquarters" may seem to refer to railroads, the intent is for paragraph (c) to apply to each employer, regardless of whether the employer is a railroad or a contractor. As described previously in the analysis to paragraph (a)(2) of this section, FRA intends the term "system headquarters" to have the same meaning for railroads as in the definition of that term in § 217.4, and for contractors the term is intended to mean an employer's main headquarters in the U.S. Regarding the term "division headquarters," the term should have the same meaning for railroads as in the definition of that term in § 217.4. In that regulation, "*division headquarters* means the location designated by the railroad where a high-level operating manager (e.g., a superintendent, division manager, or equivalent), who has jurisdiction over a portion of the railroad, has an office." For contractors, the term "division headquarters" is intended to have a similar meaning to that of a railroad, but FRA will provide more discretion to each contractor to identify its division headquarters. Generally speaking, if a contractor divides its U.S. operations into regional areas that are managed on a day-to-day basis by one or more high-level managers at a field or branch office (as opposed to the system or main headquarters), then the intent of the regulation is to require those regional offices to maintain accessible records in addition to the maintenance of those records at the system headquarters.

FRA seeks comment on whether this language would cause confusion or should be modified to exempt railroads or contractors from maintaining such records at division headquarters. As previously discussed in the analysis to paragraph (a)(2), FRA anticipates that most employers that are not small entities will want to maintain these records electronically so that the records are accessible everywhere with a company computer loaded with the appropriate software and an internet connection. The electronic accessibility

of records would appear to alleviate the need to require that these records be kept at each division headquarters. Again, it is worth noting that this proposed section contains specific requirements for electronic recordkeeping in paragraph (e).

Paragraph (d) contains the requirements for each employer, training organization, or learning institution to make available those records that it is required to maintain under this part. All such records must be made available to FRA. Also, an employee's records must be made available to the employee (whether or not the person is a current employee or former employee) or any person the employee chooses as long as the employee provides such authorization in writing. The records must be made accessible upon request during normal business hours. Thus, requests made near the close of business on Friday may reasonably not be retrieved until early the following week, unless the employer has normal business hours on weekends.

As with any request for one or more records, the retrieval should be completed contemporaneously with the request, but with the understanding that a reasonable amount of time should be afforded the employer that maintains the record. When the employer maintains the records electronically, expectations for quick retrieval will be higher. Although not specified by this proposed rule, it is reasonable to expect that most records can be made available for inspection and copying/ photocopying during the same day that the request is made. In some instances, for example, when the person is a former employee who has not worked at the employer for a few years, it would be understandable if the record were kept off-site in a warehouse and it might take a week or more to retrieve the original file. However, employers are encouraged to scan and electronically maintain records of former employees (in accordance with proposed paragraph (e) of this section) to avoid lengthy retrieval delays. Furthermore, the rule is silent on whether employers and employees may agree to "copy" electronic files by sending copies as attachments to an email or saving the electronic file to some other standardized storage disk or device, but FRA believes that it should be an acceptable copying practice.

Paragraph (e) proposes requirements for each employer that chooses to retain the information prescribed in this section by maintaining an electronic recordkeeping system. These requirements were adopted by the RSAC

without much debate as they are based on requirements promulgated in other FRA regulations. FRA notes that the conductor certification NPRM published slightly different requirements for electronic recordkeeping on November 10, 2010, and that FRA may want to amend the requirements in this final training rule to conform to the final conductor certification standards. 75 FR 69166. FRA invites comment on these procedures.

Paragraph (f) proposes a transfer of records requirement with the goal of preserving training records that might otherwise be lost when an employer ceases to do business. When an employer ceases to do business and its assets will be transferred to a successor employer, there may be a question of whether the successor employer has any obligation to maintain the records for the employer company it has acquired. The answer is an emphatic yes. FRA has accepted the RSAC recommendation that the successor employer shall retain all records required to be maintained under this part for the remainder of the period prescribed in this part. As most successor employers would want to retain at least some portion of the acquired employer's safety-related railroad employees, it is expected that successor employers would have an interest in maintaining these records even if there was no specific regulatory requirement.

#### Section 243.205 Periodic Oversight

There are two central purposes to conducting periodic oversight under a training rulemaking. One central purpose is to take notice of individual employees who are in non-compliance and to take corrective action to ensure that those specific employees know how to do the work properly. In some instances, the employee might need coaching or retraining, especially if the person has not had much experience doing the work. In other instances, training may not be an issue and other remedial action may be appropriate. A second central purpose in conducting periodic oversight is to look at all of the oversight data as a whole to detect patterns of non-compliance. The annual review proposed in § 243.207 is intended to spur such a global review of training and trigger adjustments that improve the effectiveness of training courses. Taken together, these oversight and review actions should lead to significant improvements in compliance and the overall quality of training programs. The recording of oversight, and the identification of problem areas, is intended to compel each employer to focus on how a training course can be

improved to place greater emphasis on the causes of such non-compliance.

During the RSAC process, FRA initially took the position that each employer should be required to conduct annual task proficiency oversight over each safety-related railroad employee. After significant deliberations, FRA agreed that such extensive oversight would be costly, burdensome, and potentially overreaching given the statutory mandate for this rulemaking. This proposed rule contains a compromise that, while adding costs and burdens, is intended to be narrowly focused on closely monitoring compliance with the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. These particular compliance issues are not currently required to be as closely monitored as train movements and other railroad operations. For that reason, FRA would like to close that gap and require each employer to conduct periodic oversight covering compliance with the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

Paragraph (a) proposes the general periodic oversight provision and, as explained in the previous paragraph, limits the required testing and inspection oversight to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. When FRA discussed this recommended provision with the RSAC, FRA clarified that the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety that FRA is referring to are currently limited to 49 CFR part 214 (Railroad Workplace Safety), part 218 (Railroad Operating Practices), and part 220 (Railroad Communications). Periodic oversight means regularly conducting both tests and inspections. In this context, a test is conducted by a qualified supervisor who changes the work environment so that one or more employees would need to act to prevent non-compliance. An inspection involves a qualified supervisor observing one or more employees at a job site and determining whether the employees are in compliance. FRA clarifies the RSAC recommendation to ensure that this provision requires that each employer must "adopt and comply with a program" to conduct the periodic oversight tests and inspections. FRA does not want to give the impression that the regulation would only require conducting the periodic oversight without adopting a written strategy explained in the training program filed

with FRA. FRA proposes that the program of periodic oversight must commence on the day the employer files its program with FRA; however, if the employer has not yet commenced operations when the program is filed, the employer would begin its oversight program on the same day that it commences operations. Paragraph (a) also reiterates that the purpose of gathering the data is to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

Paragraph (b) proposes to exempt railroads from conducting periodic oversight under this part on certified locomotive engineers and conductors as those safety-related railroad employees are already covered (or will soon be covered) by similar requirements found elsewhere in this chapter. The intent of the exemption is not to eliminate locomotive engineers and conductors from tests and inspections of Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; instead, the intent is not to require a duplication of efforts already being made by railroads under other Federal requirements. Meanwhile, the results of the assessments required by parts 240 and 242 are required to be considered in determining if changes in a railroad's training programs are necessary to close any proficiency gaps found during those assessments. For example, inspections and tests might reveal that many locomotive engineers and conductors could have used a railroad-supplied cell phone during an operation in which the railroad supplied radio was not working; meanwhile, the employees claimed that they did not use the railroad-supplied cell phone because they were confused about when it was sanctioned for use versus when it was prohibited. Considering that example, an employer should review its part 220, subpart C training on electronic devices and decide whether there are ways to improve conveying the legal uses of the cell phone. The review and action are required by this part even though the periodic oversight was done to comply with one or more other parts of this chapter.

Although only proposed paragraph (c) contains the heading "[r]ailroad oversight," proposed paragraphs (c) through (f) need to be read together in order to fully understand the proposed responsibilities for each railroad as it performs oversight. Paragraph (c) begins by proposing a requirement that each railroad identify supervisory employees,

by category or subcategory, responsible for conducting periodic oversight tests and inspections for the safety-related railroad employees that the railroad authorizes to perform safety-related duties on its property. This requirement includes contractors that may be working on the railroad's property, but there are a number of caveats to that portion of the requirement that are addressed by the exceptions in paragraph (c) and the subsequent paragraphs in this proposed section. For example, paragraph (c)(1) qualifies the requirement in paragraph (c) by stating that a railroad is not required to provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets the criteria specified in paragraph (g) of this section. The wording of paragraph (c)(1) differs slightly from the RSAC recommendation but the intent is the same and commenters should find the clarity of the proposed exception an improvement. The RSAC recommended language suggested that a railroad would have to figure out whether the contractor was performing the oversight in addition to meeting the paragraph (g) requirements of this section; in the RSAC recommendation, an undue burden would be placed on a railroad to determine if a contractor was actually performing the oversight. Paragraph (c)(2) provides an exception to a railroad providing periodic oversight to a contractor's employees when the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories. For example, this second exception would apply when a railroad contracts out for all its signal system installation and maintenance work and does not employ any supervisory employees who are qualified to install or maintain signal systems. Paragraph (c)(3) provides that a railroad does not have to conduct oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section. This third exception is based on an RSAC recommendation and the concern that it is often logistically difficult to arrange periodic oversight of supervisors who are the ones generally tasked with conducting oversight for non-supervisory employees. FRA agrees that periodic oversight can be meaningful without requiring oversight of those supervisory employees identified by the railroad as responsible for conducting oversight.

Proposed paragraph (d) further limits a railroad's requirement to conduct

periodic oversight of a contractor's employees. In situations where a railroad is obligated to conduct oversight of a contractor's employees, it is proposed that a railroad would not be required to perform operational tests of safety-related railroad employees employed by a contractor. As explained in the analysis to paragraph (a) of this section, a test is conducted by a qualified supervisor that changes the work environment so that one or more employees would need to act to prevent non-compliance. FRA accepted the RSAC recommendation that conducting operational tests, sometimes known as efficiency tests, on contractor employees who may be working on projects of varying duration, would put an undue burden on railroads. That is, it could be difficult to find opportunities to set up operational tests when contractors are doing a wide-variety of projects that may not be suitable for creating a test and for which there may be insufficient time to set up a test given other supervisory responsibilities.

Although paragraph (d) does not require a railroad to conduct operational tests, this proposed provision does not prohibit it either. Additionally, paragraph (d) would still leave a railroad with the responsibility to conduct inspections of a contractor's employees if no exceptions applied. FRA accepts this RSAC recommendation because the inspection requirement should not be overly burdensome on railroads and yet still provide opportunities for effective oversight.

A railroad's obligations to conduct oversight are further qualified by proposed paragraph (e). In order to relieve a railroad's burden, FRA accepts the RSAC recommendations that provide each railroad great latitude to conduct oversight when it is convenient for the railroad. Thus, in paragraph (e)(1), FRA proposes that a railroad may choose to require supervisory employees to perform oversight test and inspection sessions when these sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. For example, some maintenance-of-way worksites may have a mix of railroad employees and employees from multiple contractors. It may often be difficult to distinguish a railroad employee from a contractor. As long as the supervisory employee is qualified to conduct the oversight, the supervisory employee would have the discretion to test or inspect any of the safety-related railroad employees at the

worksite—regardless of what company employed the person.

In paragraph (e)(2), FRA proposes that a railroad may choose to require supervisory employees to perform oversight of safety-related railroad employees employed by a contractor when a qualified railroad supervisory employee's duties place him or her in the vicinity of one or more safety-related railroad employees employed by a contractor and performing the oversight would result in minimal disruption of this supervisory employee's other assigned duties. Unlike the paragraph (e)(1) situation where the supervisor is at the worksite with the intention to perform oversight, paragraph (e)(2) addresses the situation where the supervisor is at the worksite and either observes non-compliance in his or her normal duties or finds him or herself with the time and opportunity to conduct the oversight.

Paragraph (f) proposes that when any railroad finds evidence of contractor employee non-compliance during the periodic oversight it shall provide that employee and that employee's employer with details of the non-compliance. This proposed requirement is based on an RSAC recommendation and it reinforces the central purposes of periodic oversight. Those central purposes were elaborated on in the introductory paragraph for the analysis to this proposed section. In summary, the two central purposes of periodic oversight are to (1) take corrective action to ensure that specific employees know how to do the work properly and (2) review the oversight data as a whole to detect weaknesses that can be addressed by improvements to the training program. This proposed requirement is not referring to non-compliance with any type of employer rule; instead, the concern addressed by proposed paragraph (f) is intended to only require a railroad to notify a contractor of non-compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. Although some Working Group members thought it would be sufficient if FRA addressed this issue in the preamble or this analysis, FRA has decided to make an affirmative change to the RSAC recommended regulatory text so that there would be no possible chance of confusion.

Paragraph (g) proposes that each contractor be required to conduct periodic oversight tests and inspections of its safety-related railroad employees provided that certain conditions are met. If any condition is not met, the contractor is exempt from being required to perform the oversight. For

instance, in paragraph (g)(1) there is a small business exemption for any contractor that employs 15 or fewer safety-related railroad employees. FRA accepts the RSAC recommendation in paragraph (g)(2) that a contractor should typically be responsible for periodic oversight of its own employees if it trains its own employees directly. If a contractor uses a railroad, a training organization, or a learning institution to train a category or subcategory of employees, then the contractor probably does not have the "in-house" expertise needed to conduct periodic oversight. Finally, paragraph (g)(3), proposes that a contractor would not be required to perform periodic oversight if the contractor does not employ supervisory safety-related railroad employees capable of performing the oversight. In the application of this proposed requirement, a contractor will need to determine whether it is exempt based on each occupational category or subcategory of safety-related railroad employees that the contractor employs. For example, a contractor would be required to perform oversight of its operators of roadway maintenance machines equipped with a crane if the contractor employs 16 or more safety-related railroad employees, trains its operators of roadway maintenance machines equipped with a crane by using one or more designated instructors it employs, and employs one or more supervisors capable of performing the oversight of those operators of roadway maintenance machines equipped with a crane. If the same contractor also employs only one employee capable of inspecting and maintaining wayside signal systems, then the contractor would not be required to conduct periodic oversight of that signal employee because the employer cannot meet the conditions in proposed paragraphs (g)(2) and (g)(3).

Paragraph (h) proposes a requirement that would allow a railroad and a contractor to agree that the contractor will provide the periodic oversight, notwithstanding the requirements of this section that impose the requirements on either the railroad or the contractor. During the RSAC deliberations, FRA heard discussions that contracts between railroads and contractors will often specify which party is responsible for complying with certain laws, regulations, or orders where either party could potentially be held responsible. FRA recognizes that there may be some instances where a contractor would not be required under paragraph (g) to conduct periodic oversight but that it is willing to accept

the oversight responsibility in order to secure a contract with a railroad. When devising this proposed option, the RSAC considered that this situation would otherwise be handled by the railroad providing the oversight and that the railroad would be expected to have supervisory employees qualified to do the oversight. With that understanding, the RSAC proposed that in order to accept this oversight responsibility, the contractor would need to address in its program that the railroad has trained the contractor employees responsible for training and oversight. In other words, the contractor may accept responsibility for the oversight, but not until the railroad trains the contractor's supervisory employee and qualifies that person to do the oversight; thus, the railroad has some obligation to ensure that the contractor's supervisory employees are capable of conducting the oversight before abdicating what would otherwise be the railroad's responsibility.

Paragraph (i) proposes the requirements for retaining oversight records. At a minimum, it proposes that each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. Without such basic records, it would be impossible to audit an oversight program and detect whether it has been implemented. The records shall specify each person administering tests or inspections and each person tested so that audits can confirm that the people administering the oversight are qualified to perform the oversight. The record shall also provide a method to note whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance; in keeping such records, audits can confirm that employers are using oversight to achieve the central purposes of oversight correcting individual behavior and improving training. Finally, FRA does not want to require duplication of oversight programs; thus, where periodic operational oversight is required in accordance with § 217.9 of this chapter, a railroad may specify this overlap in its program submitted in accordance with part and is not required to duplicate that oversight.

Paragraph (j) contains the statement that the records required under this section are subject to the requirements of § 243.203, which is the section containing the recordkeeping requirements of this part. The RSAC recommended this paragraph and FRA agrees that it should be a requirement. However, FRA would appreciate

comments on whether this paragraph is necessary given that the requirements of § 243.203 would apply to any records of periodic oversight required under this part even if paragraph (j) was deleted. FRA is willing to consider retaining paragraph (j) if commenters suggest that it provides a useful reminder that records of periodic oversight must be retained and that without the paragraph some employers might not grasp that the recordkeeping requirements apply under these circumstances.

FRA acknowledges that it made several word and phrase changes in this section as compared to the RSAC recommendation. FRA believes that the intent of the proposed requirements has not changed and the changes are intended to address word choices that, when the words or phrases were used in RSAC meetings, were thought to be interchangeable. For example, in paragraph (b), FRA changed the term "task proficiency oversight" to simply "periodic oversight." During the early RSAC deliberations, FRA proposed that each employee be observed to determine that each employee was proficient in performing safety-related tasks; as that requirement dropped out, the language needs to be standardized. Similarly, in paragraphs (e) and (e)(1), FRA changes the term "oversight inspection" to simply "oversight." As FRA has drafted this notice, it realized that we meant the term oversight to mean both tests and inspections, so the term oversight inspection would be too limiting. Paragraph (f) of the RSAC recommended language explained that a requirement would be the "minimum" action required under certain particular circumstances. FRA deletes this qualifier as this rule is intended to contain "general minimum training and qualification requirements" (see § 243.1(b)) and thus it is unnecessary to restate this qualifier elsewhere in this proposed part. Also, in paragraph (i), FRA changed the RSAC suggested term "periodic oversight and inspections" to "periodic oversight." Again, if the term periodic oversight refers to both tests and inspections, there is no reason to add the qualifier of "and inspections."

FRA seeks comment on a potential scope issue that would allow some situations where safety-related railroad employees would not be subject to any oversight. Those situations would likely occur when a short line railroad hires a contractor with 15 or fewer safety-related railroad employees. It is possible that the short line railroad would not have the supervisors with the expertise necessary to conduct the oversight and the contractor would be too small to be required to do it themselves per the

proposed requirements. During the RSAC deliberations, FRA acknowledged that the recommendation included a narrow number of employers that would not be covered. FRA expressed concern that including every employer would place a debilitating burden on the smallest employers.

#### Section 243.207 Annual Review

In the analysis to the previous section, the opening paragraph mentions that one of the central purposes in conducting periodic oversight is to look at all of the oversight data as a whole to detect patterns of non-compliance. Additionally, if other relevant data is analyzed on a regular basis, that data could also be used to detect non-compliance trends. The purpose of detecting these trends is so that employers can determine if knowledge or performance gaps exist in the current training and use that information to plot ways to fill in those gaps. For this reason, FRA is proposing in paragraph (a) of this section that each railroad with at least 400,000 total employee work hours per year must conduct an annual review in accordance with the requirements of this section. This proposed section only applies to railroads except that, in accordance with paragraphs (a) and (f), contractors must use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

It is likely that in most instances, it would be determined that the current method of formal training covers the subject matter, but some aspect of the training could be improved. For example, it might be determined that the training does not place enough emphasis on compliance with one or more specific tasks. Greater emphasis could be placed on the task by increasing the amount of time covering how to perform the task and the problems that could be encountered when conducting the task. The course materials should be reviewed to see if they could be improved for clarity. In other instances, especially when the pattern of non-compliance is detected in a safety-related task, adding an OJT component or adding more repetitions within the OJT may increase an employee's proficiency and lead to more lasting compliance. In still other instances, adding opportunities for individualized instruction and feedback could cut down on non-compliance. It could also be determined that a particular instructor is ineffective, or

some other aspect of the way the course is taught is not conducive to learning.

There are certainly a number of ways to improve training and that is why it is important that each person a railroad designates to conduct the annual review should be familiar with the training program filed with FRA. FRA does not propose any knowledge requirements on the designated person requirement in paragraph (c) and invites comment on whether there should be any requirements. Instead, the proposal considers that the person designated to conduct the review will need to have extensive information about the training program and individual course material, as well as direct access to shape the methods of delivery. As previously explained, the annual review is intended to effect change in how training is delivered to improve performance and should not be viewed as the end itself. In other words, if the annual report identifies gaps, the report itself has little value unless it is used to change the training program in order to improve knowledge acquisition and safety performance.

Although proposed paragraph (a) would eliminate the annual review requirement for those short line railroads with less than 400,000 total employee work hours per year, paragraph (b) contains the proposed requirement that each railroad that is required to conduct periodic oversight in accordance with § 243.205 of this part shall also be required to conduct an annual review, as provided in this section, and shall retain, at its system headquarters, one copy of the written annual review. This proposed paragraph is based on an RSAC recommendation. The intention is that, except for the smallest railroads, any railroad that conducts periodic oversight must also conduct an annual review.

The analysis necessary to do the annual review must be put in writing to prove that it was conducted. It would be expected that the document would speak for itself in that it would describe what data the review is based on and how the conclusions are reached. As with other written records required by this proposed part, it would be permissible for the annual review to be kept electronically pursuant to the recordkeeping requirements found in § 243.203(e) of this proposed part. Please note that the written annual review and the records supporting the analysis in the annual review would need to be maintained for 3 calendar years after the end of the calendar year to which the annual review relates and made available to FRA pursuant to

§ 243.203(c) and (d) of this proposed part.

FRA accepts the RSAC recommendation that a system-wide annual review should be sufficient, even for those railroads large enough to have divisions. Some railroads with divisions may choose to conduct division-wide annual reviews in addition to system-wide reviews. It is possible that a knowledge or performance gap could be identified in one division but not system-wide. Railroads large enough to have divisions may want to target modifications to training for safety-related railroad employees in certain divisions that face particular hazards or trend toward non-compliance, without unnecessarily incurring additional training expenses system-wide. However, requiring that each railroad address gaps on a division level would introduce a level of complexity that would likely go beyond what is necessary to implement an effective annual review. After all, each training program is based on training provided system-wide, not by division.

Paragraph (c) proposes a requirement that each railroad designate one or more person to conduct the written annual review. Although the proposed rule does not specify who that person must be, FRA envisions that each railroad would choose one or more managers at the system-wide level with significant knowledge of the railroad's training and oversight programs. For some railroads, a high level manager representing each discipline (e.g., track, mechanical, signal, operations, etc.) might participate. However, FRA only proposes requiring that at least one person be designated because the agency wants to be able to address any questions related to the annual review with the person that the railroad designates as responsible for conducting the written review.

Proposed paragraph (c) also contains a list of types of data that must be analyzed in accordance with the annual review. Given prior analysis discussion regarding the purpose of periodic oversight, it should come as no surprise that paragraph (c)(1) proposes that periodic oversight data required by § 243.205 must be analyzed for purposes of the annual review.

Paragraph (c)(2) proposes a requirement that reportable accident/incident data, as defined in part 225 of this chapter, must also be analyzed for purposes of the annual review. The inclusion of accident/incident data generated some discussion at the RSAC Working Group meetings. During those meetings, FRA suggested that railroads also consider "accountable" injuries,

illnesses, and rail equipment accidents. Accountable incidents may be attributable to work exposure or events, but are not required to be reported to FRA; consequently, accountable incidents may generally be categorized as those incidents that pose a lesser safety hazard than those incidents resulting in reportable accidents. Railroads also argued that information attributable to the causes of reportable accidents are less likely to be controversial compared to the causes of accountable incidents. Although FRA would encourage each railroad to consider accountable incident data when conducting an annual review, FRA accepts the RSAC recommendation to limit the requirements for accident data analysis to reportable incidents. Overall, FRA's purpose in requiring analysis of these types of data is to improve training in ways that reduce the number of reportable accidents/incidents. Thus, by addressing the reportable incidents in the annual review, it is proposed that each railroad will focus on this goal.

Paragraph (c)(3) proposes that each railroad consider FRA inspection report data in its annual review. Each year, FRA conducts thousands of audits and inspections of railroad safety compliance. Many of those inspections find instances of non-compliance, although not all of those non-complying instances result in FRA taking enforcement action as FRA may exercise enforcement discretion. See 49 CFR part 209, app. A. Whether or not FRA took enforcement action should be irrelevant to the analysis necessary for detecting knowledge or performance gaps for a railroad's annual review. The thrust of FRA's argument is that, as a safety agency, we often find safety problems—either reaffirming that the railroad has a compliance problem or uncovering a concern previously undetected by the railroad's compliance officers. FRA recognizes that each railroad will often take remedial action to immediately correct non-compliance, whether or not FRA requires that the remedial action be taken. See 49 CFR part 209, subpart E. In the context of this proposed rule, FRA wants to require that each railroad take the additional step of looking for trends of non-compliance and how training courses or programs can be adjusted to stop those trends from getting worse. FRA heard some complaints during the RSAC Working Group meetings that not every railroad currently has an electronic database or other method to track non-compliance detected by FRA inspections. For those railroads that may have difficulty

detecting such trends with FRA inspection data, FRA suggests that those railroads contact FRA for help as FRA anticipates that it could readily provide meaningful inspection data for analysis.

Paragraph (c)(4) proposes that the annual review include analysis of employee training feedback received through a course evaluation process, but only if such feedback is available. It is anticipated that most training courses and programs have built in mechanisms for obtaining employee feedback. For example, it is common for a survey to be handed out at the end of a training course and for participants to rank the quality of the course instructor, the training materials, and the training generally. There is also typically an opportunity for participants to comment about any aspect of the training by writing in a comment. The proposed rulemaking is not intended to require employee participant feedback where none existed previously; instead, the proposal is to use that information, when it is being gathered, and to use it productively to further identify gaps in knowledge or performance. FRA would expect that this information would be used for similar purposes now if it is already being gathered. By including the analysis of the employee feedback in the annual review, the feedback may be used to strengthen or weaken the argument for a modification to a training course or program.

Paragraph (c)(5) proposes that the annual review include analysis of feedback received from labor representatives, but only if such feedback is available. Like the employee training feedback through a course evaluation, the feedback received from labor representatives may be subjective but of significant value. Labor representatives may be able to act as a conduit for comments for an employee that is concerned about raising the issue directly to the railroad. In addition, labor representatives may detect non-compliance trends or learning difficulties among a union's members through conversations or surveys. Furthermore, where a union represents employees on more than one railroad, the labor representatives may have knowledge about best practices on other railroads that may be transferrable to the training program of another railroad. For all these reasons, the RSAC Working Group recommended, and FRA accepted, this proposed requirement.

Paragraph (d) proposes a requirement for the railroad's designated person to coordinate any necessary adjustments to the initial and refresher training programs based upon the results of the annual review. This proposed

requirement is a call for action when the results of the annual review strongly suggest changes are necessary in the interests of improving the program. FRA does not expect that every course or program will require an adjustment every year. It is expected that some trends or data may be inconclusive. In other instances, a trend or gap may be identified but an effective way to address the problem through a modification to the training program or a particular course is not found. Although FRA would prefer that each railroad take some affirmative action to address knowledge or performance gaps, FRA does not intend to take enforcement action against a railroad that acknowledges a trend but decides to defer modifications to training in order to take the time to properly assess the causes of the underlying non-compliance and determine the best options available to improve compliance.

Paragraph (d) also contains the railroad's option to allow the annual review required under this section to be conducted in conjunction with any periodic review required under part 217 of this chapter. FRA is not looking for railroads to duplicate reviews already required under other Federal regulations. See 49 CFR 217.9(e) and (f). It is expected that the part 217 reviews could be incorporated into the proposed reviews required by this section. However, compliance with part 217 of this chapter does not automatically ensure complete compliance with this section as it mainly would be used only to comply with paragraph (c)(1) of this section.

Proposed paragraph (e) contains a requirement for a railroad to notify any contractor it utilizes about the contractor amending its training program if the railroad's annual review of its own program reveals information that would also improve the contractor's program. The railroad must determine whether the safety-related railroad employees supplied by each contractor it utilizes are trained by the contractor or some other entity. If a contractor trains its own safety-related railroad employees, the railroad will have a duty to provide the contractor with the information needed to make the same adjustments in the contractor's program that was made in the railroad's program.

Likewise, paragraph (f) requires that contractors have a duty to use any information provided by railroads to adjust training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. If the information the contractor receives from

a railroad is not so narrowly focused, the contractor may choose to ignore the information. FRA does not want contractors to receive information and not act. When RSAC made this recommendation, it did not consider that there could be a situation where a contractor believes that making the modification requested by the railroad is contrary to safety or is otherwise not beneficial. FRA seeks comment regarding whether this proposed section should contain a provision explaining what a contractor should do if it disagrees with the railroad's information that a modification to the training program is necessary.

Paragraph (g) proposes a deadline of September 1 of each calendar year for each railroad, to which this section applies, to complete its annual review for the previous calendar year. FRA initially suggested a March 1 deadline, but during the RSAC Working Group meetings some railroads suggested September 1 would work better based on their current training schedules. That is, the major railroads conduct all regularly scheduled training during the first half of each year. Consequently, it would be difficult to conduct annual reviews during the first half of each year as the people likely designated to help with the review would be busy implementing the training. Also, it would be difficult for each railroad to immediately implement any modifications to a training program that is already underway. By requiring the annual review to be completed no later than September 1, each railroad should have several months to implement any modifications in the training programs prior to January 1 of each calendar year.

#### Section 243.209 Railroad Maintained List of Contractors Utilized

One issue that was repeatedly raised during the RSAC meetings was that employees of contractors routinely work alongside employees of railroads. From an enforcement viewpoint, it is essential that FRA be able to identify which employees work for railroads and which for contractors. When an employee works for a contractor, FRA can sometimes find it an additional burden to figure out basic contact information for the contractor employer. This proposed section is intended to require each railroad to maintain a list of the contractors it uses and some basic contact information about each of those contractors.

Paragraph (a) proposes that each railroad utilizing contractors to supply the railroad with safety-related railroad employees shall maintain a list, at its system headquarters, with information

regarding each contractor utilized. FRA provides for an exception to this requirement when two conditions are met. The first condition for the exception to apply is that the railroad must qualify each of the contractor's safety-related railroad employees that it uses, and the second condition requires that the railroad maintain the training records for each of the contractor's safety-related railroad employees utilized. FRA is willing to permit this exception because a railroad that is both qualifying and keeping training records for the contractor's employees is, in effect, responsible for the contractor's training under this part. Thus, if there is a training issue that arises, FRA may be able to address its concern directly with the railroad.

Paragraph (b) proposes the three items that must be contained in a railroad's listing of contractors. It is proposed that the listing include (1) the full corporate or business name of the contractor, (2) the contractor's primary business and email address, and (3) the contractor's primary telephone number. With this basic information, FRA should be able to track down a contractor to follow-up during any audit or investigation.

Paragraph (c) proposes that the information contained in the listing be continuously updated as additional contractors are utilized, and no contractor information shall be deleted from the list unless the contractor has not been utilized for 3 years from the end of the calendar year the contractor was last utilized. The proposed requirements are intended to keep information on the list for a reasonable length of time but allow removal when the information becomes stale. This information should likely not be necessary 3 years from the end of the calendar year the contractor was last utilized as most audits or investigations would take place inside that time frame.

FRA acknowledges to its RSAC members that the wording of this section was changed from the RSAC recommendation; however, the intent of the changes was to improve clarity and not change the intent. For example, some language in the RSAC recommendation was worded in the negative; this proposed rule switches the wording so it reads in the positive and is easier to understand. Also, as FRA acknowledged earlier in this analysis, FRA deleted the RSAC's recommended paragraph (c) and edited § 243.203(b)(6) to capture the same concept; the provision contained a good idea, but seemed out of place. The removed recommendation would have required that if a railroad elects to train some or all of a contractor's safety-

related railroad employees, the listing should also include the course name and unique identifier for each course so designated and a listing of all contractor employees trained. FRA deletes that recommended requirement because the burden for maintaining records should fall on the employer, not the railroad. FRA improved on the RSAC recommendation by proposing that the contractor will need to maintain training records of its employees whether those records are received from another business (which could be a railroad), a training organization, or a learning institution. Railroads that are in the business of training safety-related railroad employees from other railroads or contractors would need to maintain those records in order to retain such training business from other employers.

Appendix A

In the final rule, Appendix A will contain a penalty schedule similar to that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. See 5 U.S.C. 553(b)(3)(A). Nevertheless interested parties are welcome to submit their views on what penalties may be appropriate.

VIII. Regulatory Impact and Notices

A. Executive Order 12866, Executive Order 13563, and DOT Regulatory Policies and Procedures

This proposed rule is a significant regulatory action within the meaning of Executive Order 12866, Executive Order 13563, and the U.S. Department of Transportation’s regulatory policies and procedures (DOT Order 2100.5 dated May 22, 1980; 44 FR 11034, Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory impact analysis (RIA) addressing the economic impact of this proposed rule.

The RIA details estimates of the costs likely to occur over the first twenty years after its effective date and a breakeven analysis that details the reductions in human factor-caused accidents that would be necessary for the proposed rule to breakeven in the same timeframe. Informed by its analysis of the economic effects of this proposed rule, FRA concludes that this proposed rule would likely result in positive net benefits. FRA believes the proposed rule would achieve positive net benefits primarily through requiring that training programs include “hands-on” training components, which scientific literature has shown to be much more effective at reducing human factor-caused accidents than traditional

training.<sup>1</sup> The costs that may be induced by this proposed rule over the twenty-year period considered include: the costs of revising training programs to include “hands-on” training where appropriate, as well as the costs of creating entirely new training programs for any employer that does not have one already; the costs of customizing model training programs for those employers that choose to adopt a model program rather than create a new program; the costs of annual data review and analysis required in order to constantly improve training programs; the costs of revising programs in later years; the costs of additional time new employees may have to spend in initial training; the costs of additional periodic oversight tests and inspections; the costs of additional qualification tests; and the costs of additional time all safety-related railroad employees may have to spend in refresher training. The summed total of the estimated costs over the first twenty years of this proposed rule equals about \$81.6 million, discounted at a 3 percent discount rate, and about \$64.1 million, discounted at a 7 percent discount rate (in 2010 dollars).

The table below summarizes the costs considered in the RIA, summed over the twenty-year period analyzed and discounted to present value using 3 percent and 7 percent discount rates.

Cost element	Twenty-year total (3% discount rate)	Twenty-year total (7% discount rate)
Creating and revising training programs and performing annual reviews, original program users .....	\$1,999,728	\$1,564,484
Creating and revising training programs and performing annual reviews, model program users .....	179,116	129,245
Creating and revising training programs, model program users with <400k annual labor hours .....	4,751,465	3,428,505
Customizing model programs .....	910,245	842,919
Designating employees by class or craft .....	771,316	709,480
Additional time in initial training .....	16,539,877	12,235,174
Additional time in refresher training .....	25,456,709	18,831,293
Periodic oversight tests and inspections .....	15,242,583	11,275,517
Additional qualification testing .....	15,741,416	15,075,836
<b>Total .....</b>	<b>81,592,455</b>	<b>64,092,452</b>

FRA has performed a breakeven analysis for this proposed rule. FRA expects that improving training primarily by requiring the inclusion of “hands-on” elements where appropriate will reduce the number of human factor-caused railroad accidents. Rather than assume any specific reduction will be achieved, FRA has calculated the percentage of human factors accidents that would need to be prevented by this proposed rule to at least offset the total costs of the proposed rule. Reductions in human factors accidents would result

in fatalities avoided, injuries avoided, and property damage avoided, all of which can be monetized and quantified using FRA safety data.

List of benefits of reducing human factor-caused accidents

- Fatalities avoided
- Injuries avoided
- Property damage avoided

In addition, human factor-caused railroad accidents can result in train delay and environmental damages,

emergency response, but FRA does not have data with which to estimate those costs. Human factors also play a role in limiting the consequences of accidents—in other words reducing the severity of their outcomes. Some FRA regulations are focused on this and thus this proposed rule has the potential to result in improvements in this area as well.

Evaluated at either the three or seven percent discount rate, FRA estimates that this proposed rule will break even if it results in a twenty-year total

<sup>1</sup> For a review and citation information of this scientific literature, please see the Regulatory

Impact Analysis that accompanies this NPRM and that has been placed in the docket.

reduction in human factors accidents of 7.3 percent using a 3 percent discount rate, and a reduction of 7.1 percent using a 7 percent discount rate. The table below details the total present discounted annual costs of the proposed rule. The table also shows the total present discounted annual costs of human factors accidents that would be

incurred over the next 20 years without this proposed rule, as well as the percent reduction in human factors accidents that would be necessary for the accident reduction benefits to justify implementation of the proposal. This calculation takes into account various recent and concurrent initiatives to address human factor-caused accidents

including implementation of positive train control systems, revisions to hours of service regulations, development of proposed conductor certification standards and a proposed roadway worker protection rule, and implementation of programs to address fatigue and electronic device distraction among others.

Total present discounted cost of HF accidents (3% discount rate)	Total present discounted costs (3% discount rate)	Percent reduction for breakeven (3% discount rate)	Total present discounted cost of HF accidents (7% discount rate)	Total present discounted costs (7% discount rate)	Percent reduction for breakeven (7% discount rate)
\$1,246,926,928	\$81,592,455	7.3	\$1,020,012,541	\$64,092,452	7.1

Given the role and prevalence of human factor-caused accidents in the railroad industry and the relationship between quality training and safety, FRA believes it is not unreasonable to expect that improvements in training as proposed in this rule would yield safety benefits that will exceed the costs. FRA requests comments, including any relevant data and information, on all aspects of the RIA.

*B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment*

To ensure that the potential impact of this rulemaking on small entities is properly considered, FRA developed this rule in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s policies and procedures to promote compliance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must conduct an initial regulatory flexibility analysis unless it determines and certifies that a rule is not expected to have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this initial regulatory flexibility analysis to aid the public in commenting on the potential small business impacts of the proposals in this NPRM. We invite all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the proposals in this NPRM. We will consider all comments received in the public comment process when making a determination in the Final Regulatory Flexibility Assessment.

As discussed in earlier sections of this preamble, FRA is proposing regulations to establish minimum training standards for each category and subcategory of safety-related railroad employee. The proposed rule would require each railroad or contractor that employs one or more safety-related railroad employee to develop and submit a training program to FRA for approval and to designate the qualification of each such employee. As part of that program, most employers would need to conduct periodic oversight of their own employees to determine compliance with Federal railroad safety laws, regulations, and orders applicable to those employees. The proposal would also require most railroads to conduct annual written reviews of their training programs to close performance gaps. Furthermore, FRA proposes specific training and qualification requirements for operators of roadway maintenance machines that can hoist, lower, and horizontally move a suspended load. Finally, FRA proposes minor clarifying amendments to the existing training requirements for railroad and contractor employees that perform brake system inspections, tests, or maintenance.

**Description of the Reasons That Action by the Agency Is Being Considered**

Pursuant to the Rail Safety Improvement Act of 2008 § 401(a), Public Law 110–432, 122 Stat. 4883, (Oct. 16, 2008) (codified at 49 U.S.C. 20162) Congress required the Secretary of Transportation to establish minimum training standards for safety-related railroad employees and the submission of training plans from railroad carriers, contractors, and subcontractors for the Secretary’s approval.

**Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule**

FRA is addressing the RSIA’s statutory mandate to establish minimum

training standards for safety-related railroad employees and the submission of training plans in this rulemaking by proposing that each employer of one or more safety-related railroad employees, whether the employer is a railroad, contractor, or subcontractor, be required to train and qualify each such employee on the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The proposal would also require that the training program developed by each employer be submitted to FRA for approval.

The scientific literature on training in general and FRA’s own experience with training in the railroad industry show a clear link between the quality of training programs—including whether training is engaging or “hands-on”—and safety. Even though rail transportation in the United States is generally an extremely safe mode of transportation and rail safety has been improving, well-designed training programs have the potential to further reduce risk in the railroad environment.

The main goal of this proposal is to improve railroad safety by ensuring that safety-related employees receive appropriate training that takes into consideration the type of activities they perform and analysis of relevant data.

**Description of and, Where Feasible, an Estimate of the Number of Small Entities To Which the Proposed Rule Will Apply**

“Small entity” is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines a “small entity” as having the same meaning as “small business concern” under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not

dominant in its field of operation. Section 601(4), likewise includes within the definition of “small entities” not-for-profit enterprises that are independently owned and operated, and are not dominant in their fields of operation. Additionally, section 601(5) defines “small entities” as governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. The U.S. Small Business Administration (SBA) stipulates in its “Size Standards” that the largest a railroad business firm that is “for-profit” may be, and still be classified as a “small entity,” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.”

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 policy that formally establishes “small entities” as railroads which meet the line haulage revenue requirements of a Class III railroad.<sup>2</sup> The revenue requirements are currently \$20 million or less in annual operating revenue. The \$20 million limit (which is adjusted by applying the railroad revenue deflator adjustment)<sup>3</sup> is based on the Surface Transportation Board’s (STB) threshold for a Class III railroad carrier. FRA is using the STB’s threshold in its definition of “small entities” for railroads affected by this rule. FRA has also adopted the STB threshold for Class III railroad carriers as the size standard for railroad contractors.<sup>4</sup> FRA estimates that 720 railroads would be affected by this proposed rule. This number equals the number of railroads that reported to FRA in 2009, minus those railroads that are tourist, scenic, or historic railroads and are not part of the general system (these railroads are exempted from the proposed rule). Of those railroads, 46 are Class I, Class II, commuter, and intercity passenger railroads. The remaining 674 railroads are therefore assumed to be small railroads for purposes of this assessment. The proposed rule would affect all employers of safety-related railroad employees, which, in addition to railroads of all sizes, includes contractors and subcontractors who are engaged to perform safety-related duties on railroads. FRA assumes in its RIA

that approximately 795 railroad contractors and subcontractors exist, based on conversations with industry experts. That figure of 795 includes 155 well-established track and signal maintenance contractors, 500 very small (1–4 employee) or relatively new track and signal maintenance contractors, and another 140 contractors who do not perform track or signal maintenance. FRA has previously clarified its definition of small entity with respect to contractors, stating that FRA defines railroad contractors that meet the income level established for Class III railroads as small entities. For purposes of this analysis, FRA conservatively assumes that about 10 of these contractors have annual revenues in excess of \$20 million, leaving 785 contractors that are considered small entities that may be affected by this proposed rule. FRA requests comments on this assumption and any information regarding the number of small contractors impacted by this proposal.

Thus, the total estimate of the number of small entities that the proposed rule may affect equals 674 Class III railroads plus approximately 785 contractors, totaling approximately 1,459 entities.

Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Proposed Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Type of Professional Skills Necessary for Preparation of the Report or Record

The proposed rule would include several recordkeeping requirements that may pertain to small entities. Each employer would be required to maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs. Each employer would be required to maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs. Each employer that conducts periodic oversight in accordance with the proposed rule would be required to keep a record of the date, time, place, and result of each test or inspection. Each railroad utilizing contractors to supply the railroad with safety-related railroad employees would be required to maintain a list, at its system headquarters, with information regarding each contractor utilized unless: FRA believes that a professional or administrative employee would be capable of maintaining these records. FRA requests comment on whether other skills beyond those typical of a

professional or administrative employee would be necessary for the above recordkeeping requirements.

The proposed rule would require employers of safety-related railroad employees to submit a training program to FRA for approval. Each employer’s training program will be required to include on-the-job training where appropriate and practicable. However, FRA has given employers the option to adopt a model program, and FRA assumes in this assessment that nearly all small entities will adopt model programs rather than hire training experts to develop a complete, unique program. However, for the sake of the RIA and this assessment, FRA assumes that any entity that adopts a model program would customize the model program, if necessary, and FRA also assumes that such customization should require about 8 hours on average.

Following the initial submission of the training program, employers of safety-related railroad employees would be required to revise the training programs if necessary. The decision on whether to revise a training program would be required annually and would depend on changes in the workplace environment. When new laws, regulations, technologies, procedures, or equipment are introduced into the workplace, for example, it may be appropriate for training programs to be modified accordingly. FRA assumes in the RIA accompanying the NPRM that some annual revision of training programs will be required every year for all employers of safety-related railroad employees. Furthermore, these annual revisions would be required to reflect the results of annual reviews of safety data for all entities with 400,000 or more annual labor hours. For purposes of this analysis, FRA assumes that 4 Class III railroads and 3 small contractors will surpass this threshold. FRA requests comments on this assumption.

Specifically, as in the RIA, FRA assumes that 2 Class III railroads would choose to develop their own programs, while the remaining 674 Class III railroads adopt model programs, and FRA also believes that all 785 small contractors would adopt model programs. As the table below shows, all of the hours spent creating or revising training programs are assumed to be incurred by training experts or craft-specific technical experts at a cost \$56.84 per hour, which is the average wage rate in 2010 dollars of Professional and Administrative employees for Class I railroads as reported to the Surface Transportation Board, multiplied by 1.75 to cover overhead.

<sup>2</sup> See 68 FR 24891 (May 9, 2003); 49 CFR part 209, app. C.

<sup>3</sup> For further information on the calculation of the specific dollar limit, please see 49 CFR part 1201.

<sup>4</sup> See 68 FR 24891 (May 9, 2003)

## COSTS OF COMPLIANCE WITH TRAINING PROGRAM REQUIREMENTS FOR SMALL ENTITIES

Small entity group	Action	Cost per hour (\$)	Hours required	Cost per small entity (\$)
Own-program adopters (2 Class III railroads)	Create or revise and submit initial program in first year.	56.84	160	9,094.40
Own-program adopters (2 Class III railroads)	Perform annual revisions in subsequent years, annual costs, not discounted.	56.84	40	2,273.60
Model program adopters with 400,000 or more annual labor hours (4 Class III railroads, 3 contractors).	Customize and submit relevant parts of model program in first year.	56.84	8	454.72
Model program adopters with 400,000 or more annual labor hours (4 Class III railroads, 3 contractors).	Perform annual review and annual revisions in subsequent years, annual costs, not discounted.	56.84	20	1,136.80
Model program adopters with less than 400,000 annual labor hours (668 Class III railroads, 785 contractors).	Customize and submit relevant parts of model program in first year.	56.84	8	454.72
Model program adopters with less than 400,000 annual labor hours (668 Class III railroads, 785 contractors).	Perform annual revisions in subsequent years as necessary, annual costs, not discounted.	56.84	4	227.36

While the proposed rule does not explicitly require any increase in the amount of time that must be spent in initial or refresher training, such increases may arise for some small entities if those entities add substantial amounts of on-the-job training to training programs. In the RIA, FRA assumes that new hires would require one extra day of initial training as a result of the proposed rule, and that one additional hour of refresher training would be required on average for each employee. However, many small entities typically hire previously qualified safety-related railroad employees who, for example, have previously been trained by a Class I or Class II railroad. It is thus not clear to what extent the cost of additional initial training—to whatever extent that is induced by the proposed rule—would be borne by small entities. FRA requests comment on the prevalence of initial training of safety-related railroad employees by small entities.

Small entities would likely have to incur the cost of additional refresher training, to whatever extent that would be required. FRA assumed one extra hour would be required every three years for each employee, at a cost of \$47.46 per hour. FRA requests comment on the amount of additional refresher training small entities would undertake as a result of this proposed rule, and on whether \$47.46 per hour of additional refresher training seems appropriate for small entities.

Identification, to the Extent Practicable, of all Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA has attempted to avoid any duplication, overlap, or conflict with

other federal rules. The proposed rule, at § 243.103(b), states, “An employer that is required to submit one or more similar training programs or plans in accordance with requirements found elsewhere in this chapter may choose to cross-reference these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT [on-the-job] training components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.” The preamble lists, as examples of other training programs or plans that were previously required elsewhere in 49 CFR, 214.307, 217.9, 217.11, 218.95, 236.905, and 240.101.

Additionally, the proposed rule would avoid possible duplication or conflict with a recently finalized U.S. Department of Labor, Occupational Safety and Health Administration regulation. In 2010, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) published a final rule regarding “Cranes and Derricks in Construction” (Final Crane Rule). The Final Crane Rule establishes requirements designed to improve safety for employees who work with or around cranes and derricks in the construction industry, including the establishment of qualification and certification requirements for certain operators of cranes.

Because the railroad industry uses cranes differently than those used in general construction, it may be economically burdensome for railroads to meet any of the four certification options offered by OSHA in the Final

Crane Rule. The lack of logistically feasible options for many crane operators in the railroad industry to become certified under OSHA’s Final Crane Rule could cause a shortage in the availability of such operators to conduct vital roadway maintenance work, which could have a significant detrimental effect on the safety of rail operations. Additionally, to whatever degree operators chose to become certified in multiple states or jurisdictions, redundant costs would have been incurred.

FRA is proposing various requirements in part 243 that would require each employer of a safety-related railroad employee, which would include employers of one or more operators of roadway maintenance machines that are equipped with a crane, to submit a training program that explains in detail how each type of employee would be trained and qualified. However, part 243 is only intended to cover training of Federal standards and those railroad rules and procedures promulgated to implement the Federal standards. Consequently, FRA is proposing the addition of § 214.357 to those Federal standards which would include training and qualification requirements for operators of roadway maintenance machines equipped with a crane, which would replace OSHA regulations with respect to those operators training and qualification. FRA’s proposed rule would eliminate the negative effects of multiple states or jurisdictions requiring licensing or qualification of crane operators, resulting in a lower cost burden on railroads and contractors than the OSHA regulation.

Description of any Significant Alternatives to the Proposed Rule That Accomplish the Stated Objectives of Applicable Statutes and That Minimize any Significant Economic Impact of the Proposed Rule on Small Entities, Including Alternatives Considered, Such as: (1) Establishment of Differing Compliance or Reporting Requirements or Timetables That Take Into Account the Resources Available to Small Entities; (2) Clarification, Consolidation, or Simplification of Compliance and Reporting Requirements Under the Rule for Such Small Entities; (3) Use of Performance Rather Than Design Standards; (4) any Exemption From Coverage of the Rule, or any Part Thereof, for Such Small Entities

FRA is unaware of any significant alternatives that would meet the intent of RSIA08 and that would minimize the economic impact on small entities. FRA is exercising its discretion to provide the greatest flexibility for small entities available under RSIA08.

The process by which this proposed rule was developed provided outreach to small entities. As noted earlier in the preamble, this notice was developed in consultation with industry representatives via the RSAC, which includes small railroad representatives. Throughout the development of this proposed rule, FRA met with the entire Working Group on several occasions and often focused discussions on issues specific to short line and regional railroads and contractors. The discussions yielded many insights and this proposed rule takes into account the concerns expressed by small railroads during the deliberations. Several alternatives were considered in the creation of this proposed rule in order to attempt to minimize its impact on small entities. FRA and the Working Group recognized very early on in the rulemaking process that small entities probably do not have training experts on staff. Requiring every small entity to create or revise a unique training program could create a disproportionate, and possibly unnecessary, burden on small entities because it might require the small entities to hire a training expert to perform the task, whereas larger railroads and contractors may already have training experts on staff. As an alternative to requiring every entity to create unique programs, FRA is proposing to formalize a process for entities (including and especially small entities) to adopt a "model program." FRA envisions a model program to be a state-of-the-art training program reflecting best practices in training

program development. Any organization, business, or association may create a model program and submit that model program to FRA for approval. Subsequently, any employer may then choose to use a model program approved by FRA, rather than create its own program. An employer adopting a model program need only inform FRA that the employer plans to use a model program, submit the unique identifier for the program, and include any information reflecting customization or deviation from the model program that the employer has undertaken. This alternative can significantly simplify and consolidate the reporting requirements of this proposed rule for small entities.

The proposed rule's requirements with respect to periodic oversight also contain alternatives that were designed by FRA and the Working Group to limit the proposed rule's impact on small entities. Periodic oversight operational tests and inspections would be required by the proposed rule to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. FRA and the Working Group considered requiring that periodic oversight tests and inspections be performed by all employers of safety-related railroad employees. However, FRA and the Working Group also recognized that small entities may not employ supervisory employees who are qualified as safety-related railroad employees in some or all categories of employees, and requiring these entities to perform periodic oversight would necessitate that those entities expand their workforce expressly for that purpose. Additionally, one purpose of periodic oversight with respect to this proposed rule is to determine if changes in training programs are necessary to close any proficiency gaps found during oversight assessments. As such, it would make sense if the entity that performs the training of safety-related employees also is the entity that performs the periodic oversight tests and inspections.

As an alternative approach designed to ensure that periodic oversight is useful, and to minimize the burden that would arise if small entities had to expand their workforce just to comply, several provisions are included in the proposed rule that limit the extent to which small contractors will have to conduct periodic oversight. In general, railroads will be responsible for performing oversight for all railroad employees and some oversight for contractors performing safety-related

duties on its property. Railroads would not be required to perform operational tests of contractor employees, but railroads would be required to perform periodic oversight inspections of contractor employees performing safety-related duties on railroad property. However, if a contractor employs more than 15 safety-related railroad employees, trains its own employees, and employs supervisory safety-related railroad employees capable of performing oversight, the contractor, rather than the railroad, would be required to perform periodic oversight on its own employees. Contractors who meet those criteria may not be small entities, and contractors would only perform periodic oversight if it relied on its own training in accordance with its training program and could therefore improve the program with the results of the oversight program. In any case, a railroad and contractor may voluntarily agree that the contractor will perform the periodic oversight.

The requirements for periodic oversight also contain provisions designed to limit impact on small railroads. First, if a contractor conducts its own periodic oversight, then the railroad would not be required to also do so. Second, railroads would not be required to perform operational tests of contractor employees in any case, as mentioned above. Third, a railroad would not be required to perform oversight test or inspections for categories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories. This final exception is designed mostly with small entities in mind. Small railroads may maintain a very small workforce and hire contractors to perform most safety-related duties. Those small entities who do not have employees on staff who are capable of performing oversight of contractor employees would therefore not be required to expand their workforces by hiring a supervisory employee trained in the safety-related duties that the contractor employees perform in order to perform oversight of contractor employees.

FRA and the Working Group also considered alternatives for small entities in the section of the proposed rule requiring annual reviews of safety data. Railroads would be required, under the proposed rule, to conduct an annual review of periodic oversight data, reportable accident/incident data, FRA inspection report data, employee training feedback, and feedback received from labor representatives if available. However, all railroads with

less than 400,000 total employee work hours per year would be exempted from this annual review requirement. FRA believes that all but six Class III freight railroads would fall below this threshold, but FRA requests comment regarding this belief.

FRA requests comments on this finding of no significant alternative related to small entities. FRA also requests comments on whether this

proposed regulation exercises the appropriate level of discretion and flexibility to comply with RSIA08 in the most cost effective and beneficial manner.

Requests for Comment To Assist Regulatory Flexibility Analysis

FRA requests comments on all aspects of this initial regulatory flexibility assessment.

*C. Paperwork Reduction Act*

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

49 CFR Section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
214.357—Training and Qualification Program for Operators of Roadway Maintenance Machines (RMM) Equipped with a Crane.	535 railroads/contractors .....	535 revised programs.	4 hours .....	2,140 hours
—Initial Training/Qualification of RMM Operators (Cranes).	17,396 roadway workers .....	1,750 trained workers.	24 hours .....	42,000 hours
—Initial Training/Qualification of RMM Operators (Boom Trucks).	17,396 roadway workers .....	15,646 trained workers.	4 hours .....	62,584 hours
—Periodic Training/Qualification of RMM Operators	17,396 roadway workers .....	17,396 trained workers.	1 hour .....	17,396 hours
—Records of Training/Qualification .....	17,396 roadway workers .....	17,396 records ..	15 minutes .....	4,349 hours
243.7—Waivers—Petitions .....	1,541 railroads/contractors .....	3 petitions .....	6 hours .....	18 hours
243.101—Training Programs .....	1,541 railroads/contractors .....	1,541 programs	160 hours + 8 hours.	19,624 hours
—Revisions to Training Programs .....	59 RRs/contractors .....	59 programs .....	40 hours + 20 hours.	2,140 hours
—New RRs/Contractors—Initial Training Programs	37 RRs/contractors .....	37 programs .....	8 hours .....	296 hours
—Contractor Validation Document to RRs on Training Its Own Workers.	795 contractors .....	155 documents	15 minutes .....	39 hours
—RR Copy of Contractor Validation Document .....	720 railroads .....	155 copies .....	15 minutes .....	39 hours
243.103—Already Existing Training Programs Supplemented with On the Job Training Component.	1,541 railroads/contractors .....	2 programs .....	80 hours .....	160 hours
—Already Existing Training Program FRA Required Modification.	1,541 railroads/contractors .....	385 programs ...	8 hours .....	3,080 hours
243.109—Initial Training Programs Found Deficient by FRA—Revisions.	1,541 railroads/contractors .....	385 programs ...	8 hours .....	3,080 hours
—Request to Extend Resubmission Deadline .....	1,541 railroads/contractors .....	19 requests .....	15 minutes .....	5 hours
—Initial Training Program Found Deficient and Needing Revision by FRA.	37 railroads/contractors .....	9 programs .....	8 hours .....	72 hours
—Request to Extend Resubmission Deadline .....	37 railroads/contractors .....	2 requests .....	15 minutes .....	1 hour
—Previously Approved Programs Requiring an Informational Filing When Modified.	1,541 railroads/contractors .....	150 info. filings ..	6 hours .....	900 hours
—Previously Approved Training Programs Found Deficient and Modified Further.	1,541 railroads/contractors .....	7 programs .....	4 hours .....	28 hours
—New Portions or Revisions to an Approved Training Program Needing Revision.	1,541 railroads/contractors .....	15 modified programs.	4 hours .....	60 hours
—Request to Extend Resubmission Deadline .....	1,541 railroads/contractors .....	3 requests .....	15 minutes .....	1 hour
—Copies of Submissions, Resubmissions, Informational Filings to Labor Presidents.	720 railroads .....	2,000 copies .....	15 minutes .....	500 hours
—Labor Representative Comment on Submissions, Resubmissions, Info. Filing.	5 RR labor organizations .....	500 comments ..	4 hours .....	2,000 hrs.
243.111—Programs Filed by Training Organizations/Learning Institutions.	12 training organizations .....	72 programs .....	80 hours .....	5,760 hours
—Written Request for Extension to Submit Program by Tr. Organization.	12 training organizations .....	3 requests .....	15 minutes .....	1 hour
—Info. Filing for Prev. Modified Prog. ....	12 training organizations .....	7 filings .....	6 hours .....	42 hours
—Substantial Additions or Revisions to Previously Approved Training Program.	12 training organizations .....	3 documents .....	4 hours .....	12 hours
—Revised Program Found Deficient and Needing Further Revision.	12 training organizations .....	1 further revised document.	4 hours .....	4 hours
—Safety Related Employees Instructed by Training Organizations and Records.	12 training organizations .....	20,000 trained employees + 20,000 records.	8 hours + 5 minutes.	161,667 hours

49 CFR Section or statutory provision	Respondent universe	Total annual responses	Average time per response	Total annual burden hours
—Request to Training Organization/Learning Institution by Student to Provide Transcript or Record.	.....	2,500 requests + 2,500 records.	5 minutes + 5 minutes.	416 hours
243.113—Required Information to File Submissions Electronically.	1,541 railroads/contractors .....	1,155 letters .....	15 minutes .....	289 hours
243.201—Designation of Existing Safety-related Employees by Job Category—Lists.	1,541 railroads/contractors .....	1,541 lists .....	15 minutes .....	385 hours
—Request to Extend Deadline for Designation List	1,541 railroads/contractors .....	100 requests .....	15 minutes .....	25 hours
—Designation Lists for Employers Commencing Operations After Specified Date.	37 railroads .....	37 lists .....	15 minutes .....	9 hours
—Training of Newly Hired Employees or Those Assigned New Safety-related Duties and Records.	1,541 railroads/contractors .....	2,250 trained employees + 2,250 records.	8 hours + 15 minutes.	18,563 hours
—Requests for Relevant Qualification or Training Record from an Entity Other Than Current Employer.	1,538 railroads/contractors .....	250 requests + 250 records.	5 minutes + 5 minutes.	42 hours
—Testing of Employees When Current Record of Training is Unavailable.	1,538 railroads/contractors .....	1,667 tests + 1,667 records.	8 hours + 30 minutes.	14,170 hours
—Testing of Employees Who Have Not Received Initial/Periodic Training.	1,538 railroads/contractors .....	2,667 tests + 2,667 records.	16 hours + 30 minutes.	44,006 hours
—Employee Refresher Training Every Three Years	1,538 railroads/contractors .....	35,000 retrained employees + 35,000 records.	1 hour + 15 minutes.	43,750 hours
—Qualified Employees Designated/Listed to Provide Formal Training to Other Employees and Records.	1,538 railroads/contractors .....	2,100 listings + 2,100 qualified + 2,100 records.	30 minutes + 24 hours + 5 minutes.	51,625 hours
243.203—Electronic Recordkeeping—Representatives Designated by Employers to Authenticate Retrieved Information.	1,538 railroads/contractors .....	4,200 designations.	5 minutes .....	350 hours
—Transfer of Records to Successor Employer .....	1,538 railroads/contractors .....	500 records .....	15 minutes .....	125 hours
243.205—Modified Training Resulting from Periodic Oversight Tests and Inspections.	1,538 railroads/contractors .....	10 modified programs.	40 hours .....	400 hours
—Periodic Tests and Inspections .....	1,538 railroads/contractors .....	210,000 tests/inspections.	10 minutes .....	35,000 hours
—Results of Part 240/242 Assessments Causing Modification of Training Program.	1,538 railroads/contractors .....	5 programs .....	8 hours .....	40 hours
—Identification of Supervisory Employees Who Conduct Periodic Oversight Tests by Category/Subcategory.	1,538 railroads/contractors .....	250 identifications.	5 minutes .....	21 hours
—Contractor Periodic Tests/Inspections Conducted by RR Supervisory Employees.	720 railroads .....	65,000 tests/inspections.	10 minutes .....	10,833 hours
—Notification by RR of Contractor Non-Compliance with Federal Laws/Regulations/Orders to Employee and Employer.	720 railroads .....	2,500 notices + 2,500 notices.	5 minutes .....	416 hours
—Contractor conduct of Periodic Oversight Tests/Inspections of Its Safety-related Employees.	795 contractors .....	65,000 tests/inspections.	10 minutes .....	10,833 hours
—Contractor Direct Training of Its Employees for Qualifying Those Employees to Perform Safety-related Duties.	795 contractors .....	32,000 trained employees.	8 hours .....	256,000 hours
—Employer Records of Periodic Oversight .....	1,538 railroads/contractors .....	32,000 records ..	5 minutes .....	2,667 hours
243.207—Annual Review of Safety Data .....	53 railroads .....	53 reviews .....	2 hours .....	106 hours
—RR Copy of Annual Review at System Headquarters.	53 railroads .....	53 copies .....	1 hour .....	53 hours
—RR Designation of Person(s) to Conduct Annual Review.	53 railroads .....	106 designation	15 minutes .....	27 hours
—Adjustments to Initial/Refresher Training Based Upon Results of Annual Review.	53 railroads .....	5 adjusted programs.	1 hour .....	5 hours
—RR Notification to Contractor of Relevant Training Program Adjustments.	53 railroads .....	8 notifications .....	15 minutes .....	2 hours
—Contractor Adjustment of Its Training Program Based on RR Information.	795 contractors .....	8 programs .....	16 hours .....	128 hours
243.209 Railroad Maintained List of Contractors Utilized.	720 railroads .....	795 lists .....	30 minutes .....	398 hours
—Updated Lists of Contractors .....	720 railroads .....	79 lists .....	15 minutes .....	20 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at (202) 493-6292, or Ms. Kimberly Toone at (202) 493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan 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 Mr. Brogan or Ms. Toone at the following address: [Robert.Brogan@dot.gov](mailto:Robert.Brogan@dot.gov); [Kimberly.Toone@dot.gov](mailto:Kimberly.Toone@dot.gov).

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

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

#### D. 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, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

This NPRM has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This proposed rule would not have a substantial effect on the States or their political subdivisions; it would not impose any compliance costs; and it would not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the "essentially local safety or security hazard" exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in

Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

#### E. International Trade Impact Assessment

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

This proposed rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

#### F. Environmental Impact

FRA has evaluated this 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 proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. See 64 FR 28547 (May 26, 1999).

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

#### G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State,

local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$140,800,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. The proposed rule will not result in the expenditure, in the aggregate, of \$140,800,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

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

I. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an

association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-78) or you may visit <http://www.regulations.gov#!privacyNotice>.

List of Subjects

49 CFR Part 214

Bridges, Occupational safety and health, Penalties, Railroad safety, Reporting and recordkeeping requirements.

49 CFR Part 232

Incorporation by reference, Railroad power brakes, Railroad safety, Two-way end-of-train devices.

49 CFR Part 243

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 214—[AMENDED]

1. Section 214.7 is amended by adding a definition in alphabetical order for roadway maintenance machines equipped with a crane to read as follows:

\* \* \* \* \*
Roadway maintenance machines equipped with a crane means any roadway maintenance machine equipped with a crane or boom that can hoist, lower, and horizontally move a suspended load.

\* \* \* \* \*
2. Section 214.341 is amended by revising paragraph (b)(2) to read as follows:

\* \* \* \* \*
(b) \* \* \*
(2) No roadway worker shall operate a roadway maintenance machine without having knowledge of the safety instructions applicable to that machine. For purposes of this paragraph, the safety instructions applicable to that machine means:

- (i) the manufacturer's instruction manual for that machine; or
(ii) the safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the

manufacturer's safety instructions they replace.

\* \* \* \* \*

3. Section 214.357 is added to read as follows:

§ 214.357 Training and qualification for operators of roadway maintenance machines equipped with a crane.

(a) In addition to the general training and qualification requirements for operators of roadway maintenance machines set forth in §§ 214.341 and 214.355 of this subpart, each employer shall adopt and comply with a training and qualification program for operators of roadway maintenance machines equipped with a crane to ensure the safe operation of such machines.

(b) Each employer's training and qualification program for operators of roadway maintenance machines equipped with a crane shall require initial and periodic qualification of each operator of a roadway maintenance machine equipped with a crane and shall include:

- (1) Procedures for determining that the operator has the skills to safely operate each machine the person is authorized to operate; and
(2) Procedures for determining that the operator has the knowledge to safely operate each machine the person is authorized to operate. Such procedures shall determine that either:
(i) The operator has knowledge of the safety instructions (i.e., the manufacturer's instruction manual) applicable to that machine; or
(ii) The operator has knowledge of the safety instructions developed to replace the manufacturer's safety instructions when the machine has been adapted for a specific railroad use. Such instructions shall address all aspects of the safe operation of the crane and shall be as comprehensive as the manufacturer's safety instructions they replace.

(c) Each employer shall maintain records that form the basis of the training and qualification determinations of each operator of roadway maintenance machines equipped with a crane that it employs.

(d) Availability of records. Each employer required to maintain records under this part shall make all records available for inspection and copying/ photocopying to representatives of FRA, upon request during normal business hours.

(e) Training conducted by an employer in accordance with operator qualification and certification required by the Department of Labor (29 CFR 1926.1427) may be used to satisfy the

training and qualification requirements of this section.

#### PART 232—[AMENDED]

4. Section 232.203 is amended by revising paragraphs (b)(6)(iv), and (e)(6) through (e)(8) to read as follows:

\* \* \* \* \*

(b) \* \* \*

(6) \* \* \*

(iv) Any combination of the training or testing contained in paragraphs (b)(6)(i) through (b)(6)(iii) of this section and paragraphs (b)(3) through (b)(5) of this section may be used to satisfy the training and testing requirements for an employee in accordance with this paragraph.

\* \* \* \* \*

(e) \* \* \*

(6) The tasks required to be performed under this part which the employee is deemed qualified to perform;

(7) Identification of the person(s) determining that the employee has successfully completed the training necessary to be considered qualified to perform the tasks identified in paragraph (e)(6) of this section; and

(8) The date that the employee's status as qualified to perform the tasks identified in paragraph (e)(6) of this section expires due to the need for refresher training.

\* \* \* \* \*

#### PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES

5. Add a new part 243 to read as follows:

##### Subpart A—General

Sec.

243.1 Purpose and scope.

243.3 Application and responsibility for compliance.

243.5 Definitions.

243.7 Waivers.

243.9 Penalties and consequences for noncompliance.

243.11 Information collection requirements.

##### Subpart B—Program Components and Approval Process

243.101 Employer program required.

243.103 Training components identified in program.

243.105 Optional model program development.

243.107 Training program submission, introductory information required.

243.109 Training program submission, review, and approval process.

243.111 Approval of programs filed by training organizations or learning institutions.

243.113 Option to file program electronically.

##### Subpart C—Program Implementation and Oversight Requirements

243.201 Employee qualification requirements.

243.203 Records.

243.205 Periodic oversight.

243.207 Annual review.

243.209 Railroad maintained list of contractors utilized.

Appendix A to Part 243—Schedule of Civil Penalties

**Authority:** 49 U.S.C. 20103, 20107, 20131–20155, 20162, 20301–20306, 20701–20702, 21301–21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.49.

##### Subpart A—General

###### § 243.1 Purpose and scope.

(a) The purpose of this part is to ensure that any person employed by a railroad or a contractor of a railroad as a safety-related railroad employee is trained and qualified on any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

(b) This part contains the general minimum training and qualification requirements for each category and subcategory of safety-related railroad employee, regardless of whether the employee is employed by a railroad or a contractor of a railroad. Contractors shall coordinate with railroads and comply with the contents of this part, including those aspects of training that are specific to the contracting railroad's rules and procedures.

(c) The requirements in this part do not exempt any other requirement in this chapter.

(d) Unless otherwise noted, this part augments other training and qualification requirements contained in this chapter.

###### § 243.3 Application and responsibility for compliance.

(a) This part applies to all railroads, contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees except:

(1) Railroads or contractors of railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (i.e., plant railroads, as defined in § 243.5);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 243.5; or

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

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any duty covered by this part, shall perform that duty in accordance with this part.

###### § 243.5 Definitions.

As used in this part—

*Administrator* means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

*Associate Administrator* means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate as designated in writing.

*Calendar year* means the period of time beginning on January 1 and ending on December 31 of each year.

*Contractor* means a person under contract with a railroad, including, but not limited to, a prime contractor or a subcontractor.

*Designated instructor* means a person designated as such by an employer, training organization, or learning institution, who has demonstrated, pursuant to the training program submitted by the employer, training organization, or learning institution, an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training.

*Employer* means a railroad or a contractor of a railroad that employs at least one safety-related railroad employee.

*Formal training* means training that has a structured and defined curriculum, and which provides an opportunity for training participants to have questions timely answered during the training or at a later date. In the context of this part, formal training may include, but is not limited to, classroom, computer-based, on-the-job, simulator, or laboratory training.

*Knowledge-based training* is a type of formal training that is not task-based and is intended to convey information required for a safety-related railroad employee to comply with Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders.

*On-the-job training (OJT)* means job training that occurs in the workplace, i.e., the employee learns the job while doing the job.

*Person* means an entity of any type covered under 1 U.S.C. 1, including, but not limited to, the following: A railroad;

a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

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

*Qualified* means that a person has successfully completed all instruction, training, and examination programs required by both the employer and this part, and that the person, therefore, may reasonably be expected to proficiently perform his or her duties in compliance with all Federal railroad safety laws, regulations, and orders.

*Safety-related duty* means either a safety-related task or a knowledge-based prohibition that a person meeting the definition of a safety-related railroad employee is required to comply with, when such duty is covered by any Federal railroad safety law, regulation, or order.

*Safety-related railroad employee* means an individual who is engaged or compensated by an employer to:

(1) Perform work covered under the hours of service laws found at 49 U.S.C. 21101, et seq.;

(2) Perform work as an operating railroad employee who is not subject to the hours of service laws found at 49 U.S.C. 21101, et seq.;

(3) In the application of parts 213 and 214 of this chapter, inspect, install, repair, or maintain track, roadbed, and signal and communication systems, including a roadway worker or railroad bridge worker as defined in § 214.7 of this chapter;

(4) Inspect, repair, or maintain locomotives, passenger cars or freight cars;

(5) Inspect, repair, or maintain other railroad on-track equipment when such equipment is in a service that constitutes a train movement under part 232 of this chapter;

(6) Determine that an on-track roadway maintenance machine or hi-rail vehicle may be used in accordance with part 214, subpart D of this chapter, without repair of a non-complying condition;

(7) Directly instruct, mentor, inspect, or test, as a primary duty, any person while that other person is engaged in a safety-related task; or

(8) Directly supervise the performance of safety-related duties in connection with periodic oversight in accordance with § 243.205.

*Safety-related task* means a task that a person meeting the definition of a safety-related railroad employee performs, when such task is covered by any Federal railroad safety law, regulation, or order.

*Task-based training* means a type of formal training with a primary focus on teaching the skills necessary to perform specific tasks that require some degree of neuromuscular coordination.

*Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation* means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (i.e., there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

#### § 243.7 Waivers.

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(b) Each petition for a waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

#### § 243.9 Penalties and consequences for noncompliance.

(a) A 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 \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$100,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. See Appendix A to this part for a statement of agency civil penalty policy.

(b) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

(c) A 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.

#### § 243.11 Information collection requirements.

(a) The information collection requirements of this part were reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.) and are assigned OMB control number \_\_\_\_\_.

(b) The information collection requirements are found in the following sections: \_\_\_\_\_

### Subpart B—Program Components and Approval Process

#### § 243.101 Employer program required.

(a) Effective [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE], each employer conducting operations subject to this part shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(b) An employer commencing operations subject to this part after [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE] shall submit a training program for its safety-related railroad employees and request FRA approval at least 90 days prior to commencing operations. After FRA approves the training program in accordance with this part, the employer shall adopt and comply with the training program.

(c) In the program required by this part, the employer shall:

(1) Classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology;

(2) Define the occupational categories or subcategories of safety-related railroad employees. The definition of each category or subcategory shall include a list of the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, based on the employee's assignments and duties, broken down at a minimum to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order. The listing of the Federal requirements shall contain the descriptive title of each law, regulation, or order;

(3) Create tables or utilize other suitable formats which summarize the information required in paragraphs (c)(1) and (c)(2) of this section, segregated by major railroad departments (e.g., Operations, Maintenance of Way, Maintenance of Equipment, Signal and Communications). After listing the major departments, the tables or other formats should list the categories and subcategories of safety-related railroad employees within those departments;

(4) Develop procedures to design and develop key learning points for any task-based or knowledge-based training; and

(5) Determine how training shall be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders.

*(d) On-the-job (OJT) training requirements.*

(1) The OJT portion of the training program shall consist of the following three key components:

(i) A brief statement describing the tasks and related steps the employee learning the job shall be able to perform;

(ii) A statement of the conditions (prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(2) Prior to beginning the initial safety-related tasks associated with OJT exercises, employers shall make any relevant information or materials, such as operating rules, safety rules, or other

rules available to employees involved for referencing.

(3) The tasks and related steps associated with OJT exercises for a particular category or subcategory of employee shall be maintained together in one manual, checklist, or similar document. This reference shall be made available to all employees involved in those OJT exercises.

(e) *Contractor's responsibility to validate approved program to a railroad.* A contractor that chooses to train its own safety-related railroad employees shall provide each railroad that utilizes it with a document indicating that the contractor's program of training was approved by FRA. A contractor is being utilized by a railroad when any of the contractor's employees conduct safety-related duties on behalf of the railroad and the railroad does not otherwise qualify those employees of the contractor that are allowed to perform those duties.

(f) *Railroad's responsibility to retain contractor's validation of program.* A railroad that chooses to utilize contractor employees to perform safety-related duties and relies on contractor-provided training as the basis for those employees' qualification to perform those duties shall retain a document from the contractor indicating that the contractor's program was approved by FRA. A copy of the document required in paragraph (e) of this section satisfies this requirement.

**§ 243.103 Training components identified in program.**

(a) Each employer's program shall include the following components:

(1) A unique name and identifier for each formal course of study;

(2) A course outline for each course that includes the following:

(i) Any prerequisites to course attendance;

(ii) A brief description of the course, including the terminal learning objectives;

(iii) A brief description of the target audience, e.g., a list of the occupational categories and subcategories of employees the course will be delivered to;

(iv) The method(s) of course delivery, which may include, but are not limited to, classroom, computer-based, simulator, laboratory, correspondence courses, or any combination thereof;

(v) The anticipated course duration;

(vi) A syllabus of the course to include any applicable U.S.C. chapters, 49 CFR parts, or FRA orders covered in the training; and

(vii) The kind of assessment (written test, performance test, verbal test, OJT

standard, etc.) performed to demonstrate employee competency.

(3) A document for each OJT program component that includes the following:

(i) The roles and responsibilities of each category of person involved in the administration and implementation, guidelines for program coordination, and the progression and application of the OJT;

(ii) A listing of the occupational categories and subcategories of employees for which the OJT program applies; and

(iii) Details of the safety-related tasks and subtasks, conditions, and standards covered by the program components.

(4) The job title and telephone number of the employer's primary training point(s) of contact, listed separately by major department or employee occupational category, if applicable.

(5) If any training organization or learning institution developed and will deliver all or any part of the training, the employer must include the following:

(i) A narrative, text table, or other suitable format which describes those portions of the training that fit into this category;

(ii) The business name of the organization that developed and will deliver the training; and

(iii) The job title and telephone number of the training organization or learning institution's primary training point of contact.

(b) An employer that is required to submit similar training programs or plans pursuant to other regulatory requirements contained elsewhere in this chapter may elect to cross-reference these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information.

(c) If an employer arranges job-related practice and practice related feedback sessions to supplement classroom, laboratory, simulator training, or OJT, the program shall include a description of the supplemental training.

(d) FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate.

**§ 243.105 Optional model program development.**

(a) Any organization, business, or association may develop and submit one or more model training programs to FRA for review and approval so that the model program(s) may be used by multiple employers.

(1) Any such model program should be submitted with a unique identifier associated with the program, or FRA will assign a unique identifier.

(2) The program associated with the organization's unique identifier shall include all information required by § 243.103.

(b) An employer that chooses to use a model program approved by FRA is not required to submit the entire program to FRA. Instead, the employer must submit only the unique identifier, and all other information that is specific to that employer or deviates from the model program.

**§ 243.107 Training program submission, introductory information required.**

(a) An employer who provides or is responsible for the training of safety-related railroad employees shall submit its training program to FRA for review and approval. Each employer shall state in its submission whether, at the time of filing, it:

(1) Primarily conducts the training program of its own safety-related railroad employees, utilizing its own resources;

(2) Conducts any training for other than its own safety-related railroad employees;

(3) Implements any training programs conducted by some other entity on its behalf but adopted by that employer;

(4) Qualifies safety-related railroad employees previously qualified by other employers;

(5) Qualifies safety-related railroad employees previously trained by training organizations or learning institutions; or

(6) Any combination of paragraph (a)(1) through (a)(5) of this section.

(b) An employer who utilizes any of the options specified in paragraphs (a)(2) through (a)(5) of this section shall provide the following information in its submission:

(1) The categories of safety-related railroad employees who, at the time of filing, will receive training utilizing one or more of these options; and

(2) Whether the training delivered, utilizing one or more of these options, composes all or part of the overall training program regimen for that category of employee at the time of filing.

(c) An employer that elects to use training organizations or learning

institutions to train some or all of its safety-related railroad employees, or to hire new safety-related railroad employees that have previously received training from any training organizations or learning institutions, shall include the full name of the training organization or learning institution in its submission.

**§ 243.109 Training program submission, review, and approval process.**

(a) *Initial programs.* (1) Apprenticeship or similar intern programs, that began prior to submission of the employer's initial program filed in accordance with this part, shall be described in the employer's initial program. Any such apprenticeship or similar intern programs may continue, but if the Associate Administrator advises the employer of specific deficiencies, the employer shall resubmit that portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(2) An employer's initial program, as required by § 243.101(a), must be submitted to the Associate Administrator and is considered approved, and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the program and inform the employer as to whether the initial program conforms to this part. If the Associate Administrator determines that all or part of the program does not conform, the Associate Administrator will inform the employer of the specific deficiencies. The deficient portions of the non-conforming program may remain in effect until approval of the revised program, unless FRA provides notification otherwise. An employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(3) For an employer that is commencing operations in accordance with § 243.101(b), the employer's initial

program, must be submitted to the Associate Administrator and is considered approved upon notification from the Associate Administrator that the program has been approved. Following submission, the Associate Administrator will review the program and inform the employer as to whether the initial program conforms to this part. If the Associate Administrator determines that the program does not conform to this part, the employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. At the Associate Administrator's discretion, the Associate Administrator may determine that the employer may implement any portion of its program prior to resubmission. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(b) *Previously approved programs require an informational filing when modified.* The employer must review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or modification of existing safety-related duties. An employer that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise to individual employers, one or more group of employers, or the general public. Programs modified in accordance with this paragraph, after the initial FRA approval, are considered approved upon being modified and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The filing shall contain a summary description of sufficient detail that FRA can associate the changes with the employer's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed since the previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program;

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed; and

(4) A statement from an organization, business, or association that has submitted a model program pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the effected training program of the changes and the need for the employer to comply with those changes that apply to the employer's operation.

(c) *New portions or revisions to an approved program.* Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (b) of this section, shall be considered approved and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the new portions or revisions to the previously approved program and inform the employer as to whether the modifications conform to this part. Any program deficiencies noted by the Associate Administrator shall be addressed in the same manner as paragraph (a)(2) of this section. The Associate Administrator will inform the employer as to whether a new portion or revision to an approved program conforms to this part. If the Associate Administrator has determined that the changes do not conform to this part, the employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. Failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

(d) *Additional submission, resubmission, or informational filing requirement for railroads.* (1) Each railroad shall:

(i) Simultaneous with its filing with the FRA, serve a copy of any submission, resubmission, or informational filing required pursuant to this section, to the president of each labor organization that represents the railroad's employees subject to this part; and

(ii) Include in its submission, resubmission, or informational filing required pursuant to this section a statement affirming that the railroad has served a copy to the president of each

labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(2) Not later than 90 days from the date a railroad files its submission, resubmission, or informational filing required pursuant to this section, a representative designated by the president of each labor organization that represents railroad employees subject to this part, may file a comment on the submission, resubmission, or informational filing:

(i) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590; and

(ii) The commenter shall certify that a copy of the comment was served on the railroad.

**§ 243.111 Approval of programs filed by training organizations or learning institutions.**

(a) A training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program to FRA for review and approval.

(b) A training organization or learning institution that has provided training services to employers covered by this part prior to [EFFECTIVE DATE OF THIS RULE] may continue to offer such training services without FRA approval for a period not to exceed one year. The Associate Administrator may extend this period at any time based on a written request. Such written requests for an extension of time to submit a program should contain any factors the training organization or learning institution wants the Associate Administrator to consider prior to approving or disapproving the extension.

(c) A program submitted by a training organization or learning institution must include all information required for an employer's program in accordance with this part, unless the requirement could only apply to an employer's program. The submitted program for a training organization or learning institution must also include the following information:

(1) The full corporate or business name of the training organization or learning institution;

(2) The training organization or learning institution's primary business and email address;

(3) The training organization or learning institution's primary telephone number and point of contact;

(4) A listing of the training organization or learning institution's designated instructors;

(5) A resume for each designated instructor, showing how the instructor achieved the subject-matter and training expertise necessary to develop and deliver training to safety-related railroad employees, unless the designated instructors are currently employed by a railroad;

(6) A list of references of employer customers the learning organization or training institution has provided services to in the past; and

(7) A brief summary statement indicating how the training organization or learning institution determined the knowledge, skills, and abilities necessary to develop the training courses it provides to employers and independent students who enroll with such training organization or learning institution in order to become safety-related railroad employees. This brief summary should be of sufficient detail so that FRA can ascertain the methodologies the training organization or learning institution used during training development.

(d) Except as specified in paragraph (b) of this section, prior approval by the Associate Administrator is required before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs of any deficiencies, the Associate Administrator will clarify whether any particular training courses shall be considered approved.

(e) *Previously approved programs require an informational filing when modified.* The training organization or learning institution shall review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or in modifications of existing safety-related duties. A training organization or

learning institution that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise. Programs modified in accordance with this paragraph are considered approved upon modification and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed as specified in this section. The filing shall contain a summary description of sufficient detail so that FRA can associate the changes with the training organization's or learning institution's previously approved program, and shall include:

(1) Descriptions of all new or refresher training courses developed after the previous FRA approval, using the same criteria required for an initial filing;

(2) Explanations whenever OJT or arranged practice is added to, or discontinued from, a program; and

(3) Explanations as to how the methods of delivering training, or qualifying employees has changed.

(f) *New portions or revisions to an approved program.* Substantial additions or revisions to a previously approved program, that are not described as informational filings in accordance with paragraph (e) of this section, shall require prior approval by the Associate Administrator before FRA will accept such training as sufficient to meet the requirements of this part. The Associate Administrator will advise the training organization or learning institution in writing whether FRA has approved the new or revised program. If all or part of the program is not approved by FRA, the Associate Administrator will inform the training organization or learning institution of specific deficiencies. At the time that the Associate Administrator informs the training organization or learning institution of any deficiencies, the Associate Administrator will clarify whether any particular new or revised training courses shall be considered approved.

(g) Training organizations and learning institutions subject to this part are required to maintain records for each safety-related railroad employee that attends the training, in accordance with the recordkeeping requirements of this part.

(h) Training organizations and learning institutions subject to this part shall provide a student's training transcript or training record to any employer upon request by the student.

#### **§ 243.113 Option to file program electronically.**

(a) Each employer, training organization, or learning institution to which this part applies is authorized to file by electronic means any program submissions required under this part in accordance with the requirements of this section.

(b) Prior to any person submitting an employer, training organization, or learning institution's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

(1) The name of the employer, training organization, or learning institution;

(2) The names of two individuals, including job titles, who will be the entity's points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the entity's points of contact;

(4) The entity's system or main headquarters address located in the United States;

(5) The email addresses for the entity's points of contact; and

(6) The daytime telephone numbers for the entity's points of contact.

(c) An entity that electronically submits an initial program, informational filing, 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.

(d) A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

(e) FRA may electronically store any materials required by this part regardless of whether the entity that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically.

(f) An entity 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.

#### **Subpart C—Program Implementation and Oversight Requirements**

##### **§ 243.201 Employee qualification requirements.**

(a) *Designating existing employees.* By no later than [DATE 2 YEARS AFTER EFFECTIVE DATE OF THIS RULE], each employer, in operation as of [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE], shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory. The Associate Administrator may extend this period based on a written request.

(b) An employer commencing operations after [DATE ONE YEAR AND 120 DAYS AFTER EFFECTIVE DATE OF THIS RULE] shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory prior to beginning operations, and only permit designated employees to perform safety-related service in that category or subcategory. Any person designated shall have met the requirements for newly hired employees or those assigned new safety-related duties in accordance with paragraph (c) of this section.

(c) *Newly hired employees or those assigned new safety-related duties.* The following requirements apply to qualifying a safety-related railroad employee who, subsequent to the employer's designation in accordance with paragraphs (a) and (b) of this section, is newly hired or is to engage in a safety-related task not associated with the employee's previous training.

(1) Prior to an employee becoming a qualified member of an occupational category or subcategory, the employer shall require a safety-related railroad employee who is newly hired or is to engage in safety-related duties not associated with the employee's previous training to successfully complete the formal training curriculum for that category or subcategory of safety-related railroad employee. Successful completion of the formal training curriculum includes passing any required examinations covering the skills and knowledge the employee will need to possess in order to perform the safety-related duties necessary to be a member of the occupational category or subcategory.

(2) If the training curriculum includes OJT, the employee shall demonstrate, to the satisfaction of a designated

instructor, OJT proficiency by successfully completing the safety-related tasks necessary to become a qualified member of the occupational category or subcategory. However, as part of the OJT process and prior to completing such training and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed.

(d) *Employees previously qualified or trained, but not by the current employer.* If an employee has received relevant qualification or training for a particular occupational category or subcategory through participation in a FRA-approved training program submitted by an entity other than the employee's current employer, that training shall satisfy the requirements of this part:

(1) Provided that:

(i) a current record of training is obtained from that other entity; or  
(ii) when a current record of training is unavailable from that other entity, an employer performs testing to ensure the employee has the knowledge necessary to be a member of that category or subcategory of safety-related railroad employee; and

(2) When the employee, in the previous 180 days, has either not performed the safety-related duties or not received initial or periodic training for an occupational category or subcategory, the employer shall perform testing to ensure the employee has retained the knowledge necessary to remain a member of that occupational category or subcategory. In the situation where an employee's records are unavailable and the employee is subject to testing under paragraph (d)(1)(ii) of this section, no additional testing is required.

(e) *Refresher training requirements and options.* Beginning [DATE on January 1, TWO YEARS AFTER EFFECTIVE DATE OF THIS RULE], each employer shall deliver refresher training at an interval not to exceed 3 calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. Each employer shall ensure that, as part of each employee's refresher training, the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures

promulgated to implement those Federal railroad safety laws, regulations, and orders.

(f) An employee designated to provide formal training to other employees, and who is not a designated instructor, shall be qualified on the safety-related topics or tasks in accordance with the employer's training program and the requirements of this part.

#### § 243.203 Records.

(a) *General requirements for qualification status records; accessibility.* Each employer shall maintain records to demonstrate the qualification status of each safety-related railroad employee that it employs.

(1) The records for former safety-related railroad employees shall be accessible for 6 years at the employer's system headquarters after the employment relationship ends.

(2) Current employee records shall be accessible at the employer's system headquarters.

(b) The records shall include the following information concerning each such employee:

(1) The name of the employee;

(2) Occupational category or subcategory designations for which the employee is deemed qualified;

(3) The dates that each formal training course was completed;

(4) The title of each formal training course successfully completed;

(5) An indication of whether the person passed or failed any associated tests;

(6) If the safety-related railroad employee attended safety-related training offered by a business, a training organization, or a learning institution with an FRA-approved program, a copy of the transcript or appropriate record from that business, training organization, or learning institution;

(7) The employee's OJT performance, which shall include the unique name or identifier of the OJT program component in accordance with § 243.103, the date the OJT program component was successfully completed, and the identification of the person(s) determining that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories for which the employee is designated in accordance with the program required by this part;

(8) The date that the employee's status is determined to be qualified and the employee is designated to perform the safety-related duties identified with any particular occupational categories or

subcategories, in accordance with the program required by this part;

(9) If an employee's qualification status was transferred from another entity with an approved program, a copy of the training record from that other entity; and

(10) Any additional information required by this part.

(c) *Record accessibility for other than individual employee records.* Except for records demonstrating the qualification status of each safety-related railroad employee as described in paragraph (b) of this section or otherwise specified in this part, each record required by this part shall be accessible at the system headquarters and at each division headquarters where the test, inspection, annual review, or other event is conducted for 3 calendar years after the end of the calendar year to which the event relates.

(d) *Availability of records.* Each employer, training organization, or learning institution required to maintain records under this part shall:

(1) Make all records available for inspection and copying/photocopying to representatives of FRA, upon request during normal business hours; and

(2) Make an employee's records available for inspection and copying/photocopying to that employee, former employee, or such person's representative upon written authorization by such employee during normal business hours.

(e) *Electronic recordkeeping.* Each employer, training organization, or learning institution to which this part applies is authorized to retain by electronic recordkeeping the information prescribed in this section, provided that all of the following conditions are met:

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

(2) The electronic system shall ensure that each record cannot be modified in any way, or replaced, once the record is transmitted and stored;

(3) The employer, training organization, or learning institution adequately limits and controls accessibility to such information retained in its electronic database system and identifies those individuals who have such access;

(4) The employer, training organization, or learning institution has a terminal at the system headquarters,

and each railroad that has operating divisions has a terminal at each division headquarters;

(5) Each such terminal has a computer (i.e., monitor, central processing unit, and keyboard) and either a facsimile machine or a printer connected to the computer to retrieve and produce information in a usable format for immediate review by FRA representatives;

(6) The employer, training organization, or learning institution has a designated representative who is authorized to authenticate retrieved information from the electronic system as true and accurate copies of the electronically kept records; and

(f) *Transfer of records.* If an employer ceases to do business and its assets will be transferred to a successor employer, it shall transfer to the successor employer all records required to be maintained under this part, and the successor employer shall retain them for the remainder of the period prescribed in this part.

#### § 243.205 Periodic oversight.

(a) As part of the program required in accordance with this part, an employer shall adopt and comply with a program to conduct periodic oversight tests and inspections to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. The program of periodic oversight shall commence on the day the employer files its program with FRA pursuant to § 243.101(a) or on the day the employer commences operations pursuant to § 243.101(b). The data gathered through the testing and inspection components of the program shall be used to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

(b) Periodic oversight specified in this section is not required for employees covered by parts 240 and 242 of this chapter, but a railroad shall use results of the assessments required by those parts to determine if changes in its training programs are necessary to close any proficiency gaps found during those assessments.

(c) *Railroad oversight.* Each railroad shall identify supervisory employees, by category or subcategory, responsible for conducting periodic oversight tests and inspections for the safety-related railroad employees that it authorizes to perform safety-related duties on its property, except a railroad is not required to:

(1) Provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets the criteria specified in paragraph (g) of this section;

(2) Provide oversight for categories or subcategories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories; or

(3) Provide oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section.

(d) A railroad is not required to perform operational tests of safety-related railroad employees employed by a contractor.

(e) A railroad may choose to require supervisory employees to perform oversight of safety-related railroad employees employed by a contractor either:

(1) When oversight test and inspection sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; or

(2) When a qualified railroad supervisory employee's duties place this person in the vicinity of one or more safety-related railroad employees employed by a contractor and performing the oversight would result in minimal disruption of this person's other assigned duties.

(f) Any railroad that finds evidence of contractor employee non-compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety during the periodic oversight shall provide that employee and that employee's employer with details of the non-compliance.

(g) *Contractor oversight.* Each contractor shall conduct periodic oversight tests and inspections of its safety-related railroad employees provided:

(1) A contractor employs more than 15 safety-related railroad employees;

(2) A contractor relies on training it directly provides to its own employees as the basis for qualifying those employees to perform safety-related duties on a railroad; and

(3) A contractor employs supervisory safety-related railroad employees capable of performing oversight.

(h) Notwithstanding the requirements of paragraphs (c) and (g) of this section,

a railroad and a contractor may agree that the contractor will provide the oversight by specifying in the program that the railroad has trained the contractor employees responsible for training and oversight.

(i) Each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. The records shall specify each person administering tests and inspections, and each person tested. The record shall also provide a method to record whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance. Modifications of the program required by § 217.9 of this chapter may be used in lieu of this oversight program, provided a railroad specifies it has done so in its program submitted in accordance with this part.

(j) Records required under this section are subject to the requirements of § 243.203.

#### § 243.207 Annual review.

(a) *Review of safety data and adjustments to required training programs.* The purpose of this review is to determine if knowledge or performance gaps exist in the application of Federal railroad safety laws, regulations, and orders. This section shall apply to each railroad once a program has been approved by FRA in accordance with this part. This section does not apply to a railroad with less than 400,000 total employee work hours annually. In addition, this section does not apply to employers other than railroads except as specified in paragraph (f) of this section.

(b) Each railroad that is required to conduct periodic oversight in accordance with § 243.205 is also required to conduct an annual review, as provided in this section, and shall retain, at its system headquarters, one copy of the written annual review.

(c) Each railroad shall designate a person(s) who shall conduct a written annual review. The annual review shall be designed to identify knowledge or performance gaps in occupational categories and determine whether adjustments to the training component of the program are the appropriate intervention to close those gaps or otherwise improve the effectiveness of the program. Such review shall include analysis of the following data:

(1) Periodic oversight data required by § 243.205;

(2) Reportable accident/incident data as defined in part 225 of this chapter;

(3) FRA inspection report data;

(4) Employee training feedback received through a course evaluation process, if such feedback is available; and

(5) Feedback received from labor representatives, if such feedback is available.

(d) Based upon the results of the annual review, the designated person(s) shall coordinate any necessary adjustments to the initial and refresher training programs. At the railroad's option, the annual review required under this section may be conducted in conjunction with any periodic review required under part 217 of this chapter.

(e) If a railroad utilizes a contractor that directly trains its own safety-related railroad employees, the railroad shall notify the contractor of the relevant training program adjustments made to the railroad's program in accordance with paragraph (d) of this section.

(f) A contractor shall use any information provided by a railroad to adjust its training specific to the Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety.

(g) Prior to September 1 of each calendar year, each railroad to which this section applies shall complete its annual review for the previous calendar year.

**§ 243.209 Railroad maintained list of contractors utilized.**

(a) Each railroad utilizing contractors to supply the railroad with safety-related railroad employees shall maintain a list, at its system headquarters, with information regarding each contractor utilized unless:

(1) the railroad qualifies each of the contractor's safety-related railroad employees utilized; and

(2) the railroad maintains the training records for each of the contractor's safety-related railroad employees utilized.

(b) The listing required by paragraph (a) of this section shall include:

(1) The full corporate or business name of the contractor;

(2) The contractor's primary business and email address; and

(3) The contractor's primary telephone number.

(c) The information required by this section shall be continuously updated as additional contractors are utilized, and no contractor information shall be deleted from the list unless the contractor has not been utilized for at least 3 years from the end of the calendar year the contractor was last utilized.

**APPENDIX A TO PART 243—  
SCHEDULE OF CIVIL PENALTIES**

A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$100,000 for any violation where circumstances warrant. *See* 49 CFR part 209, Appendix A.

(Penalty Schedule to be included in Final Rule)

Issued in Washington, DC, on January 25, 2012.

**Joseph C. Szabo,**  
*Administrator.*

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