



**4910-06-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 270**

**[Docket No. FRA-2011-0060, Notice No. 7]**

**RIN 2130-AC71**

**System Safety Program**

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

**ACTION:** Final rule; stay of regulations.

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**SUMMARY:** On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement a system safety program (SSP) to improve the safety of their operations. On February 10, 2017, FRA stayed the SSP final rule's requirements until March 21, 2017, and extended the stay until May 22, 2017, June 5, 2017, and then December 4, 2017. FRA is issuing this final rule to extend that stay until December 4, 2018.

**DATES:** Effective November 29, 2017, the stay of 49 CFR part 270 is extended until December 4, 2018. Petitions for reconsideration must be received on or before [INSERT DATE 50 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments in response to petitions for reconsideration must be received on or before [INSERT DATE 95 DAYS AFTER DATE OF PUBLICATION IN FEDERAL REGISTER].

**ADDRESSES:** Petitions for reconsideration and comments on petitions for

reconsideration: Any petitions for reconsideration or comments on petitions for reconsideration related to this Docket No. FRA-2011-0060, Notice No. 7, may be submitted by any of the following methods:

- Web site: The Federal eRulemaking Portal, [www.regulations.gov](http://www.regulations.gov). Follow the Web site's online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590.
- Hand Delivery: Docket Management Facility, Room W12-140 on the ground level of the West Building, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC71). Note that all petitions and 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 petitions, comments or materials.

Docket: For access to the docket to read background documents, petitions for reconsideration, or comments received, go to <http://www.regulations.gov> at any time or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New

Jersey Avenue SE., Room W12-140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Gross, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel; telephone: 202-493-1342; e-mail: Elizabeth.Gross@dot.gov.

**SUPPLEMENTARY INFORMATION:**

On August 12, 2016, FRA published a final rule requiring commuter and intercity passenger railroads to develop and implement an SSP to improve the safety of their operations. See 81 FR 53850. On February 10, 2017, FRA stayed the SSP final rule's requirements until March 21, 2017, consistent with the new Administration's guidance issued January 20, 2017, intended to provide the Administration an adequate opportunity to review new and pending regulations. See 82 FR 10443 (Feb. 13, 2017). To provide additional time for that review, FRA extended the stay until May 22, 2017, June 5, 2017, and then December 4, 2017. See 82 FR 14476 (Mar. 21, 2017), 82 FR 23150 (May 22, 2017), and 82 FR 26359 (June 7, 2017). These stays of the rule's requirements did not affect the SSP final rule's information protection provisions in 49 CFR 270.105, which took effect for information a railroad compiles or collects solely for SSP purposes on August 14, 2017.

FRA's review included petitions for reconsideration of the SSP final rule (Petitions). Various rail labor organizations (Labor Organizations) filed a single joint petition.<sup>1</sup> State and local transportation departments and authorities (States) filed the

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<sup>1</sup> The labor organizations that filed the joint petition are: the American Train Dispatchers Association (ATDA), Brotherhood of Locomotive Engineers and Trainmen (BLET), Brotherhood of Maintenance of Way Employees Division (BMWED), the Brotherhood of Railroad Signalmen (BRS), Brotherhood Railway Carmen Division (TCU/IAM), and Transport Workers Union of America (TWU).

three other petitions, one of which was a joint petition (State Joint Petition).<sup>2</sup> The State Joint Petition requested that FRA stay the SSP final rule, and NCDOT specifically requested that FRA stay the rule while FRA was considering the petitions. All Petitions were available for public comment in the docket for the SSP rulemaking. On November 15, 2016, the Massachusetts Department of Transportation (MassDOT) submitted a comment supporting the State Joint Petition, also asking FRA to stay the SSP final rule. FRA did not receive any public comments opposing the States' requests for a stay.

On October 30, 2017, FRA met with the Passenger Safety Working Group and the System Safety Task Group of the Railroad Safety Advisory Committee (RSAC) to discuss the Petitions and comments received in response to the Petitions.<sup>3</sup> FRA specifically invited its state partners to this meeting, which was also open to the public. This meeting was necessary for FRA to receive input from industry and the public, and to discuss potential paths forward to respond to the Petitions prior to FRA taking final action. During the meeting, a representative from the Oregon Department of Transportation asked whether the SSP final rule would be further stayed pending FRA's development of a response to the Petitions and public input received at the meeting. An FRA representative indicated that he anticipated a further stay of the rule to provide time

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<sup>2</sup> The Capitol Corridor Joint Powers Authority (CCJPA), Indiana Department of Transportation (INDOT), Northern New England Passenger Rail Authority (NNEPRA), and San Joaquin Joint Powers Authority (SJJPA) filed a joint petition (Joint Petition). The North Carolina Department of Transportation (NCDOT) and State of Vermont Agency of Transportations (VTrans) each filed separate petitions.

<sup>3</sup> Attendees at the October 30, 2017, meeting included representatives from the following organizations: ADS System Safety Consulting, LLC; American Association of State Highway and Transportation Officials (AASHTO); American Public Transportation Association (APTA); American Short Line and Regional Railroad Association (ASLRRA); ATDA; Association of American Railroads (AAR); BLET; BMWED; BRS; CCJPA; The Fertilizer Institute; Gannett Fleming Transit and Rail Systems; International Brotherhood of Electrical Workers; Metropolitan Transportation Authority (MTA); National Railroad Passenger Corporation (Amtrak); National Transportation Safety Board (NTSB); NCDOT; NNEPRA; Politico; San Joaquin Regional Rail Commission/Altamont Corridor Express; Sheet Metal, Air, Rail, and Transportation Workers (SMART); United States Department of Transportation – Transportation Safety Institute. During the meeting, an attorney from Kaplan Kirsch & Rockwell, LLP representing AASHTO indicated he was authorized to speak on behalf of all the State petitioners.

to resolve the issues raised by the petitions. None of the meeting participants expressed opposition to a further stay.<sup>4</sup>

Given the multiple requests for a continued stay of the rule, the comment received supporting a stay, the lack of opposition to a stay in either the comments or at the public RSAC meeting, and FRA's interest in addressing the issues raised in the State petitions prior to requiring full compliance with the SSP final rule, FRA is issuing this final rule extending the stay until December 4, 2018.

### **Regulatory Impact and Notices**

#### Executive Orders 12866, 13563, and 13771 and DOT Regulatory Policies and Procedures

This final rule is a non-significant regulatory action within the meaning of Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26, 1979). The final rule follows the direction of Executive Order 13563 "Improving Regulation and Regulatory Review", which emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Finally, the final rule also follows the guidance of Executive Order 13771 "Reducing Regulation and Controlling Regulatory Costs" (EO 13771), which directs agencies that "for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process." FRA identified this final rule as a deregulatory effort to comply with EO 13771. For more information on EO 13771, refer to Office of Management and Budget's April 5, 2017 publication "Memorandum:

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<sup>4</sup> Once the RSAC meeting notes are finalized, FRA will place them in Docket ID FRA-2011-0060 at [www.regulations.gov](http://www.regulations.gov).

Implementing Executive Order 13771, titled ‘Reducing Regulation and Controlling Regulatory Costs.’”

In July 2016, FRA issued the System Safety Program final rule (2016 Final Rule) as part of its efforts to continuously improve rail safety and to satisfy the statutory mandate in sections 103 and 109 of Rail Safety Improvement Act of 2008. The 2016 Final Rule requires passenger railroads to establish a program that systematically evaluates railroad safety risks and manages those risks with the goal of reducing the numbers and rates of railroad accidents, incidents, injuries, and fatalities. Paperwork requirements are the largest burden of the 2016 Final Rule.

FRA believes that the final rule, which will stay the requirements of the 2016 Final Rule until December 4, 2018, will reduce regulatory burden on the railroad industry. By staying the requirements of the 2016 Final Rule, railroads will realize a cost savings. Railroads will not sustain any costs during the first year of this analysis. In addition, because the analysis discounts future costs and the final rule will move forward all costs by one-year, the present value cost of the final rule is lower as compared to the present value cost of the 2016 Final Rule. FRA estimates this cost savings to be approximately \$164,480, at a 3% discount rate, and \$76,788, at a 7% discount rate. The following table shows 2016 Final Rule total cost, delayed one-year implementation date total costs (final rule total cost), and the cost savings from a one-year implementation date delay.

	<b>Present Value (7%)</b>	<b>Present Value (3%)</b>
2016 Final rule, total cost	\$ 2,327,223	\$ 3,412,649
Final rule, total cost	2,250,435	3,248,169
Cost savings from one-year delay	\$ 76,788	\$ 164,480

## Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and E.O. 13272, 67 FR 53461 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), the FRA Administrator certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

This final rule will affect passenger railroads, but will have a beneficial effect, lessening the burden on small railroads.

“Small entity” is defined in 5 U.S.C. 601 as including a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “linehaul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 1,500 employees, or a “commuter rail system” with annual receipts of less than \$15.0 million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A. Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000. Federal agencies may adopt their own size standards for small entities, in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency

policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891 (May 9, 2003), codified at Appendix C to 49 CFR part 209. The \$20-million limit is based on the Surface Transportation Board’s revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1–1. FRA is using this definition for this rulemaking.

This final rule will apply to passenger railroads. Based on the definition of “small entity,” only two passenger railroads are considered small entities: Saratoga & North Creek Railway (SNC), and the Hawkeye Express (operated by the Iowa Northern Railway Company (IANR)). As the final rule is not significant, if it did impact these two small entities, this final rule would merely provide these entities with additional compliance time without introducing any additional burden.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the Administrator of the FRA hereby certifies that this final rule will not have a significant impact on a substantial number of small entities. A substantial number of small entities may be impacted by this regulation; however, any impact on these entities will be minimal and positive.

#### Paperwork Reduction Act

There are no new collection of information requirements contained in this final rule and, in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et

seq., an information collection submission to the Office of Management and Budget is not required. The record keeping and reporting requirements already contained in the SSP final rule were approved by the Office of Management and Budget on October 5, 2016. The information collection requirements thereby became effective when they were approved by OMB. The OMB approval number is OMB No. 2130-0599, and OMB approval expires on October 31, 2019.

### Federalism Implications

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

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this rule does not 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. In addition, FRA has determined that this rule does not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

#### International Trade Impact Assessment

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

#### Environmental Assessment

FRA has evaluated this rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this rule is not a major 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, which concern the promulgation of railroad safety rules and policy statements that do not result in

significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation. 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 rule is not a major Federal action significantly affecting the quality of the human environment.

#### Unfunded Mandates Reform Act of 1995

Pursuant to section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).

Section 202 of the Act (2 U.S.C. 1532) further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 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.

This written statement must detail the effect on State, local, and tribal governments and the private sector. For the year 2017, this monetary amount of

\$100,000,000 has been adjusted to \$156,000,000 to account for inflation. This final rule would not result in such an expenditure, and thus preparation of such a statement is not required.

#### Energy Impact

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

#### Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described

in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

### **List of Subjects in 49 CFR Part 270**

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

### **The Rule**

In consideration of the foregoing, FRA extends the stay of the SSP final rule published August 12, 2016 (81 FR 53850) until December 4, 2018.

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

Issued in Washington, DC, on November 27, 2017.

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Juan D. Reyes III,  
Chief Counsel.

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