



4910-06-P

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**49 CFR Part 270**

**[Docket No. FRA-2011-0060, Notice No. 9]**

**RIN 2130-AC79**

**System Safety Program**

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

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

**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. FRA has stayed the SSP final rule's requirements until December 4, 2018. FRA is issuing this final rule to extend that stay until September 4, 2019.

**DATES:** Effective [INSERT DATE OF FILING FOR PUBLIC INSPECTION], the stay of 49 CFR part 270 is extended until September 4, 2019.

**ADDRESSES:** Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket.

**FOR FURTHER INFORMATION CONTACT:** Elizabeth A. Gross, 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, December 4, 2017, and then December 4, 2018. See 82 FR 14476 (Mar. 21, 2017); 82 FR 23150 (May 22, 2017); 82 FR 26359 (June 7, 2017); and 82 FR 56744 (Nov. 30, 2017).<sup>1</sup> In that November 2017 document, FRA stated that the 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 on August 14, 2017, for information a railroad compiles or collects after that date solely for SSP purposes.

FRA's review included petitions for reconsideration of the SSP final rule (Petitions). Various rail labor organizations (Labor Organizations) filed a single joint

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<sup>1</sup> FRA notes it inadvertently published two notifications in the Federal Register identified as Notice No. 6 for this docket. See 82 FR 23150 (May 22, 2017), Docket No. FRA-2011-0060-0043; and 82 FR 26359 (June 7, 2017), Docket No. FRA-2011-0060-0044. Before identifying the duplication, FRA published a subsequent Notice No. 7. See 82 FR 56744 (Nov. 30, 2017), Docket No. FRA-2011-0060-0047. FRA is numbering this document as Notice No. 9, to reflect that it is actually the ninth notification published for this docket.

petition.<sup>2</sup> State and local transportation departments and authorities (States) filed the three other petitions, one of which was a joint petition (State Joint Petition).<sup>3</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 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>4</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

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<sup>2</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).

<sup>3</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>4</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; San Joaquin Regional Rail Commission/Altamont Corridor Express; Sheet Metal, Air, Rail, and Transportation Workers (SMART); and 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.

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 to resolve the issues raised by the petitions. None of the meeting participants expressed opposition to a further stay. See generally FRA-2011-0060-0046.

In response to draft rule text FRA presented for discussion during the RSAC meeting, the States indicated they would need an extended caucus to discuss. On March 16, 2018, the Executive Committee of the States for Passenger Rail Coalition (SPRC)<sup>5</sup> provided, and FRA uploaded to the rulemaking docket, proposed revisions to the draft rule text. See FRA-2011-0060-0050. FRA is reviewing and considering these suggested revisions in formulating its response to the petitions for reconsideration.

Given the request 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 through notice and comment rulemaking prior to requiring full compliance with the SSP final rule, FRA finds notice and comment for this stay to be impracticable and incompatible with the forthcoming NPRM.

### **Regulatory Impact and Notices**

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

This final rule is a non-significant deregulatory action within the meaning of Executive Order 12866 and DOT policies and procedures. See 44 FR 11034 (Feb. 26,

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<sup>5</sup> SPRC's website indicates it is an "alliance of State and Regional Transportation Officials," and each state petitioner appears to be an SPRC member. See <https://www.s4prc.org/state-programs>.

1979. The final rule is considered an EO 13771 deregulatory action. Details on the estimated cost savings are below.

In August 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 the 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 number and rates of railroad accidents, incidents, injuries, and fatalities. Paperwork requirements are the largest burden of the 2016 Final Rule.

FRA believes that this final rule, which will stay the requirements of the 2016 Final Rule until September 4, 2019, will reduce regulatory burden on the railroad industry. By staying the requirements of the 2016 Final Rule, railroads will realize a cost savings as railroads will not sustain any costs during the first nine months of this analysis. In addition, because this analysis discounts future costs and this final rule will move forward all costs by nine months, the present value costs of this stay will lower the present value cost of the SSP rulemaking. FRA estimates this cost savings to be approximately \$255,928, at a 3-percent discount rate, and \$246,360, at a 7-percent discount rate. The following table shows the 2016 Final Rule’s total cost, delayed an additional nine months past the 2017 stay extension, the implementation date total costs, and the cost savings from the additional nine-month implementation date delay.

	<b>Present Value (7%)</b>	<b>Present Value (3%)</b>
2016 Final Rule, total cost	\$ 2,327,223	\$ 3,412,649
Cost savings from nine-month delay	\$ 246,360	\$ 255,928
2016 Final Rule, total cost with cost savings from nine-month	\$ 2,080,863	\$ 3,156,721

Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 et seq., and Executive Order 13272, 67 FR 53461 (Aug. 16, 2002), require agency review of proposed and final rules to assess their impact on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis unless it determines and certifies that a rule, if promulgated, would not have a significant impact on a substantial number of small entities. 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 any small railroad.

“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.

For purposes of this analysis, this final rule will apply to 30 commuter or other short-haul passenger railroads and two intercity passenger railroads, the National Railroad Passenger Corporation (Amtrak) and the Alaska Railroad Corporation (ARC). Neither is considered a small entity. Amtrak serves populations well in excess of 50,000, and the ARC is owned by the State of Alaska, which has a population well in excess of 50,000.

Based on the definition of “small entity,” only one passenger railroad is considered a small entity: the Hawkeye Express (operated by the Iowa Northern Railway Company). As the final rule is not significant, this final rule will merely provide this entity with additional compliance time without introducing any additional burden.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the FRA Administrator 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 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 (OMB) is not required. The record keeping and reporting requirements already contained in the SSP final rule were approved by OMB 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.

#### 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. 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 detailing the effect on State, local, and tribal governments and the private sector. This final rule will 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). FRA has evaluated this rule in accordance with Executive Order 13211 and has determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

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

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

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

**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.

**Mathew M. Sturges,**  
*Deputy Administrator.*

**The Rule**

In consideration of the foregoing, FRA extends the stay of the SSP final rule published August 12, 2016 (81 FR 53850) until September 4, 2019.

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