



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[DOCKET No. FRA-2018-0096, Notice No. 1]

RIN 2130-AC72

State Highway-Rail Grade Crossing Action Plans

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is issuing this proposed rule in response to a mandate from the Fixing America's Surface Transportation Act to issue a rule requiring 40 States and the District of Columbia to develop and implement highway-rail grade crossing action plans. This proposed rule would also require the ten States previously required to develop highway-rail grade crossing action plans by the Rail Safety Improvement Act of 2008 and FRA's implementing regulation to update their plans and to submit reports to FRA describing actions they have taken to implement them.

DATES: Written comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**]. FRA will consider comments received after that date to the extent practicable.

ADDRESSES: You may submit comments on Docket No. FRA-2018-0096 by any one of the following methods:

- *Federal eRulemaking Portal:* Go to <http://www.regulations.gov> and follow the online

instructions for submitting comments;

- *Mail:* Docket Management Facility, U.S. DOT, 1200 New Jersey Avenue, SE, W12-140, Washington, DC 20590;
- *Hand Delivery:* The Docket Management Facility is located in Room W12-140, West Building Ground Floor, U.S. DOT, 1200 New Jersey Avenue, SE, Washington, DC 20590, and open between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- *Fax:* 1-202-493-2251.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC72). 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> and follow the online instructions for accessing the docket or visit the Docket Management Facility described above.

FOR FURTHER INFORMATION CONTACT: Debra Chappell, Transportation Specialist, Highway-Rail Crossing and Trespasser Programs Division, Office of Safety Analysis, FRA, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6018); or Kathryn Gresham, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: 202-493-6063).

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I. Executive Summary

This proposed rule would revise FRA's existing regulation on State highway-rail grade crossing action plans (49 CFR 234.11) to require 40 States and the District of Columbia to develop and implement FRA-approved highway-rail grade crossing action plans. The proposed rule would also require the ten States previously required to develop highway-rail grade crossing action plans by the Rail Safety Improvement Act of 2008 (RSIA) and FRA's implementing regulation at 49 CFR 234.11 to update their plans and to submit reports describing the actions they have taken to implement their plans. FRA seeks comment on all aspects of this proposal.

This rulemaking responds to the Fixing America's Surface Transportation Act (Pub. L. 114-94) (FAST Act) mandate that the FRA Administrator promulgate a regulation requiring States to develop, implement (and update, if applicable) State highway-rail grade crossing action plans. *See* section 11401 of the FAST Act. In the RSIA, Congress directed the Secretary of Transportation to identify the ten States that had the most highway-rail grade crossing collisions, on average, over the previous three years, and require those States to develop grade crossing action plans for the Secretary of Transportation's approval. *See* section 202 of the RSIA. RSIA required the action plans to "identify specific solutions for improving" grade crossing safety and to "focus on crossings that have experienced multiple accidents or are at high risk" for accidents. Using FRA's database of reported highway-rail grade crossing accidents/incidents that occurred at public and private grade crossings, FRA determined the following ten States had the most reported highway-rail grade crossing accidents/incidents at public and private grade crossings during the three-year period from 2006 through 2008: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas. Therefore, on June 28, 2010, FRA issued a final rule (2010 final rule) requiring these ten States to develop highway-rail grade crossing action plans and submit them to FRA for approval (based on the Secretary of Transportation's delegation of authority to the Federal Railroad Administrator in 49 CFR 1.89). *See* 75 FR 36551 (June 28, 2010) (codified at 49 CFR 234.11).

Section 11401 of the FAST Act tasks the FRA Administrator with promulgating a regulation requiring these ten States to update the highway-rail grade crossing action plans they previously submitted to FRA under 49 CFR 234.11. This statutory mandate

also directs FRA to include a regulatory provision that requires each of these ten States to submit reports to FRA describing: (a) what the State did to implement its previous highway-rail grade crossing action plan; and (b) how the State will continue to reduce highway-rail grade crossing safety risks. As for the other 40 States and the District of Columbia, the FAST Act mandate also requires the FRA Administrator to promulgate a regulation requiring them to develop and implement State highway-rail grade crossing action plans. *See* FAST Act section 11401(b)(1)(B).

The FAST Act mandate contains specific requirements for the contents of the highway-rail grade crossing action plans. As set forth in section 11401(b)(2) of the FAST Act, each highway-rail grade crossing safety plan must identify highway-rail grade crossings that: (a) have experienced recent highway-rail grade crossing accidents or incidents; (b) have experienced multiple highway-rail grade crossing accidents or incidents; or (c) are at high-risk for accidents or incidents. Section 11401(b)(2) of the FAST Act further provides that each highway-rail grade crossing action plan must identify specific strategies for improving safety at highway-rail grade crossings, including highway-rail grade crossing closures or grade separations. Each State highway-rail grade crossing action plan must also designate a State official responsible for managing implementation of the plan. *See* FAST Act section 11401(b)(2).

The FAST Act mandate also contains requirements related to FRA's review and approval of State highway-rail grade crossing action plans, as well as requirements related to the publication of FRA-approved plans. For example, when FRA approves a State's highway-rail grade crossing action plan, section 11401(b)(4) of the FAST Act

requires FRA to make the approved plan publicly available on an “official Internet Web site.”

If a State submits a highway-rail grade crossing action plan FRA deems incomplete or deficient, section 11401(b)(6) of the FAST Act requires FRA to notify the State of the specific areas in which the plan is deficient. In addition, section 11401(b)(6) requires States to correct any identified deficiencies and resubmit their corrected plans to FRA within 60 days from FRA’s notification of the deficiency. If a State fails to meet this 60-day deadline for correcting deficiencies identified by FRA, section 1401(b)(8) of the FAST Act requires FRA to post a notice on an “official Internet Web site” that the State has an incomplete or deficient highway-rail grade crossing action plan.

FRA personnel, including FRA regional grade crossing managers, inspectors, and specialists and experts from FRA’s Highway-Rail Crossing and Trespasser Programs Division, will be available to assist States with developing, implementing, and updating their highway-rail grade crossing action plans. For example, as further explained in the Section-by-Section Analysis below, FRA will provide highway-rail grade crossing accident/incident data to States upon request. FRA will also assist State agencies who wish to use FRA’s Office of Safety Analysis website to generate customized reports of highway-rail grade crossing accident/incident data.

Under 23 U.S.C 148, to receive certain highway funds, States are required to implement highway safety improvement programs, which implement their (continually updated) strategic highway safety plans, a component of which is “improvements to rail-highway grade crossings” 23 U.S.C. 148(d)(1)(B)(vii). Further, highway funding (23 U.S.C. 130) is available to fund States’ development of rail-highway grade crossing plans

(FAST Act Sec 11401(b)(5)) and the Secretary may also condition rail improvement grants to States (49 U.S.C. 229) on the existence of the plans.

II. Section-by-Section Analysis

Section 234.1 Scope

This section discusses the scope of part 234. FRA proposes to revise paragraph (a)(3) to reflect the revised requirements contained in 49 CFR 234.11 as a result of the FAST Act mandate and indicate that these revised requirements are within the scope of this part.

Section 234.11 State Highway-Rail Grade Crossing Action Plans

Currently, paragraph (a) indicates the purpose of this section is to reduce “collisions” at highway-rail grade crossings in the ten States that have had the most highway-rail grade crossing collisions from 2006-2008 (the “initial ten States”). FRA proposes to revise paragraph (a) to explain that the purpose of this section is to reduce “accidents” at highway-rail grade crossings “nationwide by requiring States and the District of Columbia to develop or update highway-rail grade crossing action plans and implement them.” (FRA proposes to replace the term, “collisions,” with the term, “accidents,” for consistency with the language of Section 11401(b) of the FAST Act.) As proposed, this paragraph would continue to make clear, as the existing language does, that this section would not restrict any other entity from adopting a highway-rail grade crossing action plan, nor would it restrict any State or the District of Columbia from adopting a highway-rail grade crossing action plan with additional or more stringent requirements not inconsistent with this regulation. For purposes of this section, unless otherwise stated, the term “State” refers to any one of the 50 States in the United States of

America or the District of Columbia; at the same time, FRA may also separately identify the District of Columbia for clarity.

Proposed paragraph (b) would require 40 States and the District of Columbia to develop individual State highway-rail grade crossing action plans that address each of the required elements listed in paragraph (e) and to submit their individual plans to FRA for review and approval no later than one year after the final rule effective date.

FRA proposes to require States and the District of Columbia to submit their highway-rail grade crossing action plans electronically through FRA's website in Portable Document Format (PDF). FRA intends to provide a secure document submission site for States and the District of Columbia to use to upload their highway-rail grade crossing action plans for FRA review and approval.

Existing paragraph (c) of this section outlines the requirements for a State highway-rail grade crossing action plan and requires the initial ten States to submit their plans to FRA by August 27, 2011. As noted above, this existing requirement for the initial ten States to develop and submit State highway-rail grade crossing action plans for FRA review and approval on or before August 27, 2011, was derived from the RSIA. In response to the mandate of Section 11401 of the FAST Act, FRA proposes to revise this section to require each of the initial ten States to update its existing State highway-rail grade crossing action plan and to provide a report on the State's efforts to implement its existing plan.

Proposed paragraph (c)(1) would require each of the initial ten States to update its existing State highway-rail grade crossing action plan to address each of the required elements listed in paragraph (e) (the same required elements that new State highway-rail

grade crossing action plans would be required to address) no later than one year after the final rule's effective date. This list in paragraph (e) incorporates many of the same elements that the initial ten States were required to address in their existing plans. Paragraph (c)(1) would also require each of the initial ten States to submit its updated highway-rail grade crossing action plan to FRA for review and approval.

Paragraph (c)(2) would also require each of the initial ten States to submit a report to FRA describing how the State implemented the highway-rail grade crossing action plan that it previously submitted to FRA under 49 CFR 234.11. Each of these initial ten States would also be required by paragraph (c)(2) to describe in its report how the State will continue to reduce highway-rail grade crossing safety risks. These proposed requirements are derived from section 11401(b)(1) of the FAST Act. FRA envisions that this report, which should address each proposed initiative/solution contained in the State's highway-rail grade crossing action plan previously submitted to FRA under 49 CFR 234.11, could simply be submitted as an appendix to the State's updated plan. FRA intends to use these implementation reports when preparing the report to Congress required by section 11401(c) of the FAST Act addressing the progress these initial ten States have made in implementing their previously submitted action plans.

In paragraph (d)(1), FRA proposes to require each of the initial ten States to submit its updated highway-rail grade crossing action plan and implementation report electronically in PDF form. FRA intends to provide a secure document submission site for these States to use to upload their updated highway-rail grade crossing action plans and implementation reports for FRA review. Paragraph (d)(2) identifies the ten States

that would be required to update their existing State highway-rail grade crossing action plans and submit implementation reports to FRA.

Paragraph (e) contains a proposed list of required elements for new and updated State highway-rail grade crossing action plans. These elements are derived from section 11401(b)(2) of the FAST Act. Section 11401(b)(2) of the FAST Act mandates that each State highway-rail grade crossing action plan “identify highway-rail grade crossings that have experienced recent highway-rail grade crossing accidents or incidents or multiple highway-rail grade crossing accidents or incidents, or are at high-risk for accidents or incidents.” As reflected in paragraph (e)(1), FRA proposes to interpret “recent highway-rail grade crossing accidents or incidents” as highway-rail grade crossing accidents or incidents that have occurred within the previous 3 years. FRA proposes to interpret “multiple highway-rail grade crossing accidents or incidents” as more than one highway-rail grade crossing accident or incident that occurred within the previous 5 years. This five-year timeframe is consistent with the five-year timeframe used by the initial ten States when they prepared their state highway-rail grade crossing action plans pursuant to existing § 234.11. FRA is not, however, proposing to adopt an official definition or interpretation of the phrase “at high-risk for accidents or incidents.” FRA intends to give States the flexibility to define this category of highway-rail grade crossings for themselves. In sum, paragraph (e)(1) would require States to identify highway-rail grade crossings that: have experienced at least one accident or incident within the previous three years; have experienced more than one accident or incident within the previous five years; or are otherwise “at high-risk for accidents or incidents, as defined by the State or the District of Columbia.” FRA expects that States would explain how they have defined

“high risk for accidents or incidents” if they assert in their State action plans that they have one or more highway-rail grade crossings that fall within this category.

Paragraph (e)(2) would require States to identify the data sources used to categorize the highway-rail grade crossings in paragraph (e)(1). To help States identify highway-rail grade crossings that have experienced recent accidents or incidents (i.e., at least one grade crossing accident or incident within the previous three years), have experienced multiple accidents or incidents (i.e., more than one accident or incident within the previous five years), or are at high-risk for accidents or incidents, FRA will provide highway-rail grade crossing accident/incident data to States upon request. FRA will also assist State agencies electing to use FRA’s Office of Safety Analysis website to generate customized reports of highway-rail grade crossing accident/incident data. However, if the State highway-rail grade crossing action plan identifies highway-rail grade crossings that are at “high-risk for accidents or incidents,” FRA expects that the State will explain the criteria it used to classify highway-rail grade crossings as “high-risk for accidents or incidents,” in addition to discussing the data sources it used to identify this category of crossings.

Paragraph (e)(3) would require States to discuss specific strategies for improving safety at the highway-rail grade crossings identified in paragraph (e)(1) over a five-year period. FRA anticipates States will explain the causal factors that contribute to highway-rail grade crossing safety risks at the grade crossings identified in their action plans, including, if applicable, risks posed by highway-rail grade crossings that are frequently blocked by idling trains. Also, as indicated in the proposed rule text, FRA encourages States to consider crossing closures and grade separations as potential strategies for

improving grade crossing safety. Paragraph (e)(4) would require States to provide an implementation timeline for the strategies that will be used to improve safety at the highway-rail grade crossings identified in paragraph (e)(1). Section 11401(b) of the FAST Act did not dictate a specific period of time that State highway-rail grade crossing action plans should cover. However, existing paragraph (c) of this section required the original ten States to develop highway-rail grade crossing action plans that covered a five-year period. Therefore, for the sake of consistency, FRA proposes that the plans for the remaining 40 States and the District of Columbia cover a period of at least five years. Based on FRA's previous experience working with the initial ten States, a period of at least five years seems appropriate because many of the strategies that may be included in these plans (e.g., crossing closures and grade separations) could take up to five years to implement. However, FRA solicits comment on the time period that should be covered by highway-rail grade crossing plans prepared by the remaining 40 States and the District of Columbia.

Paragraph (e)(5) proposes to require each State and the District of Columbia to designate an official responsible for managing implementation of the State highway-rail grade crossing action plan. FRA is planning to create a secure document submission site that can be used to upload highway-rail grade crossing action plans. The official designated under this paragraph would be given primary user access to the secure document submission site, as well as the authority to grant access to secondary users. Accordingly, FRA envisions that the designated official will need to register with FRA to gain primary user access to the secure document submission site.

As reflected in paragraph (f) of this section, FRA proposes to require States and the District of Columbia to provide the following contact information for their designated officials, so they can be invited to set up primary user accounts: the name and title of the designated State official; the business mailing address for the designated State official; the e-mail address for the designated State official; and the daytime business telephone number for the designated State official. Also, paragraph (f)(2) of this section would require each State and the District of Columbia to notify FRA if a new official is subsequently designated to manage implementation of its highway-rail grade crossing action plan and to provide contact information for the new designated official.

Paragraph (g) sets forth FRA's proposed review and approval process for highway-rail grade crossing action plans. FRA is soliciting comments on the proposed timeframes for each stage of the proposed review and approval process. These proposed timeframes include: (1) the 60-day period that would be allotted for FRA's preliminary review of each State action plan, and (2) the 60-day period that would be allotted for States with action plans deemed incomplete or deficient to correct their plans and submit corrected plans to FRA for review.

In particular, FRA is soliciting comment on the best way to implement these 60-day timeframes, which are specified in sections 11401(b)(6) and (b)(7) of the FAST Act. For instance, FRA is concerned that the proposed 60-day review period may not be adequate in the event most State action plans are submitted to FRA for review at approximately the same time. Accordingly, FRA is soliciting comment on whether the final rule should contain staggered deadlines for the submission of State action plans, and if so, what criteria for staggering should be used.

FRA is proposing a two-stage review process for new, updated, and corrected highway-rail grade crossing action plans. As reflected in paragraph (g)(1), FRA proposes to update its website to reflect receipt of each new, updated, or corrected highway-rail grade crossing action plan.

To avoid delaying implementation of needed grade crossing safety improvements for agency review of each highway-rail grade crossing action plan, FRA proposes in paragraph (g)(2)(A) to conduct a preliminary review of each new, updated, and corrected highway-rail grade crossing action plan within sixty (60) days of receipt. During this preliminary review, FRA would determine if the elements prescribed in paragraph (e) of this section are included in the plan.

As reflected in paragraph (g)(2)(B), each new, updated, or corrected State highway-rail grade crossing action plan would be considered conditionally approved unless FRA notifies the designated official described in paragraph (e)(5) within 60 days of the date of receipt that the plan is incomplete or deficient. However, as reflected in paragraph (g)(2)(C), FRA proposes to reserve the right to conduct a more comprehensive review of each new, updated, or corrected State highway-rail grade crossing action plan during the 120-day period following receipt of the plan to determine if the elements prescribed in paragraph (e) of this section have been sufficiently addressed and discussed in the plan. During this 120-day review period, FRA will provide email notification to the State or District of Columbia's designated official if FRA determines that a new, updated, or corrected State highway-rail grade crossing action plan is incomplete or deficient. FRA requests comment on these proposed approval timelines and procedures

and specifically, whether such a two-stage approval process is necessary if staggered submission deadlines were to be adopted.

In response to the FAST Act's mandate to make public each approved plan and certain other information regarding submitted plans, FRA proposes to post a table on its website that would reflect the review/approval status of each highway-rail grade crossing action plan submitted to FRA. In the table, FRA proposes to post information about the date(s) on which it receives an action plan submitted by a State or the District of Columbia, the date of automatic conditional approval (if applicable), the date(s) on which FRA notifies the State or District of Columbia that the plan is deficient or incomplete (if applicable), the date on which the corrected action plan is received by FRA (if applicable), and the date on which FRA notifies the State or District of Columbia that the action plan has been fully approved. This full FRA approval date would be the specific date FRA provides email notification to the State or District of Columbia that FRA has fully approved the action plan.

Paragraph (g)(3) specifically addresses highway-rail grade crossing action plans that FRA determines to be incomplete or deficient. As reflected in paragraph (g)(3)(A), FRA proposes to provide email notification to the State or the District of Columbia's designated official of the specific areas in which the highway-rail grade crossing action plan is incomplete or deficient.

In paragraph (g)(3)(B), FRA proposes to allow States and the District of Columbia to complete, correct, and resubmit within 60 days any highway-rail grade crossing action plan that is deemed incomplete or deficient. This 60-day timeframe is derived from section 11401(b)(7) of the FAST Act, which directs States to complete their

grade crossing action plans and correct deficiencies identified within 60 days of the date of FRA notification.

As reflected in paragraph (g)(4)(A), after FRA has completed its review and approves a new, updated, or corrected State highway-rail grade crossing action plan, FRA proposes to notify the State's designated official described in paragraph (e)(5) of this section by e-mail that the highway-rail grade crossing action plan has been fully approved.

Paragraph (g)(4)(B) states that FRA proposes to make each fully-approved highway-rail grade crossing action plan publicly available for online viewing. This provision is intended to comply with section 11401(b)(4) of the FAST Act, which requires the FRA Administrator to make each approved State highway-rail grade crossing action plan publicly available on "an official Internet Web site." To make fully-approved plans publicly available for online viewing, FRA proposes to post each fully-approved plan on its website. In addition, to avoid confusion, the Federal Highway Administration will remove the original State Action Plans submitted by the initial ten States from its website.

Paragraph (g)(4)(C) would also require each State and the District of Columbia to implement its highway-rail grade crossing action plan upon full approval.

Under 23 U.S.C. 148, to receive certain highway funds, States are required to implement highway safety improvement programs, which implement their (continually updated) strategic highway safety plans, a component of which is "improvements to rail-highway grade crossings" 23 U.S.C. 148(d)(1)(B)(vii). Highway funding (23 U.S.C. 130) is available to fund States' development of highway-rail grade crossing plans

under this proposed rule. In addition, as stated in paragraph (h), the Secretary of Transportation may condition the awarding of rail improvement grants to States (49 U.S.C. 229) on the State's or District of Columbia's submission of an FRA-approved State highway-rail grade crossing action plan under this section.

III. Regulatory Impact and Notices

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This NPRM is a non-significant regulatory action and has been evaluated in accordance with existing policies and procedures under Executive Order 12866 and DOT Order 2100.6. 44 FR 11034, Feb. 26, 1979; 58 FR 51,735; <https://www.transportation.gov/regulations/2018-dot-rulemaking-order>.

The purpose of the NPRM is to reduce accidents at highway-rail grade crossings nationwide. The NPRM would require each State and the District of Columbia to submit or re-submit to FRA a highway-rail grade crossing action plan (Plan). The proposed rule would also require each of the 10 States¹ who previously created an FRA-approved Plan to submit a report to FRA that describes how the State implemented its existing Plan and how the State will continue to reduce highway-rail grade crossing safety risks.²

Costs

The NPRM specifically lists the required elements for Plans.³ To minimize the compliance costs, the NPRM would afford each State the flexibility to develop or update a Plan based upon the individual State's hazard assessment.

¹ For purposes of this section, unless otherwise stated, the term "State" refers to any one of the 50 States in the United States of America or Washington, DC.

² This analysis covers a 10-year period immediately following the potential implementation date of the NPRM, where all costs and benefits are measured in 2017 dollars.

³ U.S. Department of Transportation, Federal Railroad Administration, RIN 2130-AC72, Section 234.11(e) *Required elements for State highway-rail grade crossing action plans*.

Section 11401(a) of the FAST Act required FRA to develop and distribute a model State highway-rail grade crossing action plan (Model Plan). In conjunction with the Federal Highway Administration (FHWA), FRA developed a “*Highway-Railway Grade Crossing Action Plan and Project Prioritization Noteworthy Practices Guide*.” FRA shared this guide with States via letters that included the data requirements as discussed in Section 11401 of the Fast Act. The guide is currently available on the Department of Transportation’s website.⁴ Previous State action plans from the 2010 final rule are also currently available to the public on DOT’s website.⁵ After issuing a final rule arising from this NPRM, FRA will provide States with assistance in developing their Plans. FRA anticipates that assistance will help to reduce the compliance burden.

Table ES.1 shows the costs associated with the NPRM. The largest costs for the 10 States that have already developed an FRA-approved Plan are: updating and submitting a Plan to FRA (\$350,000 (PV⁶, 7%) and \$364,000 (PV, 3%)) and submitting a report to FRA that describes how each State implemented its previously submitted Plan and how the State will continue to reduce highway-rail grade crossing safety risks (\$57,000 (PV, 7%) and \$59,000 (PV, 3%)), and resubmitting (if necessary) a Plan should FRA determine the State’s updated Plan submission to be incomplete or deficient (\$17,000 (PV, 7%) and \$18,000 (PV, 3%)). Collectively, t the largest costs for the other

⁴ United States Department of Transportation, Federal Railroad Administration, “Highway-Railway Grade Crossing Action Plan and Project Prioritization Noteworthy Practices Guide.” Report Number FHWA-SA-16-075. November 2016. <https://www.fra.dot.gov/Elib/Document/16793>.

⁵ U.S. Department of Transportation, Federal Highway Administration, Rail-Highway Crossing (Section 130) Programs, “State Grade Crossing Action Plans” <https://safety.fhwa.dot.gov/hsip/xings/>.

⁶ To compare benefits and costs that occur at different points in time, this analysis calculates the present value (PV) of all monetary factors on an annual basis. PV provides a way of converting future costs and benefits into equivalent dollars today. Consequently, it permits comparisons of benefit/cost streams that involve different time paths. The formula used to calculate these flows is: $1 \div (1 + r)^t$, where “*r*” is the discount rate and “*t*” is the number of years ahead. Discount rates of 0.03 and 0.07 are used.

40 States and DC are: developing and submitting a Plan to FRA (\$1.0 million (PV, 7%) and \$1.1 million (PV, 3%)); and resubmitting (if necessary) a Plan should FRA determine the State’s previous Plan submission to be incomplete or deficient (\$38,000 (PV, 7%) and \$40,000 (PV, 3%)).

As shown in Table ES.1, the NPRM would result in a total cost of \$1.5 million (PV, 7%), and \$1.6 million (PV, 3%).

Table ES-1: Cost Summary, discounted at 7% and 3% (2017 dollars)⁷

Costs	States Updating Existing Plan		States Creating New Plan		All States	
	7%	3%	7%	3%	7%	3%
Develop or Update Plan	\$350,000	\$364,000	\$1,070,000	\$1,111,000	\$1,420,000	\$1,475,000
Submitting Report to FRA	\$ 57,000	\$ 59,000	--	--	\$ 57,000	\$59,000
Resubmit Plan	\$ 17,000	\$ 18,000	\$ 38,000	\$ 40,000	\$ 55,000	\$57,000
Total Cost	\$424,000	\$441,000	\$1,108,000	\$1,151,000	\$1,532,000	\$1,591,000
Annualized	\$ 60,000	\$ 52,000	\$ 158,000	\$ 135,000	\$ 218,000	\$ 187,000

FRA assumes that all costs would be incurred in the first year of analysis. The costs that are derived from the analysis do not include the costs of voluntary changes in investments or operations that States would make after implementing their Plans.

Benefits

This analysis found that the NPRM would have a positive impact in mitigating highway-rail grade crossing accidents. FRA expects it would take a few years for the States to see benefits associated with the implementing of their Plans. Also, without periodic updates, Plans may lose their effectiveness over time. Therefore, this analysis

⁷ Numbers rounded to the nearest 1,000.

concluded that Plans would only have a positive impact towards reducing accidents in year 4 to year 8 after States develop their Plans.

B. Regulatory Flexibility Determination

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 (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 proposed rule would not have a significant economic impact on a substantial number of small entities.

“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 500 employees, or a “commuter rail system” with annual receipts of less than 15 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.

FRA identified 51 entities (the 50 States and the District of Columbia) that would be affected by this proposed rule. The proposed rule would not impact any other entity—public or private. Each of the 50 States and the District of Columbia have a population greater than 50,000. Therefore, the proposed rule would not directly regulate any small entities. Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601(b), the FRA Administrator hereby certifies that this proposed rule would not have a significant impact on a substantial number of small entities. FRA requests comments on all aspects of this certification.

C. Federalism

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

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the proposed rule will not have substantial direct effects on the States, on the relationship between the Federal 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 proposed rule, which complies with a statutory mandate, will not have federalism implications that impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for this proposed rule is not required.

D. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.* The section that contains the new

information collection requirements is noted below, and the estimated burden times to fulfill each requirement are as follows:

CFR Section	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours ⁸	Total Annual Burden Dollar Cost Equivalent
234.11 – State Highway-Rail Grade Crossing Action Plans – Development and submission of New Plans (40 States + DC)	40 States + District of Columbia	3.5 plans + 10 plans + 7 plans	700 hours + 550 hours + 200 hours	9,350 hours	\$572,220
-- State Highway-Rail Grade Crossing Action Plans – Development and submission of updated plans for listed States in Section 234.11e with FRA Previously Approved Plans (10 States)	10 States	1.5 plans + 1.5 plans + 2 plans	1,100 hours + 640 hours + 225 hours	3,060 hours	\$187,272
-- State Highway-Rail Grade Crossing Action Plan Implementation Reports (10 listed States in Section 234.11e)	10 States	1.5 reports + 1.5 reports + 2 reports	160 hours + 120 hours + 40 hours	500 hours	\$30,600
-- Notification to FRA by State or District of Columbia (DC) of another official to assume responsibilities described in paragraph (e)(6) of this Section	50 States + District of Columbia	4 notifications	5 minutes	.33 hour	\$20
-- FRA review and approval of State Highway-Rail Grade Crossing Action Plans: Disapproved plans needing revision (40 States + DC)	40 States + District of Columbia	1 plan + 3 plans + 2 plans	105 hours + 60 hours + 24 hours	333 hours	\$20,380
-- FRA review and approval of State Highway-Rail Grade Crossing Action Plans: Disapproved plans needing revision (10 listed States in Section 234.11e)	10 States	.5 plan + .5 plan + .5 plan	55 hours + 32 hours + 11 hours	148 hours	\$9,058

⁸ As noted in the Regulatory Impact Analysis (RIA) accompanying this proposed rule, the States/DC will incur the costs for this proposed rule's requirements in the first year. However, since FRA is requesting a two-year approval from OMB for the information collection associated with this proposed rule, FRA has divided by two the number of burden responses, burden hours, and dollar equivalent cost to obtain the average annual burden once the proposed/final rule goes into effect. Also, please note that the dollar equivalent cost for the estimated burden hours is based on Bureau of Labor Statistics (BLS) data for the average hourly wage for State employees responsible for submitting a State Highway-Rail Grade Action Plan/updated plans/implementation reports and amounts to \$61.20 per hour. Please see the RIA for this proposed rule for more details.

TOTAL	N/A	42 (plans/ reports/ notifications	N/A	13,391 hours	\$819,550
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All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Under 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 Ms. Hodan Wells, Information Clearance Officer, at 202-493-0440, or Ms. Kimberly Toone, Records Management Officer, Office of Railroad Safety, Federal Railroad Administration, at 202-493-6132.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, SE, 3rd Floor, Washington, DC 20590. Comments may also be submitted via e-mail to Ms. Wells at Hodan.Wells@dot.gov or Ms. Toone at Kim.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 will be seeking an OMB reinstatement of a previously approved control number under **OMB No. 2130-0589** that was discontinued because all requirements had been fulfilled under an earlier rulemaking.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. 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*.

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 rule 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 Assessment

FRA has evaluated this proposed rule under 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 proposed 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 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 the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rule will not result in

the expenditure, in the aggregate, of \$100,000,000 or more 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). FRA evaluated this proposed rule in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

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

I. 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, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.dot.gov/privacy. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide

comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR part 234

Highway safety, Penalties, Railroad safety, Reporting and recordkeeping requirements, State and local governments.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—[AMENDED]

1. The authority citation for part 234 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311, 22501 note; Pub. L. 114-94, Div. A, Sec. 11401; and 49 CFR 1.89.

2. In § 234.1, revise paragraph (a)(3) to read as follows:

§ 234.1 Scope.

(a) * * *

(3) Requirements for certain identified States to update their existing State highway-rail grade crossing action plans and submit reports about the implementation of their existing plans and for the remaining States and the District of Columbia to develop State highway-rail grade crossing action plans;

* * * * *

3. Section 234.11 is revised to read as follows:

§ 234.11 State highway-rail grade crossing action plans.

(a) *Purpose.* The purpose of this section is to reduce accidents at highway-rail grade crossings nationwide by requiring States and the District of Columbia to develop or update highway-rail grade crossing action plans and implement them. This section does not restrict any other entity from adopting a highway-rail grade crossing action plan. This section also does not restrict any State or the District of Columbia from adopting a highway-rail grade crossing action plan with additional or more stringent requirements not inconsistent with this section.

(b) *New action plans.* (1) Except for the 10 States identified in paragraph (d)(2) of this section, each State and the District of Columbia shall develop a State highway-rail grade crossing action plan that addresses each of the required elements listed in paragraph (e) of this section and submit such plan to FRA for review and approval not later than [DATE 426 DAYS FROM DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

(2) Each State and the District of Columbia shall submit its highway-rail grade crossing action plan electronically through FRA's website in Portable Document Format (PDF).

(c) *Updated action plan and implementation report.* (1) Each of the 10 States listed in paragraph (d)(2) of this section shall develop and submit an updated State highway-rail grade crossing action plan that addresses each of the required elements listed in paragraph (e) of this section to FRA for review and approval, not later than [DATE 426 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER].

(2) Each of the 10 States listed in paragraph (d)(2) of this section shall also develop and submit to FRA, not later than [DATE 426 DAYS AFTER DATE OF PUBLICATION OF FINAL RULE IN THE FEDERAL REGISTER], a report describing:

(i) How the State implemented the State highway-rail grade crossing action plan that it previously submitted to FRA for review and approval; and

(ii) How the State will continue to reduce highway-rail grade crossing safety risks.

(d) *Electronic submission of updated action plan and implementation report.* (1) Each of the 10 States listed in paragraph (d)(2) of this section shall submit its updated highway-rail grade crossing action plan and implementation report electronically through FRA's website in PDF form.

(2) The requirements of paragraph (c) of this section and this paragraph (d) apply to the following States: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas.

(e) *Required elements for State highway-rail grade crossing action plans.* Each State highway-rail grade crossing action plan described in paragraphs (b) and (c) of this section shall:

(1) Identify highway-rail grade crossings that:

(i) Have experienced at least one accident or incident within the previous 3 years;

(ii) Have experienced more than one accident or incident within the previous 5

years; or

(iii) Are at high-risk for accidents or incidents as defined by the State or the District of Columbia in the action plan;

(2) Identify data sources used to categorize the highway-rail grade crossings in paragraph (e)(1) of this section;

(3) Discuss specific strategies, including highway-rail grade crossing closures or grade separations, to improve safety at those crossings over a period of at least five years;

(4) Provide an implementation timeline for the strategies discussed in paragraph (d)(2) of this section; and

(5) Designate an official responsible for managing implementation of the State highway-rail grade crossing action plan.

(f) *Electronic submission.* (1) When the State or the District of Columbia submits its highway-rail grade crossing action plan or updated action plan and implementation report electronically through FRA's website, the State or the District of Columbia shall provide the following information to FRA for the designated official described in paragraph (e)(5) of this section:

(i) The name and title of the designated official;

(ii) The business mailing address for the designated official;

(iii) The e-mail address for the designated official; and

(iv) The daytime business telephone phone for the designated official.

(2) If the State or the District of Columbia designates another official to assume the responsibilities described in paragraph (e)(5) of this section, the State or the District of Columbia shall contact FRA and provide the information listed in paragraph (f)(1) of this section for the new designated official.

(g) *Review and approval.* (1) FRA will update its website to reflect receipt of each new, updated, or corrected highway-rail grade crossing action plan submitted pursuant to this section.

(2)(i) Within sixty (60) days of receipt of each new, updated, or corrected highway-rail grade crossing action plan, FRA will conduct a preliminary review of the action plan to determine if the elements prescribed in paragraph (e) of this section are included in the plan.

(ii) Each new, updated, or corrected State highway-rail grade crossing action plan shall be considered conditionally approved for purposes of this section unless FRA notifies the designated official described in paragraph (e)(5) of this section within sixty (60) days of receipt that the highway-rail grade crossing action plan is incomplete or deficient.

(iii) FRA reserves the right to conduct a more comprehensive review of each new, updated, or corrected State highway-rail grade crossing action plan within 120 days of receipt.

(3) If FRA determines that the new, updated, or corrected highway-rail grade crossing action plan is incomplete or deficient:

(i) FRA will provide email notification to the designated official described in paragraph (e)(5) of this section of the specific areas in which the plan is deficient and allow the State or the District of Columbia to complete the plan and correct the deficiencies identified.

(ii) Within 60 days of the date of FRA's email notification that the highway-rail grade crossing action plan is incomplete or deficient, the State or District of Columbia

shall correct all deficiencies and submit the corrected State highway-rail grade crossing action plan to FRA for approval. The State or District of Columbia shall submit its corrected highway-rail grade crossing action plan electronically through FRA's website in PDF form.

(4)(i) When a new, updated, or corrected State highway-rail grade crossing action plan is fully approved, FRA will provide email notification to the designated official described in paragraph (e)(5) of this section.

(ii) FRA will make each fully-approved State highway-rail grade crossing action plan publicly available for online viewing.

(iii) Each State and the District of Columbia shall implement its fully-approved highway-rail grade crossing action plan.

(h) The Secretary of Transportation may condition the awarding of any grants under 49 U.S.C. ch. 244 on the State's or District of Columbia's submission of an FRA-approved State highway-rail grade crossing action plan under this section.

Issued in Washington, DC.

Ronald L. Batory,

Administrator,

Federal Railroad Administration.

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