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TITLE 49--TRANSPORTATION

CHAPTER II--FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF  
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Decisions Pursuant to 49 CFR 172.820

Sec. Appendix C to Part 209--FRA's Policy Statement Concerning Small  
Entities

This policy statement required by the Small Business Regulatory  
Enforcement Fairness Act of 1996 (Pub. L. 104-121) (SBREFA) explains  
FRA's communication and enforcement policies concerning small entities  
subject to the federal railroad safety laws. These policies have been  
developed to take into account the unique concerns and operations of  
small businesses in the administration of the national railroad safety  
program, and will continue to evolve to meet the needs of the railroad  
industry. For purposes of this policy statement, the Regulatory  
Flexibility Act (5 U.S.C. 601, et seq.),

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and the ``excessive demand'' provisions of the Equal Justice Act (5  
U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D)), Class III railroads,  
contractors and hazardous materials shippers meeting the economic  
criteria established for Class III railroads in 49 CFR 1201.1-1, and  
commuter railroads or small governmental jurisdictions that serve  
populations of 50,000 or less constitute the class of organizations  
considered ``small entities'' or ``small businesses.''

FRA understands that small entities in the railroad industry have  
significantly different characteristics than larger carriers and  
shippers. FRA believes that these differences necessitate careful  
consideration in order to ensure that those entities receive appropriate  
treatment on compliance and enforcement matters, and enhance the safety  
of railroad operations. Therefore, FRA has developed programs to respond  
to compliance-related inquiries of small entities, and to ensure proper  
handling of civil penalty and other enforcement actions against small  
businesses.

Small Entity Communication Policy

It is FRA's policy that all agency personnel respond in a timely and  
comprehensive fashion to the inquiries of small entities concerning rail  
safety statutes, safety regulations, and interpretations of these  
statutes and regulations. Also, FRA personnel provide guidance to small  
entities, as needed, in applying the law to specific facts and  
situations that arise in the course of railroad operations. These agency  
communications take many forms, and are tailored to meet the needs of  
the requesting party.

FRA inspectors provide training on the requirements of all railroad  
safety statutes and regulations for new and existing small businesses  
upon request. Also, FRA inspectors often provide impromptu training  
sessions in the normal course of their inspection duties. FRA believes  
that this sort of preventive, rather than punitive, communication  
greatly enhances railroad safety. FRA's Office of Safety and Office of  
Chief Counsel regularly provide oral and written responses to questions  
raised by small entities concerning the plain meaning of the railroad  
safety standards, statutory requirements, and interpretations of the  
law. As required by the SBREFA, when FRA issues a final rule that has a  
significant impact on a substantial number of small entities, FRA will  
also issue a compliance guide for small entities concerning that rule.

It is FRA's policy to maintain frequent and open communications with  
the national representatives of the primary small entity associations  
and to consult with these organizations before embarking on new policies  
that may impact the interests of small businesses. In some regions of  
the country where the concentration of small entities is particularly  
high, FRA Regional Administrators have established programs in which all

small entities in the region meet with FRA regional specialists on a regular basis to discuss new regulations, persistent safety concerns, emerging technology, and compliance issues. Also, FRA regional offices hold periodic conferences, in which specific blocks of time are set aside to meet with small businesses and hear their concerns.

In addition to these communication practices, FRA has instituted an innovative partnership program that expands the extent to which small entities participate in the development of policy and process. The Railroad Safety Advisory Committee (RSAC) has been established to advise the agency on the development and revision of railroad safety standards. The committee consists of a wide range of industry representatives, including organizations that represent the interests of small business. The small entity representative groups that sit on the RSAC may appoint members of their choice to participate in the development of new safety standards. This reflects FRA's policy that small business interests must be heard and considered in the development of new standards to ensure that FRA does not impose unnecessary economic burdens on small businesses, and to create more effective standards. Finally, FRA's Web site (<http://www.fra.dot.gov>) makes pertinent agency information available instantly to the public.

FRA's longstanding policy of open communication with small entities is apparent in these practices. FRA will make every effort to develop new and equally responsive communication procedures as is warranted by new developments in the railroad industry.

#### Small Entity Enforcement Policy

FRA has adopted an enforcement policy that addresses the unique nature of small entities in the imposition of civil penalties and resolution of those assessments. Pursuant to FRA's statutory authority, and as described in Appendix A to 49 CFR part 209, it is FRA's policy to consider a variety of factors in determining whether to take enforcement action against persons, including small entities, who have violated the safety laws and regulations. In addition to the seriousness of the violation and the person's history of compliance, FRA inspectors consider "such other factors as the immediate circumstances make relevant." In the context of violations by small entities, those factors include whether the violations were made in good faith e.g., based on an honest misunderstanding of the law), and whether the small entity has moved quickly and thoroughly to remedy the violation(s). In general, the presence of both good faith and prompt remedial action militates against taking a civil penalty action, especially if the violations are

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isolated events. On the other hand, violations involving willful actions and/or posing serious health, safety, or environmental threats should ordinarily result in enforcement actions, regardless of the entity's size.

Once FRA has assessed a civil penalty, it is authorized to adjust or compromise the initial penalty claims based on a wide variety of mitigating factors, unless FRA must terminate the claim for some reason. FRA has the discretion to reduce the penalty as it deems fit, but not below the statutory minimums. The mitigating criteria FRA evaluates are found in the railroad safety statutes and SBREFA: The severity of the safety or health risk presented; the existence of alternative methods of eliminating the safety hazard; the entity's culpability; the entity's compliance history; the entity's ability to pay the assessment; the impacts an assessment might exact on the entity's continued business; and evidence that the entity acted in good faith. FRA staff attorneys regularly invite small entities to present any information related to these factors, and reduce civil penalty assessments based on the value and integrity of the information presented. Staff attorneys conduct conference calls or meet with small entities to discuss pending violations, and explain FRA's view on the merits of any defenses or mitigating factors presented that may have resulted or failed to result in penalty reductions. Among the "other factors" FRA considers at this stage is the promptness and thoroughness of the entity's remedial action to correct the violations and prevent a recurrence. Small entities should be sure to address these factors in communications with FRA concerning civil penalty cases. Long-term solutions to compliance problems will be given great weight in FRA's determinations of a final settlement offer.

Finally, under FRA's Safety Assurance and Compliance Program (SACP), FRA identifies systemic safety hazards that continue to occur in a carrier or shipper operation, and in cooperation with the subject business, develops an improvement plan to eliminate those safety concerns. Often, the plan provides small entities with a reasonable time frame in which to make improvements without the threat of civil penalty. If FRA determines that the entity has failed to comply with the

improvement plan, however, enforcement action is initiated.

FRA's small entity enforcement policy is flexible and comprehensive. FRA's first priority in its compliance and enforcement activities is public and employee safety. However, FRA is committed to obtaining compliance and enhancing safety with reasoned, fair methods that do not inflict undue hardship on small entities.

[68 FR 24894, May 9, 2003]