

11FEDERAL RAILROAD ADMINISTRATION
Risk Reduction Program
(49 CFR Part 271)
SUPPORTING JUSTIFICATION
RIN 2130-AC11; OMB No. 2130-0610

Summary

- This submission is a new collection of information solely associated with FRA's Notice of Final rule titled Risk Reduction Program (49 CFR Part 271), which is statutorily mandated by the Rail Safety Improvement Act of 2008.
- FRA is publishing this final rule in the **Federal Register** on February 18, 2020. See 85 FR 9262. FRA has responded to all comments received under question 8.
- The total number of burden hours **requested for this submission** is **61,825 hours**.
- The total number of **responses requested** for this submission is **49,148**.
- By definition, this entire submission is a **program change**.

** The answer to question **number 12** itemizes the hourly burden associated with each requirement of this rule (See pp. 16-19).

1. Circumstances that make collection of the information necessary.

Section 103(a) of the Railroad Safety Improvement Act of 2008 (RSIA) directs the Secretary of Transportation (Secretary) to issue a regulation requiring Class I railroads, railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads), and railroads with inadequate safety performance (ISP) to develop, submit to the Secretary for review and approval, and implement a railroad safety risk reduction program (RRP).¹ RSIA section 103(a)(4) also states that railroads not required to comply with this rule may voluntarily submit to FRA for approval an RRP plan meeting the requirements. See 49 U.S.C. 20156. The Secretary has delegated responsibility to carry out her responsibilities under RSIA sections 103 and 109, and the general responsibility to conduct rail safety rulemakings under 49 U.S.C.

¹ FRA understands that each railroad subject to this RRP rule has a unique operating system, and not all railroads have the same amount of resources. Best practices for implementing an RRP will, therefore, differ from railroad to railroad. Accordingly, this rule does not establish prescriptive requirements that may be appropriate for one railroad but unworkable for another. Instead, the rule establishes general, performance-based requirements. This approach provides each railroad with the flexibility to tailor those requirements to its specific operations.

20103(a), to the Administrator of the Federal Railroad Administration (FRA). See 49 CFR 1.89(a) and (b).

The RRP rule would implement section 20156 as it applies to Class I freight railroads, freight railroads with ISP, and voluntarily-compliant railroads. Generally, the subject railroads would be required to assess and manage risk and to develop proactive hazard management methods to promote safety improvement. The rule, however, contains provisions that, while not explicitly required by the statutory safety risk reduction program mandate, are necessary to properly implement the mandate and are consistent with the intent behind the mandate. The rule would also require railroads to consult in good faith, and use their best efforts to reach agreement with, employees on the RRP plan contents and any substantive amendments to the plan.

The main components of an RRP are the risk-based hazard management program and risk-based hazard analysis. A properly implemented risk-based hazard management program and risk-based hazard analysis will identify the hazards and resulting risks on the railroad's system, develop methods to mitigate or eliminate (if practicable) these hazards and risks, and set forth a plan to implement these methods. As part of its RRP, a railroad will also consider various technologies that may mitigate or eliminate the identified hazards and risks.

The implementation of an RRP would be supported by a written risk reduction program plan (RRP plan). The RRP rule sets forth various elements that a railroad's RRP plan must contain to properly implement an RRP. These elements would include, but would not be limited to, procedures and processes for the following RRP components: risk-based hazard management program; safety performance evaluation; safety outreach; technology implementation plan; RRP employee/contractor training; railroad employee involvement; and internal assessment.

In addition to this rule, there are two separate rulemakings that would also address the mandate for passenger railroads and for a fatigue management plan (FMP). The RRP NPRM discussed both of these rulemakings and how they related to the RRP rulemaking. See 80 FR at 10955. FRA published an SSP final rule for passenger railroads on August 12, 2016. See 81 FR 53850. Further, section 20156(d)(2) states that an RRP must include a FMP that meets the requirements of section 20156(f). However, this RRP final rule does not implement this mandate because FRA addresses FMPs in a separate rulemaking.

2. How, by whom, and for what purpose the information is to be used.

This is a new collection of information. The information collected under this final rule will be used by railroads and FRA to improve safety through structured, proactive processes to systematically evaluate railroad safety hazards on their systems and manage

the risks associated with those hazards to reduce the number and rates of railroad accidents/incidents, injuries, and fatalities.

This final rule will require each Class I freight railroad and each freight railroad with ISP to develop and implement an RRP to improve the safety of its operations. An RRP is a comprehensive, system-oriented approach to safety that determines a railroad operation's level of risk by identifying and analyzing applicable hazards, and it involves developing plans to mitigate, if not eliminate, that risk. For instance, each railroad will have the flexibility to tailor an RRP to its specific railroad operations. Additionally, each railroad will be required to implement its RRP under a written RRP plan that FRA has reviewed and approved. Further, each railroad will be required to conduct an annual internal assessment of its RRP, and FRA will be auditing each railroad's RRP processes and procedures to ensure that they comply with the requirements of this the new Part 271.

Under this new final rule²:

- (1) Class I and ISP railroads will use the required safety performance evaluation to determine whether the RRP is effectively reducing risk. The safety performance evaluation will also be used by railroads to monitor emerging or new risks. The safety performance evaluation will require railroads to develop and maintain ongoing processes and systems for evaluating the safety performance of a railroad's system. Each railroad would need to develop and maintain processes and systems for measuring its safety culture. Overall, a safety performance evaluation would consist of both a safety monitoring and a safety assessment component.
- (2) An RRP will include a safety outreach component that communicates RRP safety information to railroad personnel (including contractors), as that information is relevant to their positions. The safety outreach component, at a minimum, will convey safety-critical information, explain why RRP-related safety actions are taken, and explain why safety procedures are introduced or changed. Additionally, on an ongoing basis, the status of risk-based HMP activities will be reported to railroad senior management.
- (3) Technology analysis will be used by railroads to evaluate current, new, or novel technologies that may mitigate or eliminate hazards and the resulting risks identified through the risk-based hazard management program (HMP). Railroads will analyze the safety impact, feasibility, and costs and benefits of implementing such technologies. The technology analysis, at a minimum, will consider different technologies including processor-based technologies, positive train control systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and

² Information collection requests relating to petitions and audits will occur outside of this information collection request timeframe.

indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

- (4) Railroads will be required to provide RRP training to each employee, including an employee of any person identified by the railroad's RRP plan pursuant to § 271.205(a)(3) as performing significant safety-related services on the railroad's behalf or utilizing significant safety-related services provided by the railroad, or who has significant responsibility for implementing and supporting the railroad's RRP. Additionally, railroads are required to keep a record of training conducted under this section, update that record as necessary, make training records available for inspection, and copy upon the request of representatives of FRA or States participating under part 212 of this chapter.
- (5) Railroads will be also required to involve their directly affected employees in the establishment and implementation of the RRP. For example, a railroad must have a process for involving directly affected employees when identifying hazards, developing and implementing mitigation strategies, conducting internal annual assessments, or otherwise performing actions required by this part.
- (6) Under the consultation process requirements of this rule, railroads that are required to establish an RRP must "consult with, employ good faith and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit employee labor organization representing a class or craft of directly affected employees of the railroad carrier, on the contents of the safety risk reduction program." Good faith and best efforts consultation with employees will be used by railroads to educate the directly affected employees on risk reduction and how it may affect them. It will also be used by railroads to obtain the support and input of their employees, who have the most direct and intimate knowledge of the railroad's daily operations and who will be tasked with implementing each railroad's RRP. Good faith and best efforts consultation will be used by employees to directly and proactively provide their knowledge and insight into making the railroad's RRP as effective as possible. For railroads and directly affected employees who cannot reach consensus on the proposed content of the RRP/RRP Plan, these employees may file a statement with the Secretary of Transportation (with FRA as the Secretary's delegate) explaining their views on the plan and why consensus was not reached. FRA will review these directly affected employees' statements in its review and approval of the railroad's RRP/RRP plan. Based on the nature and content of the directly affected employees' statements, FRA may require modifications to the railroad's RRP/RRP Plan.
- (7) Under subpart C, a railroad will be required to adopt and implement its RRP through a written RRP plan that FRA has reviewed and approved under the requirements of subpart D.
- (8) Under subpart E, a railroad is to perform an internal assessment and report on internal audits on an annual basis. Likewise, the final rule will impose an external audit by FRA or its designees on a periodic basis.

- (9) Section 271.13(g) allows an ISP railroad to petition FRA for approval to discontinue RRP compliance after a five-year compliance period. FRA assumes many ISP railroads will maintain their RRP's beyond the five-year compliance period in order to continue receiving both the RRP's safety benefits and the rule's information protections.

In sum, this collection of information is an essential and invaluable tool that assists FRA in its primary mission, namely promoting and ensuring railroad safety throughout the United States.

3. Extent of automated information collection.

For many years, FRA has highly endorsed and strongly encouraged the use of the latest information technology, wherever feasible, to reduce burden on the railroad industry. FRA has particularly encouraged the use of electronic records by railroads and other respondents. In keeping with its longstanding practice and with the requirements of the Government Paperwork Elimination Act (GPEA) and the Paperwork Reduction Act (PRA) of 1995, all documents required to be submitted to FRA under this Part may be submitted electronically pursuant to the procedures provided in Appendix B to this Part. The electronic option then will make it easier, more convenient, and less expensive for railroads to file their documents (e.g., RRP Plans and consultation statements) with FRA.

It should be noted that, for short line railroads with fewer resources, there is the option to deliver the required documents to FRA in a CD, DVD, or other electronic format. FRA finds this an entirely acceptable method of submission as long as it has the capability to read the type of electronic storage format sent. Once the final rule goes into effect and railroads begin to comply, FRA believes that approximately 80 to 85 percent of responses will be completed electronically.

4. Efforts to identify duplication.

In addition to the consultation and information protection sections, some overlap would exist between various other Risk Reduction Program (RRP) and System Safety Program (SSP) provisions (e.g., certain definitions, the process for amending plans, etc.). The requirements in this final rule generally follow those in the SSP, and do not reflect any comments FRA has received in response to the SSP. FRA recognizes that drafting proposals on related topics simultaneously can give the appearance of overlapping or duplicative requirements. As these rulemakings progress, we will work to minimize any overlapping or duplicative requirements. FRA is not aware of any other relevant rules that may duplicate, overlap, or conflict with the proposed rule.

Similar data are not available from any other source.

5. Efforts to minimize the burden on small businesses.

A “small entity” is defined in 5 U.S.C. 601(3) as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Title 49 U.S.C. 601(4) likewise includes within the definition of small entities non-profit enterprises that are independently owned and operated, and are not dominant in their field of operation.

The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a “for-profit” railroad business firm may be, and still be classified as a small entity, is 1,500 employees for “line haul operating railroads” and 500 employees for “switching and terminal establishments.” 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 as 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. This definition is what FRA is using for this final rule.

Class I freight railroads and railroads with inadequate safety performance would have to comply with all of the provisions of Part 271. However, the amount of effort to comply with the rule is commensurate with the size of the entity. In the universe of railroads for potential compliance under this rule, there are 7 Class I railroads, 11 Class II railroads (1 of which is classified as a passenger railroad that would be excepted from the rule), and 735 Class III freight railroads.

To identify the non-Class I railroads that must comply with this rule, FRA will annually conduct a two-phase analysis to determine which railroads have inadequate safety performance. This is accomplished by the following: (1) a statistically-based quantitative analysis of fatalities, FRA-reportable injuries/illnesses, FRA-reportable accidents/incidents, and FRA safety violations; and (2) a qualitative assessment that includes input from affected railroads and their employees. (See § 271.13 of the final

rule for a full description of the process used to determine inadequate safety performance.)

Because FRA's initial inadequate safety performance analysis will occur at least one year after the RRP final rule goes into effect, it is impossible for FRA to know how many Class III railroads will be required to comply. FRA reviewed a 3-year rolling average of safety data to test the selection process. This analysis accounted for the types of information that railroads and employees could present to FRA during the qualitative review process. Such information could serve to refute the quantitative analysis' identification of a railroad as demonstrating inadequate safety performance. Based on this analysis, FRA expects to identify approximately 10 Class II and Class III freight railroads that demonstrate inadequate safety performance in year 2 of the 10-year period of the analysis. In each subsequent year, FRA expects to identify five additional ISP railroads. Therefore, by year 10, FRA will have identified approximately 50 ISP railroads.

FRA expects the number of ISP railroads will reach a maximum of 50 railroads by year 10, at which point the number of ISP railroads should flatten out or decline. In estimating the maximum number of ISP railroads, FRA considered the following factors: (1) industry-wide safety performance improvement; (2) in year 7 of the analysis, some ISP railroads will seek and receive relief from being in the program after complying for 5 years; (3) the size of the railroad pool being examined for inadequate safety performance would shrink as more railroads are required to comply with part 271; and (4) those railroads not identified as being an ISP railroad will observe the positive behaviors and results of ISP railroads and will embrace the better safety practices without having a formal RRP program.

6. Impact of less frequent collection of information.

If the information were not collected or collected less frequently, railroad safety throughout the United States would be significantly adversely affected. Specifically, if Class I railroads and railroads with inadequate safety performance do not develop and implement Risk Reduction Programs (RRPs), then undoubtedly there will be higher numbers of train accidents, particularly severe collisions and major derailments, as well as other railroad incidents and corresponding injuries and fatalities to workers that go with them that could have been prevented with an effective Risk Reduction Program. Without the implementation of an effective RRP, Class I and ISP railroads will not have a comprehensive, system-oriented approach to safety that not only determines daily operations level of risk by identifying and analyzing applicable hazards, but also formulates a plan to mitigate, and where possible, eliminate that risk. An effective RRP encourages – and indeed facilitates – a railroad and its employees to work together to proactively identify hazards and to jointly determine what action to take to mitigate or eliminate the risks associated with those hazards. Effective RRP will lead to decreases

in unsafe behaviors. Decreases in unsafe behaviors or hazards will create a corresponding decrease in railroad-related incidents and the casualties and property damage that go along with them.

Without effective RRP, Class I and ISP railroads will not have an ongoing program that supports continuous safety improvement. Necessary components of the RRP – a risk-based hazard management program (HMP), a safety performance evaluation component, a safety outreach component, a technology analysis and technology implementation plan, and RRP implementation and support training – provide railroads with a comprehensive means of assessing their systems risks as well as the framework for reducing those risks.

Without an RRP risk-based hazard management program, Class I and ISP railroads would not be able to identify hazards in a proactive, integrated, system-wide, and ongoing manner. The scope of a risk-based HMP would be scalable, based upon the size and extent of the railroad's system. As part of its HMP, each railroad would have to conduct a risk-based hazard analysis. A risk-based hazard analysis would address the following components of a railroad's system: infrastructure; equipment; employee levels and work schedules; operating rules and practices; management structure; employee training; and other areas impacting railroad safety that are not covered by railroad safety laws or regulations or other Federal laws or regulations. A risk-based hazard analysis would identify hazards by analyzing the following: (1) various aspects of the railroad's system (including any operational changes, system extensions, or system modifications); and (2) accidents and incidents, injuries, fatalities, and other known indicators of hazards (such as data compiled from a close call reporting system). A railroad would then calculate risk by determining and analyzing the likelihood and severity of potential events associated with identified hazards. These risks would be compared and prioritized for the purpose of mitigation.

Without the required RRP safety performance evaluation, Class I and ISP railroads would not be able to monitor new or emerging risks. The safety performance evaluation enables railroads to develop and maintain ongoing processes and systems for evaluating the safety performance of a railroad's system. Each railroad would develop and maintain processes and systems for measuring its safety culture. Overall, a safety performance evaluation would consist of both a safety monitoring and a safety assessment component. The safety performance evaluation would be developed by establishing processes and systems for acquiring data and information from the following sources: (i) continuous monitoring of operational processes and systems; (ii) periodic monitoring of the operational environment to detect changes that may generate new hazards; (iii) investigations of accidents/incidents, injuries, fatalities, and other known indicators of hazards; (iv) investigations of reports regarding potential non-compliance with Federal railroad safety laws or regulations, railroad operating rules and practices, or mitigation strategies established by the railroad; and (v) a reporting system through which employees can report safety concerns (including, but not limited to, hazards, issues,

occurrences, and incidents) and propose safety solutions and improvements. A railroad would have substantial flexibility to design a reporting system best suited to its own organization or, if a railroad already has some sort of reporting system, to modify it to meet the needs of its RRP.

Without the required RRP safety outreach component of an effective RRP, Class I and ISP railroads would be unable to communicate important safety information to employees and contractors who work in implementing the RRP. Specifically, in their safety outreach programs, Class I and ISP railroads would convey safety-critical information to employees; would explain why RRP-related safety actions are taken; and would explain why safety procedures are introduced or changed. In essence, railroads would use the safety outreach component of an RRP to communicate the effect the RRP is having on the railroad's overall safety performance to those employees most responsible for supporting and fulfilling the railroad's RRP. Ongoing safety outreach will help crystallize any changes that need to be made in the railroad's RRP to enhance safety.

Without the required RRP technology analysis, Class I and ISP railroads would be unable to evaluate current, new, or novel technologies that could mitigate or eliminate hazards and the resulting risks identified through the risk-based hazard management program (HMP). Without the required technology analysis, these railroads would be unable to analyze the safety impact, feasibility, and costs and benefits of implementing such technologies. The technology analysis, at a minimum, would consider different technologies including processor-based technologies, positive train control (PTC) systems, electronically-controlled pneumatic brakes, rail integrity inspection systems, rail integrity warning systems, switch position monitors and indicators, trespasser prevention technology, and highway-rail grade crossing warning and protection technology.

Without the required RRP training, the employees of Class I and ISP railroads who hold positions of safety leadership and employees whose job duties primarily relate to developing and implementing an RRP would not be familiar with the elements of their railroad's program and would not have the necessary knowledge and skills needed to fulfil their responsibilities. Rail safety would suffer as a result.

Without the required RRP "good faith" and "best efforts" consultation by Class I and ISP railroads with their employees/employee representative organizations, railroads would not be able to educate their directly affected employees on risk reduction and how it may affect them. Also, without this essential consultation, it would not be possible to gain the support and input of those employees who have direct and intimate knowledge of the railroad's daily operations and who will be tasked with implementing each railroad's RRP. Good faith and best efforts consultation enables employees to directly and proactively provide their knowledge and insight so that railroads can make their RRPs as effective as possible. This will enhance overall rail safety.

Without the RRP requirement to conduct annual internal assessments, Class I and ISP railroads would not be able to carry out essential audits to determine that their RRPs are properly implemented and effective. The internal assessments will be used by railroads to determine the extent to which the railroad has accomplished the following:

(i) achieved the implementation milestones described in its RRP plan pursuant to proposed § 271.223(b); (ii) complied with the elements of its approved RRP plan that have already been implemented; (iii) achieved the goals described in its RRP plan pursuant to proposed § 271.203(c); (iv) implemented previous internal assessment improvement plans pursuant to proposed § 271.403; and (v) implemented previous external audit improvement plans pursuant to § 271.503. A properly executed internal assessment would provide the railroad with detailed knowledge of the status of its program implementation and the degree to which the program is effectively reducing risk. Results of the internal assessment are required to be reported to the railroad's senior management. The railroad's senior management will use the information to develop an improvement plan in order to make their daily operations safer.

Finally, FRA external audits of the railroad's RRP will focus on reviewing the railroad's RRP process and ensuring that the railroad is following the processes and procedures described in its FRA-approved RRP plan. This will be an interactive process. FRA will communicate with the railroad during the audit and attempt to resolve any issues before its completion. Once the audit is completed, FRA will provide the railroad with written notification of the audit results so that railroads would be clearly informed of any areas where the railroad was not properly complying with its RRP plan, any areas that needed to be addressed by the railroad's RRP but were not, or any other areas in which FRA found that the railroad and its program were not in compliance with this Part. Such FRA oversight will serve to remedy any RRP/RRP Plan deficiencies and will also serve to improve rail safety.

In short, this collection of information promotes and enhances national rail safety, and thus serves as a vital component of FRA's multi-faceted safety program. It supports the main DOT objective and is essential in assisting FRA to fulfill its primary agency mission and objective.

7. Special circumstances.

All information collection requirements are in compliance with this section.

8. Compliance with 5 CFR 1320.8.

As noted in the summary section, FRA is publishing a Notice of final rule in the **Federal Register** on February 18, 2020, titled Risk Reduction Program. See 85 FR 9262. FRA has responded to comments received concerning the proposed rule.

Background

On December 8, 2010, FRA published an ANPRM soliciting public comment on how FRA could best develop and implement a risk reduction regulation based upon the requirements of the RSIA. See 75 FR 76345-76351. Comments were due by February 7, 2011.

FRA received 11 written comments in response to the ANPRM from a variety of entities, including railroads, industry organizations, non-profit employee labor organizations, a consulting firm, and a private citizen.³ Many of the questions and issues raised by commenters were subsequently discussed in depth during the RSAC process. This document, therefore, will contain only a very brief overview of the comments. Written comments submitted in response to the ANPRM are in the public docket for this proceeding and can be viewed and downloaded at www.regulations.gov.

Many of the ANPRM commenters identified similar issues or questions. Two commenters recommended that FRA develop a performance-based risk reduction rule, in order to encourage railroads to find flexible and creative solutions to safety risks. These commenters also stressed the importance of protecting risk reduction information from disclosure and use in litigation. Other commenters requested clarification on the relationship between risk reduction and system safety, or expressed concerns related to how a risk reduction rule would address issues such as contractors or training requirements. Commenters also provided recommendations on how FRA should identify railroads with inadequate safety performance. Several labor organizations also submitted a joint comment strongly emphasizing the importance of the Section 103(g) consultation requirements. Issues such as the above were subsequently discussed at length with both industry and labor organization representatives during the RSAC process.

Following publication of the ANPRM and close of the comment period, FRA also held two public hearings that provided interested persons an opportunity to discuss the development of a risk reduction regulation in response to the ANPRM. Interested persons were invited to present oral statements and to proffer information and views at the hearings. The first public hearing was held on July 19, 2011 in Chicago, IL, and the second public hearing was held on July 21, 2011 in Washington, DC. See 76 FR 40320,

³ The following 18 entities were signatories to comments in response to the ANPRM: Amtrak; Association of American Railroads (AAR); Association of Railways Museums, Inc. (ARM); American Public Transportation Association (APTA); American Short Line and Regional Railroad Association (ASLRRA); American Train Dispatchers Association (ATDA); Behavioral Science Technology (BST); Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT); Brotherhood of Maintenance of Way Employees Division (BMWED/IBT); Brotherhood of Railroad Signalmen (BRS); Metrolink; New York State Metropolitan Transportation Authority (NYSMTA); Patrick J. Coyle (Chemical Facility Security News); Southern Pennsylvania Transportation Authority (SEPTA); Transport Workers Union of America (TWU); Transportation Communications Union (TCU); Trinity Railway Express; Tourist Railway Association (TRA); and United Transportation Union (UTU).

July 8, 2011. During the hearings, testimony was given by representatives of the AAR, ASLRRA, Rail World, Inc., and the Teamsters Rail Conference (the BLET/IBT and BMWED/IBT). As with the comments in response to the ANPRM, the hearing testimony focused almost exclusively on topics that continued to be discussed during the RSAC process. Significant topics of discussion included the following: the identification of railroads with inadequate safety performance; the consultation requirements of section 103(g); the role of contractors within a railroad's RRP; the information protection study mandated by section 109; retention of RRP records; and FRA review of a railroad's RRP. Transcripts of the public hearings are in the public docket for this proceeding and can be viewed and downloaded at www.regulations.gov.

Following the close of the ANPRM comment period and the public hearings, FRA decided that additional input regarding the development of a risk reduction regulation would be beneficial. FRA, therefore, placed the risk reduction rulemaking into a modified RSAC process, which discussed many of the questions and concerns that appeared in the ANPRM and in responses thereto.

FRA proposed Task No. 11-04 to the RSAC on December 8, 2011. The RSAC accepted the task, and formed the Risk Reduction Program (RRP) Working Group (Working Group) for the purpose of developing and implementing RRP under the RSIA. The Working Group is comprised of members from the following organizations:

- Association of American Railroads (AAR);⁴
- Amtrak (National Railroad Passenger Corporation);
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED)
- Brotherhood of Railroad Signalmen (BRS);
- Federal Railroad Administration (FRA);
- Long Island Rail Road (LIRR);
- Metro-North Commuter Railroad Company (Metro-North);
- National Association of Railroad Passengers (NARP);
- National Railroad Construction and Maintenance Association;
- National Transportation Safety Board (NTSB);
- SEPTA;
- TRA; and
- UTU.

⁴ The AAR is comprised of members including the following entities: BNSF Railway Company (BNSF); Canadian National Railway Company (CN); Canadian Pacific Railway (CP); CSX Transportation, Inc. (CSXT); Iowa Interstate Railroad, Ltd. (IAIS); Kansas City Southern (KCS); Metra Electric District; Norfolk Southern Corporation (NS); and UP.

The Working Group completed its work after four in-person meetings and several conference calls. The first meeting of the Working Group took place on January 31 and February 1, 2012, in Cambridge, Massachusetts. At that meeting the group discussed the appropriate scope of a risk reduction regulation and heard several presentations from stakeholders regarding the requirements of the RSIA and current risk reduction practices on railroads. Subsequent meetings were held in Washington, DC on April 10, 2012; May 16, 2012; and June 13, 2012.

At the April, May, and June meetings, the group discussed a document entitled “Recommendations to the Administrator,” which provided FRA advice to consider in developing a risk reduction rule. The document was updated after each meeting to reflect the Working Group’s discussions.

At the conclusion of the Working Group’s last meeting on June 13, 2012, the Working Group obtained tentative agreement on the “Recommendations to the Administrator” document. This document did not include advice regarding railroads with inadequate safety performance, as this was developed further during subsequent conference calls. The document was also not put before the full RSAC for vote, and therefore does not represent formal RSAC consensus. FRA utilized the comments and documents from the Working Group when developing the proposed rule text, although it has streamlined and reorganized suggestions from the Working Group in order to make the rule’s requirements as clear as possible. FRA has also attempted to note in this NPRM areas in which the proposed rule text substantively differs from the Working Group’s suggestions. Ultimately, however, language contained in this proposed rule reflects the RSIA statutory requirements and the Working Group’s tentative agreement on how the requirements should be applied.

In the NPRM and the regulatory impact analysis accompanying the NPRM, FRA requested public comments and input on the proposed rule and its supporting documents and data. The remainder of section explains the relevant public comments that FRA received during the NPRM comment period and FRA’s responses to those comments.

‘Labor Organizations I’⁵ commented that various estimates regarding employee involvement and the consultation process in the NPRM’s regulatory impact analysis and the Paperwork Reduction Act were too low. ‘Labor Organizations I’ also claimed that the time period for railroad-employee interaction specified within the NPRM’s regulatory impact analysis was inadequate. While ‘Labor Organizations I’ did not provide alternative estimates, FRA made two revisions to the final rule to address these concerns,

⁵ ‘Labor Organizations I’ refers to the joint comments submitted by the following railroad labor organizations: American Train Dispatchers Association (ATDA); Brotherhood of Locomotive Engineers and Trainmen (BLET/IBT); Brotherhood of Maintenance of Way Employees Division (BMWED/IBT); Brotherhood of Railroad Signalmen (BRS); Brotherhood Railway Carmen Division TCU/IAM; Sheet Metal, Air, Rail and Transportation Workers (SMART); and Transportation Workers Union of America.

which will provide additional opportunities for railroad-employee interaction. In the final rule, FRA added a new section 271.113 requiring railroads with RRPs to include a program component that involves railroad employees in the establishment and implementation of a railroad's RRP. FRA also responded to 'Labor Organization I's' concerns by significantly updating the estimate for a railroad's RRP safety outreach component. While the NPRM's regulatory impact analysis assumed 15 minutes per employee for safety outreach, this analysis increased the time burden to 60 minutes (1 hour) per employee.

This analysis does not revise the estimate of RRP plan consultation time. The NPRM's regulatory impact analysis estimated that all seven Class I railroads would need to consult with labor organizations. On average, FRA estimated each Class I railroad would expend 200 labor hours consulting (including the time a railroad will spend preparing a consultation statement), or 1,400 labor hours for all Class I railroads. Each ISP railroad will spend approximately 20 hours per consultation. FRA believes these estimates reflect sufficient time for consultation on a railroad's RRP plan.

The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) (collectively, AAR/ASLRRA) jointly commented that the NPRM's regulatory impact analysis relied on baseless or unrealistic assumptions when evaluating costs. AAR/ASLRRA's comment did not provide an alternative assumption or method to evaluate the proposed rule's costs. With exception to stated differences, the assumptions used in this analysis are consistent with those used in the NPRM's regulatory impact analysis. FRA based these assumptions on its extensive experience and knowledge of the railroad industry.

AAR/ASLRRA also commented that the regulatory impact analysis' breakeven analysis was speculative when calculating benefits. The NPRM's regulatory impact analysis did not quantify the proposed rule's potential benefits, as doing so would require reliance on conjecture and a high degree of speculation. Instead, the NPRM's regulatory impact analysis relied on a breakeven analysis based on two benefit pools: accidents/incidents and railroad investment. This analysis quantitatively describes costs, qualitatively describes benefits, and no longer includes a breakeven analysis.

ASLRRA commented that implementation of the proposed rule for Class II and Class III railroads should wait until FRA completed an economic impact analysis to determine if the proposed rule would have a significant economic impact on a substantial number of small entities. ASLRRA's comment acknowledged it did not have the data or resources to generate reliable small railroad cost data and encouraged FRA to underwrite a collaborative effort between ASLRRA and FRA for collecting such data.

The NPRM included an Initial Regulatory Flexibility Analysis (IRFA), which relied on the NPRM's regulatory impact analysis for small railroad cost estimates. FRA's

preliminary conclusion was that the proposed rule would not be a significant economic burden for small entities.⁶ Concluding that there is sufficient data to estimate the final rule's costs for small entities without the collaborative effort that ASLRRA proposed, FRA has prepared a Final Regulatory Flexibility Analysis describing the potential impact of the final rule on small businesses. Therefore, FRA will not delay implementing the final rule for Class II and Class III railroads. FRA's analysis meets with the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et. seq.*) and Executive Order 13272 (67 Fed. Reg. 53461 (Aug. 16, 2002)).

9. Payments or gifts to respondents.

There are no monetary payments provided or gifts made to respondents associated with the information collection requirements contained in this regulation.

10. Assurance of confidentiality.

Section 109 of the RSIA specifies that certain risk reduction records obtained by the Secretary are exempt from the public disclosure requirements of the Freedom of Information Act (FOIA). This exemption is subject to two exceptions for disclosure (1) necessary to enforce or carry out any Federal law and (2) when a record is comprised of facts otherwise available to the public and FRA determines disclosure would be consistent with the confidentiality needed for RRP. See 49 U.S.C. 20118. Unless an RSIA exception applies, FRA would not disclose such records in response to a FOIA request. See 5 U.S.C. 552(b)(3) and 49 CFR 7.23(c)(3). Therefore, FRA concludes railroad risk reduction records in FRA's possession would be exempted from mandatory disclosure under FOIA unless one of the two exceptions applies.

Background

In Section 109 of the RSIA, Congress directed FRA to conduct a study to determine if it was in the public interest to withhold certain information, including the railroad's assessment of its safety risks and its statement of mitigation measures, from discovery and admission into evidence in proceedings for damages involving personal injury and wrongful death. See 49 U.S.C. 20119. FRA contracted with an outside organization to conduct this study, and the study concluded that it was in the public interest to withhold this type of information from these types of proceedings. See Study of Existing Legal Protections for Safety-Related Information and Analysis of Considerations for and Against Protecting Railroad Safety Risk Reduction Program Information, FRA, docket no. FRA-2011-0025-0031, Oct. 21, 2011. Furthermore, Congress authorized FRA, by delegation from the Secretary, to prescribe a rule, subject to notice and comment, to address the results of the study. See 49 U.S.C. 20119(b).

⁶ See 80 FR 10984 (2015).

11. Justification for any questions of a sensitive nature.

There are no questions or information of a sensitive nature, or data that would normally be considered private matters contained in this rule.

12. Estimate of burden hours for information collected.

CFR Section/Subject ⁷	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours	Total Annual Dollar Cost Equivalent ⁸
271.13 – Determination of inadequate safety performance (ISP) – Notice to employees of possible ISP identification by FRA	15 railroads	5 notices	3 hours	15 hours	\$1,018
-- Employee confidential comments to FRA regarding RR possible ISP identification	125 employees	5 comments	30 minutes	2.5 hours	\$170
-- RR Documentation to FRA refuting possible ISP identification	15 railroads	5 documents	8 hours	40 hours	\$2,715
271.101(a) – Risk Reduction Programs (RRPs) – Class I railroads	This burden is covered under sections 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103 – RRP hazard management program (HMPs)	7 railroads	2,333 HMPs analyses	3,360 hours	7,839 hours	\$532,111
271.105 – RRP safety performance evaluation (SPEs): survey/evaluation	7 railroads	2,333 SPEs evaluation	147 hours	343 hours	\$23,283
	7 railroads	2,333 assessments	1,060 hours	2,473 hours	\$167,867
271.107 – Safety Outreach – communications/reports	7 railroads	44,333 communications	1 hour	44,333 hours	\$2,379,352
	7 railroads	28 communications	30 minutes	14 hours	\$950
271.109 – Technology analysis and technology implementation plans	7 railroads	2,333 reports	10 hours	23.3 hours	\$1,582
271.111 – RRP implementation training – programs/tr. employees/rcds.	7 railroads	1,400 records of trained employees	3 minutes	70 hours	\$4,752

⁷ Information collection requests relating to petitions and audits will occur outside of this information collection request timeframe. Also, because section 271.113 requires a railroad to involve directly affected employees in establishing or implementing an RRP (e.g., when identifying hazards, conducting internal assessments, or otherwise performing activities required under part 271), the burdens associated with section 271.113 are covered under the other burdens associated with subparts B and E of part 271.

⁸ The dollar equivalent cost is derived from the Surface Transportation Board’s Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

271.101(c) -- Communication by Class I RRs that host passenger train service with RRs subject to FRA System Safety Program Requirements	7 railroads	40 communications/consultations	2 hours	80 hours	\$5,430
-- (d) -- Identification/ communication w/entities performing/utilizing significant safety-related services – Class I RRs	7 railroads	212 communications/consultations	1 hour	212 hours	\$14,391
-- RR Identification/ further communication with contractors performing/utilizing significant safety related services – Class I RRs	7 railroads	1,488 communications/consultations	1 hour	1,488 hours	\$101,005
271.101(a) – Risk Reduction Programs (RRPs) – ISP railroads	This burden is covered under sections 271.103, 271.105, 271.107, 271.109, and 271.111.				
271.103 – RRP hazard management program (HMPs)	15 railroads	5 HMPs	240 hours	1,200 hours	\$81,456
271.105 – RRP safety performance evaluation (SPEs): survey/evaluation	15 railroads	5 surveys	14.73 hours	74 hours	\$5,023
	15 railroads	5 SPEs	51.1 hours	256 hours	\$17,377
271.107 – Safety Outreach – communications/reports	15 railroads	5 communications	1 hour	5 hours	\$268
	15 railroads	5 reports	3 hours	15 hours	\$1,018
271.109 – Technology analysis and technology implementation plans	15 railroads	5 plans	5 hours	25 hours	\$1,697
271.111 – RRP implementation training – programs/tr. employees/rcds.	15 railroads	50 records of trained employees	3 minutes	2.5 hours	\$170
271.101(d) – ISPs -- Identification/ communication w/entities performing significant safety-related services	15 railroads	5 communications/consultations	2 hours	10 hours	\$679
271.201/203 – Written risk reduction program plans (RRP plans) – Adoption and implementation of RRP plans – Class I	7 railroads	2,333 RRP plans	461 hours	1,075 hours	\$72,971
-- Written RRP plans – ISP RRs	15 railroads	5 RRP plans	96 hours	480 hours	\$32,582
271.207 – RR Good faith consultation w/directly affected employees - Class I RRs	7 railroads	2,333 consults	8 hours	19 hours	\$1,290
-- RR Notification to non-represented employees of consultation meeting – Class I RRs	7 railroads	1 notification	3 hours	3 hours	\$204
-- RR Good faith consultations/notices: ISP RRs	15 railroads	5 consults/notices	20 hours	100 hours	\$6,788

(d) – Submission of detailed consultation statement along w/RRP plan by Class I RRs	7 railroads	2,333 consultation statements	200 hours	467 hours	\$31,700
– Submission of detailed consultation statement along w/RRP plan by ISPs	15 railroads	5 consultation statements	40 hours	200 hours	\$13,576
-- Copy of RRP plan/consultation statement to service list individuals – Class I RRs + ISP RRs	22 railroads	380 plan copies	2 minutes	12.7 hours	\$862
	22 railroads	380 consultation statements	2 minutes	12.7 hours	\$862
-- Statements from directly affected employees – Class I RRs	10 labor organizations	3 statements	6 hours	18 hours	\$1,222
-- Statements from directly affected employees – ISP RRs	15 railroads	12 statements	1 hour	12 hours	\$815
271.301 – Filing of RRP plan w/FRA - Class I RRs	7 railroads	2,333 filed plans	2 hours	5 hours	\$339
-- Filing of RRP plan w/FRA – ISP RRs	15 railroads	5 filed plans	2 hours	10 hours	\$679
-- Class I RR corrected RRP plan	7 railroads	1 RRP plan	2 hours	2 hours	\$136
-- FRA requested Class I RR consultation with directly affected employees regarding substantive corrections/changes to RRP plan	7 railroads	1 consult/statement	3 hours	3 hours	\$204
-- ISP RR corrected RRP plan	15 railroads	1 RRP plan	2 hours	2 hours	\$136
-- FRA requested ISP RR further consultation with directly affected employees regarding substantive amendment to RRP plan	15 railroads	1 consult/statement	1 hour	1 hour	\$68
271.303 – Amendments consultation w/directly affected employees on substantive amendments to RRP plan – Class I RRs and ISP RRs	22 railroads (Class I + ISP)	2 consults	1 hour	2 hours	\$136
-- Employee statement to FRA on RR RRP plan substantive amendment where agreement could not be reached	22 railroads (Class I + ISP)	2 employee statements	30 minutes	1 hour	\$68
-- Filed amended RRP plan - Class I RRs	7 railroads	1 plan	6 hours	6 hours	\$407
-- Filed amended RRP plan - ISP RRs	15 railroads	1 plan	1 hour	1 hour	\$68
271.307 – Retention of RRP plans – Copies of RRP Plan/Amendments by RR at system/division headquarters -- Class I and ISP RRs	22 railroads (Class I + ISP)	22 plan copies	10 minutes	4 hours	\$272
217.401/403 – Annual internal assessment/improvement plans – Class I RRs	7 railroads	2,333 assessments/ improvement plans	120 hours	280 hours	\$19,006
-- Annual internal assessment/improvement plans – ISP RRs	15 railroads	5 assessments/ improvement plans	32 hours	160 hours	\$10,861

271.405 – Internal assessment report copy to FRA – Class I RRs	7 railroads	2,333 reports	8 hours	19 hours	\$1,290
-- Internal assessment report copy to FRA – ISP RRs	15 railroads	5 reports	2 hours	10 hours	\$679
Appendix B – Request by FRA for additional information/documents to determine whether railroad has met good faith and best efforts consultation requirements of section 271.207	7 railroads	3 documents	40 hours	120 hours	\$8,146
-- Further railroad consultation w/employees after determination by FRA that railroad did not use good faith/best efforts	7 railroads	1 consult	8 hours	8 hours	\$543
-- Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date – Class I RRs	7 railroads	7 meetings/consults	2 hours	14 hours	\$950
-- Meeting to discuss administrative details of consultation process during the time between initial meeting and applicability date – ISP RRs	15 railroads	7 meetings/consults	1 hour	7 hours	\$475
-- Notification to non-represented employees of good faith consultation process –ISP RRs	15 railroads	600 notices	15 minutes	150 hours	\$10,182
-- Draft RRP plan proposal to employees – ISP RRs	15 railroads	20 proposals/copies	2 hours	40 hours	\$2,715
-- Employee comments on RRP plan draft proposal	2,000 employees	60 comments	1 hour	60 hours	\$4,073
Totals	22 railroads	49,148 responses	N/A	61,825 hours	\$3,566,619

13. Estimate of total annual costs to respondents.

There are no additional costs to respondents outside of the economic impact cost covered under the regulatory impact analysis (RIA) accompanying this final rule.

14. Estimate of Cost to Federal Government.

This section contains government administrative costs that come from the final rule. Following the Office of Information and Regulatory Affairs recommendation for agencies to include government administrative costs, where relevant, FRA identified government administrative costs related to subparts A, D, E, and F. The hourly cost of FRA employee time used in this analysis is \$57.97.⁹

⁹ GS-13 step 1, in the Washington DC, hourly salary was \$42.66 in 2011 and \$44.15 in 2016. See Salary Table 2011-DCB, Effective January 2011. Salary Table 2016-DCB, Effective January 2016. <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/> (Accessed March 15, 2018.)

Government Administrative Costs for Subpart A

Under section 271.13, Determination of Inadequate Safety Performance, the final rule imposes a burden on the Federal government because FRA will incur a cost as part of the process of determining which railroads are demonstrating inadequate safety performance. In year one, FRA must write a program to screen FRA data for inadequate safety performance. This analysis estimates writing the program will take 16 hours of employee time for a total cost of \$928. FRA will also need to run that program annually, estimated to take 30 minutes or 0.5 employee hours per year. Beginning in year two, the annual cost to run the program is \$29. Each year, prior to running the program, FRA will prepare data for analysis, which will take about two hours. After generating the results from running the program, FRA will perform a qualitative assessment of railroads screened as possibly demonstrating inadequate safety performance. In the second year, FRA expects to conduct a qualitative assessment of 20 railroads. Therefore, year two cost for performing qualitative assessment of railroads is \$18,550. In the third year, and each subsequent year, the annual cost for performing qualitative assessment of railroads is \$9,275. The average annual cost to FRA related to subpart A is **\$9,604**.

Government Administrative Costs for Subpart D

The final rule will cause the Federal government to incur additional administrative costs to perform some functions necessary to implement the final rule and ensure the RRP are functioning appropriately. These non-industry costs include costs for the review and approval of the RRP plans and amendments required by this subpart.

The one-time government cost for the approval process per Class I railroad is \$74,662. In each subsequent year, FRA estimates that collectively Class I railroads will submit just one substantive amendment for a cost of \$1,391 per year. The average annual cost to FRA related to subpart D is **\$25,352**.

Government Administrative Costs for Subpart E

The government cost relating to this subpart will occur outside of this information collection request timeframe. Beginning in year five, there will be a cost to the government.

Government Administrative Costs for Subpart F

The government cost relating to this subpart will occur outside of this information collection request timeframe. Beginning in year five, there will be a cost to the government.

Total Average Annual Costs to the Government = \$9,604 + \$25,352 = \$34,956

15. Explanation of program changes and adjustments.

This is a new collection of information solely associated with FRA's final rule that adds

new Part 271. The total burden **requested** for this submission amounts to **61,825 hours** and the total number of **responses requested** is **49,148**. By definition, the entire requested burden is a **program change**.

16. Publication of results of data collection.

There are no plans for publication of this submission. The information to be collected will be used by specialists of the Office of Safety, as well as field personnel, to enforce the regulation. The information collected may be incorporated into the FRA database, where relevant and appropriate, and provided to the general public and other interested parties who wish to access the information on the FRA Website.

17. Approval for not displaying the expiration date for OMB approval.

Once OMB approval is received, FRA will publish the approval number for these information collection requirements in a Notice in the Federal Register.

18. Exception to certification statement.

No exceptions are taken at this time regarding this information collection.