

FEDERAL RAILROAD ADMINISTRATION
Fatigue Risk Management Programs for Certain Passengers and
Freight Railroads
(49 CFR 270 and 271)
SUPPORTING JUSTIFICATION
RIN 2130-AC54; OMB No. 2130-0633

Summary

- This is a new collection of information solely associated with the Federal Railroad Administration's (FRA) Final rule titled Fatigue Risk Management Programs for Certain Passengers and Freight Railroads (49 CFR Parts 270 and 271), which is statutorily mandated by the Rail Safety Improvement Act of 2008. See 87 FR 35660. FRA has received comments in response to the Notice of Proposed Rulemaking (NPRM) issued on December 22, 2020.
- The total number of burden hours requested for this submission is 1,440 hours
- The total number of responses requested for this submission is 55.
- By definition, this entire submission is a program change.
- The answer to question number 12 itemizes information collection requirements

1. Circumstances that make collection of the information necessary.

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 to develop, submit to the Secretary for review and approval, and implement a Fatigue Risk Management Program (FRMP). Implementation of an FRMP will be supported by a written fatigue risk management program plan (FRMP plan) describing the railroad's processes and procedures for implementing the requirements for an FRMP. An FRMP plan will also be required to contain certain elements that support the development of an FRMP, such as a policy statement, a statement of the railroad's FRMP goals, a description of the railroad's system, and an FRMP implementation plan. A railroad will be required to conduct an annual internal assessment of its FRMP, and a railroad's FRMP processes and procedures will be externally audited by FRA.¹

Generally, these railroads will be required to assess and manage risk and develop proactive fatigue risk mitigation strategies to promote safety improvement. This rule will also implement other specific fatigue safety risk reduction program requirements, such as the requirement that a railroad consult with, employ good faith, and use its best efforts to

¹ 49 U.S.C. 20156.

reach agreement with all its directly affected employees (including any non-profit employee labor organization representing a class or craft of directly affected employees) on the contents of the railroad's FRMP plan.²

As part of their FRMP, compliant railroads are required, at least once every 2 years, to update their plans to address any new fatigue safety risks and ensure that their FRMP is designed to reduce the likelihood of accidents, incidents, injuries, and fatalities caused by fatigue.³

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

The information collected under this 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. FRA will externally audit each railroad's FRMP processes and procedures to ensure that they comply with the requirements of this rulemaking. Class I railroads and railroad carriers that provide intercity rail passenger or commuter rail passenger transportation (passenger railroads) and railroads determined by FRA to have inadequate safety performance (ISP) will be required to develop and implement an FRMP.

Class I railroads, passenger railroads, and ISP railroads will use the required FRMP to address hazards that could result in damage or loss to any system related to the railroad's operations, not merely safety systems. Each FRMP must be an ongoing program that supports continuous safety improvement.

Class I railroads, passenger railroads, and ISP railroads that are required to establish an FRMP 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 then will be used by railroads to educate the directly affected employees on risk reduction and how it may affect them. For railroads and directly affected employees who cannot reach consensus on the content of the FRMP Plan, these employees may file a statement with the Secretary (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 FRMP Plan. Based on the nature and content of the directly affected employees' statements, FRA may require modifications to the railroad's FRMP Plan.

² 49 U.S.C. 20156(g)(1).

³ 49 U.S.C. 20156(f)(1) and 20156(f)(2).

Section 270.201(c)(2) or 271.303(c) addresses the process a railroad must follow whenever it amends its FRA-approved FRMP Plan (regardless of whether the amendments are substantive or non-substantive). Along with the amended FRMP plan, the railroad must also file a cover letter outlining the change(s) to the original, approved FRMP plan. FRA will review the amended FRMP Plan within 45 days of receipt to determine whether it is deficient in any of the specific points the railroad is amending. If it is, railroads will have 60 days to either submit a corrected copy of the amendment that addresses all deficiencies noted by FRA or a notice that it is retracting the amendment. It should be noted that FRA may, for cause stated, reopen consideration of an FRMP Plan or amendment. FRA will use the reopened review to ensure that railroads fully comply with their FRMP Plans/amendments and, in some cases, to scrutinize information that has been made available that was not available when FRA originally approved the plan or amendment. The determination of whether to reopen consideration will be solely within FRA's discretion and made on a case-by-case basis.

In sum, this collection of information is an essential and invaluable tool that can assist 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 and the Paperwork Reduction Act of 1995, all documents required to be submitted to FRA for an FRMP may be submitted electronically pursuant to the procedures provided in section 271.301 or pursuant to section 270.201(e). The electronic option then will make it easier, more convenient, and less expensive for railroads to file their documents 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 formats. Thus, FRA estimates that about 85% of responses will be completed electronically.

4. Efforts to identify duplication.

In addition to the consultation and information protection sections, some overlap will 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 for this rule generally follow those in the RRP and SSP and do not reflect any comments FRA has received in response to the RRP and SSP NPRMs. FRA recognizes that related topics simultaneously can give the appearance of overlapping or duplicative requirements. As these rulemakings progress, FRA 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 this rule. Similar data are not available from any other source.

5. Efforts to minimize the burden on small businesses.

The Regulatory Flexibility Act (RFA) of 1980 allows the Secretary to certify a rule if that rule will not have a significant economic impact on a substantial number of small entities. FRA published an Initial Regulatory Flexibility Assessment (IRFA) to aid the public in commenting on the potential small business impacts of the proposed FRMP NPRM requirements.

This rule requires an ISP railroad to develop and implement an FRMP under an RRP plan that FRA has reviewed and approved. Since railroads have the flexibility to adjust their FRMPs to their specific risks, FRA expects the economic impact on small entities to be proportional to the number of employees, as well as the mitigation strategies implemented.

For the purposes of this analysis, the 704 Class III railroads that operate on the general rail system are considered small entities and could potentially be impacted by this final rule.⁴ The final rule estimates that 50 ISP railroads will be identified over the ten-year period. FRA can identify Class II or Class III railroads as ISP. If all railroads identified as ISP are Class IIIs, only 7 percent of the 704 Class III railroads would be affected by the final rule. Furthermore, FRA estimates Class III (ISP) railroad costs average \$22,000 per railroad, which is minimal at 0.46 percent of Class railroad average revenues.

Consistent with the findings of FRA's IRFA, the determination that the economic impact will not be significant, the FRA Administrator hereby certifies that this rule will not have a significant impact on a substantial number of small entities.

6. Impact of less frequent collection of information.

If the information were not collected or were collected less frequently, railroad safety throughout the United States would be significantly adversely affected. Specifically, if Class I railroads, passenger railroads, and railroads with inadequate safety performance do not develop and implement FRMPs, then, undoubtedly, there will be higher fatigue related railroad incidents and corresponding injuries and fatalities to workers that could have been prevented with an effective FRMP.

Without the required FRMP "good faith" and "best efforts" consultation by Class I, passenger, and ISP railroads with their employees/employee representative organizations,

⁴ FRA defines "small entities" as entities 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 annual revenues as adjusted for inflation. See 68 FR 24891, May 9, 2003. In addition, note both the SSP rule and RRP rule exempt railroads not on the general system. See 49 CFR 270.3(b) and 49 CFR 271.3(b).

railroads will not be able to educate their directly affected employees on risk reduction and how it may affect them. Good faith and best-efforts consultation enable employees to directly and proactively provide their knowledge and insight so that railroads can make their FRMP as effective as possible. This will enhance overall rail safety.

Without the FRMP requirement to conduct annual internal assessments, Class I, passenger, and ISP railroads will not be able to carry out essential audits to determine that their FRMP are properly implemented and effective. A properly executed internal assessment will provide the railroad with detailed knowledge of the status of its program implementation and the degree to which the program is effectively reducing risk.

Finally, FRA external audits of the railroad's FRMP will focus on reviewing the railroad's FRMP process and ensuring that the railroad is following the processes and procedures described in its FRA-approved FRMP plan. This process will be interactive, and 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. The written notification will inform the railroad of any deficiencies within their FRMP plans. Such FRA oversight will serve to remedy any FRMP Plan deficiencies and will also serve to improve rail safety.

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 final rule in the **Federal Register** on June 13, 2022, titled Fatigue Risk Management Programs for Certain Passenger and Freight Railroads. See 87 FR 35660.

FRA received 15 comments on the proposed rule⁵, including comments from organizations representing railroad labor and management, experts in fatigue science, and other individual commenters.

Please refer to the final rule in Section II, for a more detailed discussion of these comments.

9. Payments or gifts to respondents.

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

10. Assurance of confidentiality.

⁵ 85 FR 83484.

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 necessary to enforce or carry out any Federal law, and disclosure when a record is comprised of facts otherwise available to the public and FRA has determined that disclosure will be consistent with the confidentiality needed for FRMP.⁶ FRA, therefore, believes that fatigue risk management records in its possession will generally be exempted from mandatory disclosure under FOIA. Unless one of the two exceptions provided by the RSIA would apply, FRA will withhold disclosing any such records in response to a FOIA request.⁷

Section 109 of the RSIA also authorizes the Secretary to issue a regulation protecting from discovery and admissibility into evidence in litigation certain information generated for the purpose of developing, implementing, or evaluating a railroad FRMP. Currently, this rule will implement Section 109 with respect to FRMP.

FRA anticipates that a final FRMP rule will become effective 60 days after the date of publication. However, by statute, the protection of certain information from discovery, admission into evidence, or use for other purposes in a proceeding for damages will not become applicable until one year after the publication of the final rule.

An FRMP could be successful only if a railroad engaged in a robust assessment of the hazards and associated risks on its system. However, a railroad may be reluctant to reveal such hazards and risks if there is the possibility that such information may be used against it in a court proceeding for damages. 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.⁸ 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.⁹ 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.¹⁰

⁶ 49 U.S.C. 20118.

⁷ 5 U.S.C. 552(b)(3) and 49 CFR 7.13(c)(3).

⁸ 49 U.S.C. 20119.

⁹ 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.

¹⁰ 49 U.S.C. 20119(b).

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.

In the following table, estimates for the respondent universe, annual responses, and average time per responses are based on the experience and expertise of FRA’s Risk Reduction Program Division.

The total annual burden hours, under the fourth column, is calculated by multiplying total annual responses by average time per responses. For example, 12 written plans * 60 hours = 720 hours.

The total cost equivalent, under the sixth column, is calculated by multiplying total annual burden hours by the appropriate employee group hourly wage rate that includes a 75-percent overhead charge. FRA is including the dollar equivalent cost for each of the itemized hours below using the Surface Transportation Board's (STB) Full-Year Wage A&B data series as the basis for each cost calculation. For railroad executives, officials, and staff assistants, the hourly wage rate is \$115 per hour ($\$65.44 * 1.75 = \114.52). For professional and administrative staff, the hourly wage rate is \$76 per hour ($\$43.30 * 1.75 = \75.78).

CFR Section	Respondent Universe	Total Annual Responses (A)	Average Time per Response (B)	Total Annual Burden Hours (C) = A * B	Total Annual Dollar Cost Equivalent (D)=C * wage rates ¹¹	Section analyses and estimates
270.409 – Fatigue Risk Management Program Plan (FRMP Plan) as part of its SSP – Comprehensive FRMP plan	35 passenger railroads	11.67 plans	60 hours	700.20 hours	\$61,198.88	A railroad shall adopt and implement its FRMP through an FRA-approved FRMP plan, developed in consultation with directly affected employees as described under § 270.107. A railroad FRMP plan

¹¹ The dollar equivalent cost is derived from the 2018 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.

meeting all of this section's requirements and under Part 270 subpart C.						<p>must contain the elements described in this section. A railroad must submit the plan to FRA for approval under the criteria of subpart C.</p> <p>It is estimated that it will take approximately 60 hours to develop each written plan.</p> <p><i>Annual wage cost: \$61,198.88 (\$75.78 * 490.14 hours + \$114.52 * 210.02 hours)</i></p>
– (c)(3)(ii) Annual internal FRMP Plan assessments/reports conducted by RRs	35 passenger railroads	11.67 reviews	16 hours	186.72 hours	\$14,872.99	<p>A railroad's procedures for reviewing the FRMP as part of the annual internal assessment of its SSP under § 270.303 and for updating the FRMP plan under the process for amending its SSP plan under § 270.201(c).</p> <p>It is estimated that it will take about 16 hours to conduct each assessment and complete the required report.</p> <p><i>Annual wage cost: \$14,872.99 (\$75.78 * 168.05 hours + \$114.52 * 18.67 hours)</i></p>
– FRMP plans found deficient by FRA and requiring amendment	35 passenger railroads	1.33 amended plans	30 hours	39.90 hours	\$3,178.19	<p>FRA estimates that it will take approximately 30 hours to amend each FRMP plan.</p> <p><i>Annual wage cost: \$3,178.19 (\$75.78 * 35.91 hours + \$114.52 * 3.99 hours)</i></p>
– Consultation requirements – RR consultation with its directly affected employees on FRMP Plan	35 passenger railroads	11.67 consultations (w/labor union reps.)	90 minutes	17.51 hours	\$1,394.74	<p>A railroad shall describe in its FRMP plan how it will implement its FRMP. This description must cover an implementation period not to exceed 36 months, and shall include:</p> <p>(1) A description of the roles and responsibilities of each position or job function with significant responsibility for implementing the FRMP, including those held by employees, contractors who provide significant FRMP-related services, and other entities or persons that provide significant FRMP services.</p>

						<p>(2) A timeline describing when certain milestones that must be met to implement the FRMP fully will be achieved. Implementation milestones shall be specific and measurable;</p> <p>(3) A description of how a railroad may make significant changes to the FRMP plan under the process for amending its SSP plan in § 270.201(c); and (4) The procedures for consultation with directly affected employees on any subsequent substantive amendments to the railroad’s FRMP plan. The requirements of this section do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).</p> <p>FRA estimates that it will take 1.5 hours to complete each written consultation.</p> <p><i>Annual wage cost: \$1,394.74 (\$75.78 * 15.76 hours + \$114.52 * 1.75 hours)</i></p>
271.609 – FRMP Plan as part of its RRP – Comprehensive written FRMP Plan meeting all of this section’s requirements and under Part 271 subpart d.	7 Class I railroads	2.33 plans	90 hours	209.70 hours	\$18,328.20	<p>A railroad shall adopt and implement its FRMP through an FRA-approved FRMP plan, developed in consultation with directly affected employees as described under § 271.207. A railroad FRMP plan must contain the elements described in this section. The railroad must submit the plan to FRA for approval under the criteria of subpart D.</p>
	15 ISP railroads	3.33 plans	50 hours	166.50 hours	\$14,552.43	<p>FRA estimates that it will take approximately 90 hours to develop each written plan by Class 1 railroads.</p> <p><i>Annual wage cost: \$18,328.20 (\$75.78 * 146.79 hours + \$114.52 * 62.91 hours)</i></p> <p>Also, it is estimated that it will take approximately 50 hours to develop each written plan by ISP railroads.</p>

						<i>Annual wage cost: \$14,552.43 (\$75.78 * 116.55 hours + \$114.52 * 49.95 hours)</i>
– (c)(3)(ii) Annual internal FRMP Plan assessments/reports conducted by RRs	7 Class I +	2.33 reviews	22 hours	51.26 hours	\$4,083.06	A railroad’s procedures for reviewing the FRMP as part of the annual assessment of its RRP under § 271.401 and for updating the FRMP plan under the process for amending its RRP plan under § 271.303. FRA estimates that it will take about 22 hours to conduct each assessment and complete the required report.
	15 ISP railroads	1.67 reviews	16 hours	26.72 hours	\$2,128.35	<i>Annual wage cost: \$4,083.06 (\$75.78 * 46.13 hours + \$114.52 * 5.13 hours)</i> Also, it is estimated that it will take approximately 16 hours to conduct each assessment and complete the required report. Annual wage cost: \$2,128.35 (\$75.78 * 24.05 hours + \$114.52 * 2.67 hours)
– Consultation requirements – RR consultation with its directly affected employees on FRMP Plan	7 Class I railroads	2.33 consultations (w/labor union reps.)	90 minutes	3.50 hours	\$278.79	The procedures for consultation with directly affected employees on any subsequent substantive amendments to the railroad’s FRMP plan. FRA estimates that it will take 1.5 hours to complete each written consultation by Class 1 railroads.
	15 ISP railroads	5 consultations (w/labor union reps.)	1 hour	5 hours	\$398.27	<i>Annual wage cost: \$278.79 (\$75.78 * 3.15 hours + \$114.52 * 0.35)</i> Also, it is estimated that it will take approximately one (1) hour to develop each written consultation by ISP railroads. <i>Annual wage cost: \$398.27 (\$75.78 * 4.5 hours +</i>

						<i>\$114.52 * 0.50)</i>
– FRMP plans found deficient by FRA and requiring amendment	7 Class I railroads	0.33 amended plan	40 hours	13.20 hours	\$1,051.43	FRA estimates that it will take approximately 40 hours to amend FRMP plan by Class 1 railroads. <i>Annual wage cost: \$1,051.43 (\$75.78 * 11.88 hours + \$114.52 * 1.32 hours)</i>
	15 ISP railroads	1 amended plan	20 hours	20 hours	\$1,593.08	Also, it is estimated that it will take approximately 20 hours to amend each FRMP plan by ISP railroads. <i>Annual wage cost: \$1,593.08 (\$75.78 * 18 hours + \$114.52 * 2 hours)</i>
Totals	35 railroads	55 responses	N/A	1,440 hours	\$123,058	

13. Estimate of total annual costs to respondents.

There are no additional annual costs to respondents besides the burden hours shown above.

14. Estimate of Cost to Federal Government.

To calculate the Federal Government administrative cost, the Office of Personnel Management wage rates were used. Wages were considered at the burdened wage rate by multiplying the actual wage rate by an overhead cost of 75 percent. The following table shows the estimated average annual cost to the Federal Government to review all the required documents associated with this rule.

Annual Cost	Total wages
Year 1	0
Year 2	0
Year 3	\$35,935
Annual Average	\$11,978

15. Explanation of program changes and adjustments.

This is a new collection of information associated with FRA’s rule that adds new sections under Part 270 and Part 271. The total burden requested for this submission amounts to 1,440 hours, and the total number of responses requested is 55. By definition, the entire requested burden is a program change.

16. Publication of results of data collection.

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.

FRA is not seeking approval to not display the expiration date.

18. Exception to certification statement.

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