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## **Title 49 - Transportation**

### **Subtitle B - Other Regulations Relating to Transportation**

#### **Chapter II - Federal Railroad Administration, Department of Transportation**

##### **Part 270** System Safety Program

###### **Subpart A** General

**§ 270.1** Purpose and scope.

**§ 270.3** Application.

**§ 270.5** Definitions.

**§ 270.7** Penalties and responsibility for compliance.

###### **Subpart B** System Safety Program Requirements

**§ 270.101** System safety program; general.

**§ 270.103** System safety program plan.

**§ 270.105** Discovery and admission as evidence of certain information.

**§ 270.107** Consultation requirements.

###### **Subpart C** Review, Approval, and Retention of System Safety Program Plans

**§ 270.201** Filing and approval.

**§ 270.203** Retention of system safety program plan.

###### **Subpart D** System Safety Program Internal Assessments and External Auditing

**§ 270.301** General.

**§ 270.303** Internal system safety program assessment.

**§ 270.305** External safety audit.

###### **Subpart E** Fatigue Risk Management Programs

**§ 270.401** Definitions.

**§ 270.403** Purpose and scope of a Fatigue Risk Management Program (FRMP).

**§ 270.405** General requirements; procedure.

**§ 270.407** Requirements for an FRMP.

**§ 270.409** Requirements for an FRMP plan.

##### *Appendix A to Part 270 [Reserved]*

##### **Appendix B to Part 270**

Federal Railroad Administration Guidance on the System Safety  
Program Consultation Process

##### **Appendix C to Part 270**

Procedures for Submission of SSP Plans and Statements From  
Directly Affected Employees

## PART 270 - SYSTEM SAFETY PROGRAM

**Authority:** 49 U.S.C. 20103, 20106-20107, 20118-20119, 20156, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

**Source:** 81 FR 53896, Aug. 12, 2016, unless otherwise noted.

### Subpart A - General

#### § 270.1 Purpose and scope.

- (a) The purpose of this part is to improve railroad safety through structured, proactive processes and procedures developed and implemented by passenger rail operations. This part requires certain passenger rail operations to establish a system safety program that systematically evaluates railroad safety hazards and the resulting risks on their systems and manages those risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities.
- (b) This part prescribes minimum Federal safety standards for the preparation, adoption, and implementation of railroad system safety programs. This part does not restrict passenger rail operations from adopting and enforcing additional or more stringent requirements not inconsistent with this part.
- (c) This part prescribes the protection of information generated solely for the purpose of planning, implementing, or evaluating a system safety program under this part.

*[81 FR 53896, Aug. 12, 2016, as amended at 85 FR 12843, Mar. 4, 2020]*

#### § 270.3 Application.

- (a) Except as provided in paragraph (b) of this section, this part applies to all -
  - (1) Passenger rail operations that operate intercity or commuter passenger train service on the general railroad system of transportation; and
  - (2) Passenger rail operations that operate commuter or other short-haul rail passenger train service in a metropolitan or suburban area (as described by 49 U.S.C. 20102(2)), including public authorities operating passenger train service.
- (b) This part does not apply to:
  - (1) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation;
  - (2) Tourist, scenic, historic, or excursion operations, whether on or off the general railroad system of transportation;
  - (3) Operation of private cars, including business/office cars and circus trains; or
  - (4) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 270.5).

*[81 FR 53896, Aug. 12, 2016, as amended at 85 FR 12843, Mar. 4, 2020]*

## § 270.5 Definitions.

As used in this part -

**Administrator** means the Federal Railroad Administrator or his or her delegate.

**Confidential Close Call Reporting System (C<sup>3</sup>RS)** means an FRA-sponsored voluntary program designed to improve the safety of railroad operations by allowing railroad employees to confidentially report currently unreported or underreported unsafe events.

**Configuration management** means a process that ensures that the configurations of all property, equipment, and system design elements are accurately documented.

**FRA** means the Federal Railroad Administration.

**Fully implemented** means that all elements of a system safety program as described in the SSP plan are established and applied to the safety management of the passenger rail operation.

**Hazard** means any real or potential condition (as identified in a risk-based hazard analysis) that can cause injury, illness, or death; damage to or loss of a system, equipment, or property; or damage to the environment.

**Passenger** means a person, excluding an on-duty employee, who is on board, boarding, or alighting from a rail vehicle for the purpose of travel.

**Passenger rail operation** means an intercity, commuter, or other short-haul passenger rail service.

**Person** means an entity of any type covered under 49 U.S.C. 21301, including, but not limited to, the following: A railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor or subcontractor providing goods or services to a railroad; any employee of such owner, manufacturer, lessor, lessee, or independent contractor or subcontractor.

**Plant railroad** means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, is not considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

**Positive train control system** means a system designed to prevent train-to-train collisions, overspeed derailments, incursions into established work zone limits, and the movement of a train through a switch left in the wrong position, as described in subpart I of part 236 of this chapter.

**Rail vehicle** means railroad rolling stock, including, but not limited to, passenger and maintenance vehicles.

**Railroad** means -

- (1) Any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including -

- (i) Commuter or other short-haul rail passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and
  - (ii) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads, but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation; and
- (2) A person or organization that provides railroad transportation, whether directly or by contracting out operation of the railroad to another person.

**Risk** means the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.

**Risk-based hazard management** means the processes (including documentation) used to identify and analyze hazards, assess and rank corresponding risks, and eliminate or mitigate the resulting risks.

**Safety culture** means the shared values, actions and behaviors that demonstrate commitment to safety over competing goals and demands.

**SSP plan** means system safety program plan.

**System safety** means the application of management, economic, and engineering principles and techniques to optimize all aspects of safety, within the constraints of operational effectiveness, time, and cost, throughout all phases of a system life cycle.

**System safety program** means a comprehensive process for the application of management and engineering principles and techniques to optimize all aspects of safety.

**System safety program plan** means a document developed by the passenger rail operation that implements and supports the system safety program.

**Tourist, scenic, historic, or excursion operations** means railroad operations that carry passengers, often using antiquated equipment, with the conveyance of the passengers to a particular destination not being the principal purpose. Train movements of new passenger equipment for demonstration purposes are not tourist, scenic, historic, or excursion operations.

[81 FR 53896, Aug. 12, 2016, as amended at 85 FR 12843, Mar. 4, 2020]

## § 270.7 Penalties and responsibility for compliance.

- (a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed. See 49 CFR part 209, appendix A. Each day a violation continues shall constitute a separate offense. Any person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311. FRA's website at [www.fra.dot.gov](http://www.fra.dot.gov) contains a schedule of civil penalty amounts used in connection with this part.

- (b) Although the requirements of this part are stated in terms of the duty of a railroad or passenger rail operation, when any person, including a contractor or subcontractor to a railroad, performs any function covered by this part, that person (whether or not a railroad or passenger rail operation) shall perform that function in accordance with this part.
- (c)
  - (1) All persons providing intercity rail passenger or commuter (or other short-haul) rail passenger service share responsibility for ensuring compliance with this part. Nothing in this paragraph (c), however, shall restrict the ability to provide for an appropriate designation of responsibility for compliance with this part.
  - (2)
    - (i) Any passenger rail operation subject to this part may designate a person as responsible for compliance with this part by including a designation of responsibility in the SSP plan. This designation must be included in the SSP plan's statement describing the passenger rail operation's management and organizational structure and include the information specified by § 270.103(e)(6).
    - (ii) A passenger rail operation subject to this part may notify FRA of a designation of responsibility before submitting an SSP plan by first submitting a designation of responsibility notice to the Associate Administrator for Railroad Safety and Chief Safety Officer. The notice must include all information required under § 270.103(e)(6), and this information must also be included in the SSP plan.

[85 FR 12843, Mar. 4, 2020]

## Subpart B - System Safety Program Requirements

### § 270.101 System safety program; general.

- (a) Each passenger rail operation subject to this part shall establish and fully implement a system safety program that continually and systematically evaluates railroad safety hazards on its system and manages the resulting risks to reduce the number and rates of railroad accidents, incidents, injuries, and fatalities. A system safety program shall include a risk-based hazard management program and risk-based hazard analysis designed to proactively identify hazards and mitigate or eliminate the resulting risks. The system safety program shall be fully implemented and supported by a written SSP plan described in § 270.103.
- (b) A system safety program shall be designed so that it promotes and supports a positive railroad safety culture.

[85 FR 12844, Mar. 4, 2020]

### § 270.103 System safety program plan.

- (a) **General.**
  - (1) Each railroad subject to this part shall adopt and fully implement a system safety program through a written SSP plan that, at a minimum, contains the elements in this section and in subpart E of this part. This SSP plan shall be approved by FRA under the process specified in § 270.201.

- (2) Each passenger rail operation subject to this part shall communicate with each railroad that hosts passenger train service for that passenger rail operation and coordinate the portions of the SSP plan applicable to the railroad hosting the passenger train service.
- (b) **System safety program policy statement.** Each SSP plan shall contain a policy statement that endorses the passenger rail operation's system safety program. This policy statement shall:
- (1) Define the passenger rail operation's authority for the establishment and implementation of the system safety program;
  - (2) Describe the safety philosophy and safety culture of the passenger rail operation; and
  - (3) Be signed by the chief official of the passenger rail operation.
- (c) **System safety program goals.** Each SSP plan shall contain a statement defining the goals for the passenger rail operation's system safety program. This statement shall describe clear strategies on how the goals will be achieved and what management's responsibilities are to achieve them. At a minimum, the goals shall be:
- (1) Long-term;
  - (2) Meaningful;
  - (3) Measurable; and
  - (4) Focused on the identification of hazards and the mitigation or elimination of the resulting risks.
- (d) **Rail system description.**
- (1) Each SSP plan shall include a statement describing the rail system. The description shall include: The rail operations, including any host operations; the physical characteristics of the rail system; the scope of rail service; the rail system's maintenance activities; and any other pertinent aspects of the rail system.
  - (2) Each SSP plan shall identify the persons that enter into a contractual relationship with the passenger rail operation to either perform significant safety-related services on the passenger rail operation's behalf or to utilize significant safety-related services provided by the passenger rail operation for purposes related to railroad operations.
  - (3) Each SSP plan shall describe the relationships and responsibilities between the passenger rail operation and: Host railroads, contractor operators, shared track/corridor operators, and persons providing or utilizing significant safety-related services as identified pursuant to paragraph (d)(2) of this section.
- (e) **Management and organizational structure.** Each SSP plan shall contain a statement that describes the management and organizational structure of the passenger rail operation. This statement shall include the following:
- (1) A chart or other visual representation of the organizational structure of the passenger rail operation;
  - (2) A description of the passenger rail operation's management responsibilities within the system safety program;
  - (3) A description of how safety responsibilities are distributed within the rail organization;

- (4) Clear identification of the lines of authority used by the passenger rail operation to manage safety issues;
- (5) A description of the roles and responsibilities in the passenger rail operation's system safety program for each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified pursuant to (d)(2) of this section. As part of this description, the SSP plan shall describe how each host railroad, contractor operator, shared track/corridor operator, and any persons utilizing or providing significant safety-related services as identified pursuant to paragraph (d)(2) of this section supports and participates in the passenger rail operation's system safety program, as appropriate; and
- (6) If a passenger rail operation subject to this part designates a person as responsible for compliance with this part under § 270.7(c)(2), the following information must be included in the passenger rail operation's SSP plan and any notice of designation submitted under § 270.7(c)(2):
  - (i) The name and contact information of the designator;
  - (ii) The name and contact information of the designated entity and a statement signed by an authorized representative of the designated entity acknowledging responsibility for compliance with this part;
  - (iii) A statement affirming that a copy of the designation has been provided to the primary point of contact for each non-profit employee labor organization representing directly affected employees for consultation purposes under § 270.107(a)(2); and
  - (iv) A description of how directly affected employees not represented by a non-profit employee labor organization were notified of the designation for consultation purposes under § 270.107(a).
- (f) **System safety program implementation process.**
  - (1) Each SSP plan shall contain a statement that describes the process the passenger rail operation will use to implement its system safety program. As part of the implementation process, the SSP plan shall describe:
    - (i) Roles and responsibilities of each position that has significant responsibility for implementing the system safety program, including those held by employees and other persons utilizing or providing significant safety-related services as identified pursuant to (d)(2) of this section; and
    - (ii) Milestones necessary to be reached to fully implement the program.
  - (2) A system safety program shall be fully implemented within 36 months of FRA's approval of the SSP plan pursuant to subpart C of this part.
- (g) **Maintenance, repair, and inspection program.**
  - (1) Each SSP plan shall identify and describe the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting railroad safety. Examples of infrastructure and equipment that directly affect railroad safety include: Fixed facilities and equipment, rolling stock, signal and train control systems, track and right-of-way, passenger train/station platform interface (gaps), and traction power distribution systems.

- (2) Each description of the processes and procedures used for maintenance and repair of infrastructure and equipment directly affecting safety shall include the processes and procedures used to conduct testing and inspections of the infrastructure and equipment.
  - (3) If a manual or manuals comply with all applicable Federal regulations and describe the processes and procedures that satisfy this section, the SSP plan may reference those manuals. FRA approval of an SSP plan that contains or references such manuals is not approval of the manuals themselves; each manual must independently comply with applicable regulations and is subject to a civil penalty if not in compliance with applicable regulations.
  - (4) The identification and description required by this section of the processes and procedures used for maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety is not intended to address and should not include procedures to address employee working conditions that arise in the course of conducting such maintenance, repair, and inspection of infrastructure and equipment directly affecting railroad safety as set forth in the plan. FRA does not intend to approve any specific portion of an SSP plan that relates exclusively to employee working conditions.
- (h) **Rules compliance and procedures review.** Each SSP plan shall contain a statement describing the processes and procedures used by the passenger rail operation to develop, maintain, and comply with applicable rules and procedures directly affecting railroad safety and to comply with the applicable railroad safety laws and regulations found in this chapter. The statement shall identify:
- (1) The operating and safety rules and maintenance procedures that are subject to review under this chapter;
  - (2) Techniques used to assess the compliance of the passenger rail operation's employees with applicable operating and safety rules and maintenance procedures, and applicable railroad safety laws and regulations; and
  - (3) Techniques used to assess the effectiveness of the passenger rail operation's supervision relating to the compliance with the applicable operating and safety rules and maintenance procedures, and applicable railroad safety laws and regulations.
- (i) **System safety program employee/contractor training.**
- (1) Each employee who is responsible for implementing and supporting the system safety program, and any persons utilizing or providing significant safety-related services will be trained on the passenger rail operation's system safety program.
  - (2) Each passenger rail operation shall establish and describe in its SSP plan a system safety program training plan. A system safety program training plan shall set forth the procedures by which employees that are responsible for implementing and supporting the system safety program, and any persons utilizing or providing significant safety-related services, will be trained on the system safety program. A system safety program training plan shall help ensure that all personnel who are responsible for implementing and supporting the system safety program understand the goals of the program, are familiar with the elements of the program, and have the requisite knowledge and skills to fulfill their responsibilities under the program.
  - (3) For each position identified pursuant to paragraph (f)(1)(i) of this section, the training plan shall describe the frequency and content of the system safety program training that the position receives.

- (4) If a position is not identified under paragraph (f)(1)(i) of this section as having significant responsibility to implement the system safety program but the position is safety-related or has a significant impact on safety, personnel in those positions shall receive training in basic system safety concepts and the system safety implications of their position.
- (5) Training under this subpart may include, but is not limited to, classroom, computer-based, or correspondence training.
- (6) The passenger rail operation shall keep a record of all training conducted under this part and update that record as necessary. The system safety program training plan shall set forth the process used to maintain and update the necessary training records required by this part.
- (7) The system safety program training plan shall set forth the process used by the passenger rail operation to ensure that it is complying with the training requirements set forth in the training plan.
- (j) **Emergency management.** Each SSP plan shall contain a statement that describes the processes used to manage emergencies that may arise within the passenger rail operation's system including, but not limited to, the processes to comply with applicable emergency equipment standards in part 238 of this chapter and the passenger train emergency preparedness requirements in part 239 of this chapter.
- (k) **Workplace safety.** Each SSP plan shall contain a statement that describes the programs established to protect the safety of the passenger rail operation's employees and contractors. The statement shall include a description of:
  - (1) The processes that help ensure the safety of employees and contractors while working on or in close proximity to railroad property as described in paragraph (d) of this section;
  - (2) The processes that help ensure that employees and contractors understand the requirements established by the passenger rail operation pursuant to paragraph (f)(1) of this section;
  - (3) Any fitness-for-duty programs or any medical monitoring programs; and
  - (4) The standards for the control of alcohol and drug use in part 219 of this chapter.
- (l) **Public safety outreach program.** Each passenger rail operation shall establish and set forth a statement in its SSP plan that describes its public safety outreach program to provide safety information to railroad passengers and the general public. Each passenger rail operation's safety outreach program shall provide a means for railroad passengers and the general public to report any observed hazards.
- (m) **Accident/incident reporting and investigation.** Each SSP plan shall include a statement that describes the processes that the passenger rail operation uses to receive notification of accidents/incidents, investigate and report those accidents/incidents, and develop, implement, and track any corrective actions found necessary to address an investigation's finding(s).
- (n) **Safety data acquisition.** Each passenger rail operation shall establish and set forth a statement in its SSP plan that describes the processes it uses to collect, maintain, analyze, and distribute safety data in support of the system safety program.
- (o) **Contract procurement requirements.** Each SSP plan shall set forth a statement that describes the process(es) used to help ensure that safety concerns and hazards are adequately addressed during the safety-related contract procurement process.

(p) **Risk-based hazard management program.** Each passenger rail operation shall establish a risk-based hazard management program as part of the system safety program. The risk-based hazard management program shall be fully described in the SSP plan.

(1) The risk-based hazard management program shall establish:

- (i) The processes or procedures used in the risk-based hazard analysis to identify hazards on the rail system;
- (ii) The processes or procedures used in the risk-based hazard analysis to analyze identified hazards and support the risk-based hazard management program;
- (iii) The methods used in the risk-based hazard analysis to determine the severity and frequency of hazards and to determine the corresponding risk;
- (iv) The methods used in the risk-based hazard analysis to identify actions that mitigate or eliminate hazards and corresponding risks;
- (v) The process for setting goals for the risk-based hazard management program and how performance against the goals will be reported;
- (vi) The process to make decisions that affect the safety of the rail system relative to the risk-based hazard management program;
- (vii) The methods used in the risk-based hazard management program to support continuous safety improvement throughout the life of the rail system; and
- (viii) The methods used to maintain records of identified hazards and risks and the mitigation or elimination of the identified hazards and risks throughout the life of the rail system.

(2) The SSP plan's description of the risk-based hazard management program shall include:

- (i) The position title of the individual(s) responsible for administering the risk-based hazard management program;
- (ii) The identities of stakeholders who will participate in the risk-based hazard management program; and
- (iii) The position title of the participants and structure of any hazard management teams or safety committees that may be established to support the risk-based hazard management program.

(q) **Risk-based hazard analysis.**

(1) Once FRA approves a passenger rail operation's SSP plan pursuant to § 270.201(b), the risk-based hazard analysis methodology identified in paragraphs (p)(1)(i) through (iii) of this section shall be applied to identify and analyze hazards on the rail system and to determine the resulting risks. At a minimum, the aspects of the rail system that shall be analyzed include: Operating rules and practices, infrastructure, equipment, employee levels and schedules, management structure, employee training, and other aspects that have an impact on railroad safety not covered by railroad safety regulations or other Federal regulations.

(2) A risk-based hazard analysis shall identify specific actions that shall be implemented using the methods described in paragraph (p)(1)(iv) of this section that will mitigate or eliminate the hazards and resulting risks identified by paragraph (q)(1) of this section.

(3) A passenger rail operation shall also conduct a risk-based hazard analysis pursuant to paragraphs (q)(1) and (2) of this section when there are significant operational changes, system extensions, system modifications, or other circumstances that have a direct impact on railroad safety.

(r) ***Technology analysis and implementation plan.***

(1) A passenger rail operation shall develop, and periodically update as necessary, a technology analysis and implementation plan as described by this paragraph. The passenger rail operation shall include this technology analysis and implementation plan in its SSP plan.

(2) A passenger rail operation's technology analysis and implementation plan shall describe the process used to:

(i) Identify and analyze current, new, or novel technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis pursuant to paragraph (q)(1) of this section; and

(ii) Analyze the safety impact, feasibility, and costs and benefits of implementing the technologies identified by the processes under paragraph (r)(2)(i) of this section that will mitigate or eliminate hazards and the resulting risks.

(3) Once FRA approves a passenger rail operation's SSP plan pursuant to § 270.201(b), including the technology analysis and implementation plan, the passenger rail operation shall apply:

(i) The processes described in paragraph (r)(2)(i) of this section to identify and analyze technologies that will mitigate or eliminate the hazards and resulting risks identified by the risk-based hazard analysis pursuant to paragraph (q)(1) of this section. At a minimum, the technologies a passenger rail operation shall consider as part of its technology analysis are: Processor-based technologies, positive train control 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; and

(ii) The processes described in paragraph (r)(2)(ii) of this section to the technologies identified by the analysis under paragraph (r)(3)(i) of this section.

(4) If a passenger rail operation decides to implement any of the technologies identified in paragraph (r)(3) of this section, in the technology analysis and implementation plan in the SSP plan, the passenger rail operation shall:

(i) Describe how it will develop, adopt, implement, maintain, and use the identified technologies; and

(ii) Set forth a prioritized implementation schedule for the development, adoption, implementation and maintenance of those technologies over a 10-year period.

(5) Except as required by subpart I of part 236 of this chapter, if a passenger rail operation decides to implement a positive train control system as part of its technology analysis and implementation plan, the technology implementation plan shall set forth and comply with a schedule for implementation of the positive train control system consistent with the deadlines in the Positive Train Control Enforcement and Implementation Act of 2015, Public Law 114-73, 129 Stat. 576-82 (Oct. 29, 2015), and 49 CFR 236.1005(b)(7).

(6) The passenger rail operation shall not include in its SSP plan the analysis conducted pursuant to paragraph (r)(3) of this section. A passenger rail operation shall make the results of any analysis conducted pursuant to paragraph (r)(3) of this section available upon request to representatives of FRA and States participating under part 212 of this chapter.

(s) **Safety Assurance** -

(1) **Change management.** Each passenger rail operation shall establish and set forth a statement in its SSP plan describing the processes and procedures used to manage significant operational changes, system extensions, system modifications, or other significant changes that will have a direct impact on railroad safety.

(2) **Configuration management.** Each passenger rail operation shall establish a configuration management program and describe the program in its SSP plan. The configuration management program shall:

(i) Identify who has authority to make configuration changes;

(ii) Establish processes to make configuration changes to the rail system; and

(iii) Establish processes to ensure that all departments of the system affected by the configuration changes are formally notified and approve of the change.

(3) **Safety certification.** Each passenger rail operation shall establish and set forth a statement in its SSP plan that describes the certification process used to help ensure that safety concerns and hazards are adequately addressed before the initiation of operations or major projects to extend, rehabilitate, or modify an existing system or replace vehicles and equipment.

(t) **Safety culture.** Each SSP plan shall contain a statement that describes how the passenger rail operation measures the success of its safety culture identified in paragraph (b)(2) of this section.

[85 FR 12844, Mar. 4, 2020, as amended at 87 FR 35671, June 13, 2022]

## § 270.105 Discovery and admission as evidence of certain information.

(a) **Protected information.** Except as provided in paragraph (a)(3) of this section, any information compiled or collected after August 14, 2017, solely for the purpose of planning, implementing, or evaluating a system safety program under this part shall not be subject to discovery, admitted into evidence, or considered for other purposes in a Federal or State court proceeding for damages involving personal injury, wrongful death, or property damage. For purposes of this section:

(1) "Information" includes plans, reports, documents, surveys, schedules, lists, or data, and specifically includes a passenger rail operation's analysis of its safety risks under § 270.103(q)(1) and a passenger rail operation's statement of mitigation measures under § 270.103(q)(2);

(2) "Solely" means that a passenger rail operation originally compiled or collected the information for the exclusive purpose of planning, implementing, or evaluating a system safety program under this part. Information compiled or collected for any other purpose is not protected, even if the passenger rail operation also uses that information for a system safety program. "Solely" also means that a passenger rail operation continues to use that information only for its system safety program. If a passenger rail operation subsequently uses for any other purpose information that was initially compiled or collected for a system safety program, this section does not protect that information to the extent that it is used for the non-system safety program purpose. The use of that information

within the passenger rail operation's system safety program, however, remains protected. This section does not protect information that is required to be compiled or collected pursuant to any other provision of law of regulation; and

(3) A passenger rail operation may include a Confidential Close Call Reporting System (C<sup>3</sup>RS) program in a system safety program established under this part. For Federal or State court proceedings described by this paragraph (a) that are initiated after March 4, 2021, the information protected by this paragraph (a) includes C<sup>3</sup>RS information a passenger rail operation includes in its system safety program, even if the passenger rail operation compiled or collected the C<sup>3</sup>RS information on or before August 14, 2017, for purposes other than planning, implementing, or evaluating a system safety program under this part.

(b) **Non-protected information.** This section does not affect the discovery, admissibility, or consideration for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage of information compiled or collected for a purpose other than that specifically identified in paragraph (a) of this section. Such information shall continue to be discoverable, admissible, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage if it was discoverable, admissible, or considered for other purposes in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage on or before August 14, 2017. Specifically, the types of information not affected by this section include:

(1) Information compiled or collected on or before August 14, 2017;

(2) Information compiled or collected on or before August 14, 2017, and that continues to be compiled or collected, even if used to plan, implement, or evaluate a system safety program; or

(3) Information that is compiled or collected after August 14, 2017, and is compiled or collected for a purpose other than that identified in paragraph (a) of this section.

(c) **Information protected by other law or regulation.** Nothing in this section shall affect or abridge in any way any other protection of information provided by another provision of law or regulation. Any such provision of law or regulation applies independently of the protections provided by this section.

(d) **Preemption.** To the extent that State discovery rules and sunshine laws would require disclosure of information protected by this section in a Federal or State court proceedings for damages involving personal injury, wrongful death, or property damage, those rules and laws are preempted.

(e) **Enforcement.** This section does not apply to civil enforcement or criminal law enforcement proceedings.

[81 FR 53896, Aug. 12, 2016, as amended at 85 FR 12847, Mar. 4, 2020]

## § 270.107 Consultation requirements.

(a) **General duty.**

(1) Each passenger rail operation required to establish a system safety program under this part shall in good faith consult with, and use its best efforts to reach agreement with, all of its directly affected employees, including any non-profit labor organization representing a class or craft of directly affected employees, on the contents of the SSP plan.

- (2) A passenger rail operation that consults with a non-profit employee labor organization as required by paragraph (a)(1) of this section is considered to have consulted with the directly affected employees represented by that organization. For directly affected employees represented by a non-profit employee labor organization, the primary point of contact shall be either the general chairperson of that non-profit employee labor organization or a non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. If a passenger rail operation contracts out significant portions of its operations, the contractor and the contractor's employees performing those operations shall be considered directly affected employees for the purposes of this part.
  - (3) A passenger rail operation shall have a preliminary meeting with its directly affected employees to discuss how the consultation process will proceed. A passenger rail operation is not required to discuss the substance of an SSP plan during this preliminary meeting. A passenger rail operation must:
    - (i) Hold the preliminary meeting no later than July 2, 2020;
    - (ii) Notify the directly affected employees of the preliminary meeting no less than 60 days before it is held.
  - (4) Appendix B to this part contains non-mandatory guidance on how a passenger rail operation may comply with the requirements of this section.
- (b) **Consultation statements.** A passenger rail operation required to submit an SSP plan under § 270.201 must also submit, together with the plan, a consultation statement that includes the following information:
- (1) A detailed description of the process utilized to consult with directly affected employees;
  - (2) If the passenger rail operation could not reach agreement with its directly affected employees on the contents of its SSP plan, identification of any known areas of disagreement and an explanation of why it believes agreement was not reached; and
  - (3) A service list containing the name and contact information for either each international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the passenger rail operation's directly affected employees, or each non-profit employee labor organization primary point of contact the passenger rail operation and the non-profit employee labor organization agree on at the beginning of the consultation process. The service list must also contain the name and contact information for any directly affected employee who significantly participated in the consultation process independently of a non-profit employee labor organization. When a passenger rail operation submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified in the service list.
- (c) **Statements from directly affected employees.**
- (1) If a passenger rail operation and its directly affected employees cannot reach agreement on the proposed contents of an SSP plan, the directly affected employees may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining their views on the plan on which agreement was not reached with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer at Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590. The FRA Associate Administrator for Railroad Safety and Chief Safety Officer shall consider any such views during the plan review and approval process.

- (2) A passenger rail operation's directly affected employees have 30 days following the date of the submission of a proposed SSP plan to submit the statement described in paragraph (c)(1) of this section.
- (d) **Consultation requirements for system safety program plan amendments.** A passenger rail operation's SSP plan must include a description of the process the passenger rail operation will use to consult with its directly affected employees on any subsequent substantive amendments to the system safety program. The requirements of this paragraph do not apply to non-substantive amendments (e.g., amendments that update names and addresses of railroad personnel).

[85 FR 12847, Mar. 4, 2020]

## Subpart C - Review, Approval, and Retention of System Safety Program Plans

### § 270.201 Filing and approval.

#### (a) *Filing.*

- (1) Each passenger rail operation to which this part applies shall submit one copy of its SSP plan to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, 1200 New Jersey Avenue SE, Washington, DC 20590, no later than March 4, 2021, or not less than 90 days before commencing passenger operations, whichever is later.
- (2) The passenger rail operation shall not include in its SSP plan the risk-based hazard analysis conducted pursuant to § 270.103(q). A passenger rail operation shall make the results of any risk-based hazard analysis available upon request to representatives of FRA and States participating under part 212 of this chapter.
- (3) The SSP plan shall include:
  - (i) The signature, name, title, address, and telephone number of the chief safety officer who bears primary managerial authority for implementing the program for the submitting passenger rail operation. By signing, this chief official is certifying that the contents of the SSP plan are accurate and that the passenger rail operation will implement the contents of the program as approved by FRA;
  - (ii) The contact information for the primary person responsible for managing the system safety program; and
  - (iii) The contact information for the senior representatives of any host railroad, contractor operator, shared track/corridor operator, or persons utilizing or providing significant safety-related services.
- (4) As required by § 270.107(b), each passenger rail operation must submit with its SSP plan a consultation statement describing how it consulted with its directly affected employees on the contents of its SSP plan. Directly affected employees may also file a statement in accordance with § 270.107(c).

#### (b) *Approval.*

- (1) Within 90 days of receipt of an SSP plan, FRA will review the SSP plan to determine if the elements prescribed in this part are sufficiently addressed. This review will also consider any statement submitted by directly affected employees pursuant to § 270.107(c).

- (2) FRA will notify each person identified in the SSP plan under § 270.201(a)(3) in writing whether the proposed plan has been approved by FRA, and, if not approved, the specific points in which the SSP plan is deficient. FRA will also provide this notification to each individual identified in the service list accompanying the consultation statement required under § 270.107(b).
- (3) If FRA does not approve an SSP plan, the affected passenger rail operation shall amend the proposed plan to correct all deficiencies identified by FRA and provide FRA with a corrected copy of the SSP plan not later than 90 days following receipt of FRA's written notice that the proposed SSP plan was not approved.
- (4) Approval of an SSP plan under this part does not constitute approval of the specific actions a passenger rail operation will implement under an SSP plan pursuant to § 270.103(q)(2) and shall not be construed as establishing a Federal standard regarding those specific actions.

(c) *Review of amendments.*

(1)

- (i) A passenger rail operation shall submit any amendment(s) to the SSP plan to FRA not less than 60 days before the proposed effective date of the amendment(s). The passenger rail operation shall file the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s). The cover letter shall also describe the process the passenger rail operation used pursuant to § 270.107(d) to consult with its directly affected employees on the amendment(s).
- (ii) If an amendment is safety-critical and the passenger rail operation is unable to submit the amended SSP plan to FRA 60 days before the proposed effective date of the amendment, the passenger rail operation shall submit the amended SSP plan with a cover letter outlining the changes made to the original approved SSP plan by the proposed amendment(s) and why the amendment is safety-critical to FRA as near as possible to 60 days before the proposed effective date of the amendment(s).
- (iii) If the proposed amendment is limited to adding or changing a name, title, address, or telephone number of a person, FRA approval is not required under the process in paragraphs (c)(1)(i) and (ii) of this section, although the passenger rail operation shall still file the proposed amendment with FRA's Associate Administrator for Railroad Safety and Chief Safety Officer. These proposed amendments may be implemented upon filing with FRA. All other proposed amendments must comply with the formal approval process in paragraph (c) of this section.

(2)

- (i) Except as provided in paragraph (c)(1)(iii) of this section, FRA will review the proposed amended SSP plan within 45 days of receipt. FRA will then notify the primary contact person of each affected passenger rail operation whether the proposed amended plan has been approved by FRA, and if not approved, the specific points in which each proposed amendment to the SSP plan is deficient.
- (ii) If FRA has not notified the passenger rail operation by the proposed effective date of the amendment(s) whether the proposed amended plan has been approved or not, the passenger rail operation may implement the amendment(s) pending FRA's decision.

(iii) If a proposed SSP plan amendment is not approved by FRA, no later than 60 days following the receipt of FRA's written notice, the passenger rail operation shall provide FRA either a corrected copy of the amendment that addresses all deficiencies noted by FRA or written notice that the passenger rail operation is retracting the amendment.

(d) **Reopened review.** Following initial approval of a plan, or amendment, FRA may reopen consideration of the plan or amendment for cause stated.

(e) **Electronic submission.** All documents required to be submitted to FRA under this part may be submitted electronically. Appendix C to this part provides instructions on electronic submission of documents.

[85 FR 12848, Mar. 4, 2020]

### § 270.203 Retention of system safety program plan.

Each passenger rail operation to which this part applies shall retain at its system headquarters, and at any division headquarters, one copy of the SSP plan required by this part and one copy of each subsequent amendment to that plan. These records shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

[85 FR 12849, Mar. 4, 2020]

## Subpart D - System Safety Program Internal Assessments and External Auditing

### § 270.301 General.

The system safety program and its implementation shall be assessed internally by the passenger rail operation and audited externally by FRA or FRA's designee.

[85 FR 12849, Mar. 4, 2020]

### § 270.303 Internal system safety program assessment.

(a) Following FRA's initial approval of the passenger rail operation's SSP plan pursuant to § 270.201, the passenger rail operation shall annually conduct an assessment of the extent to which:

(1) The system safety program is fully implemented;

(2) The passenger rail operation is in compliance with the implemented elements of the approved system safety program; and

(3) The passenger rail operation has achieved the goals set forth in § 270.103(c).

(b) As part of its SSP plan, the passenger rail operation shall set forth a statement describing the processes used to:

(1) Conduct internal system safety program assessments;

(2) Internally report the findings of the internal system safety program assessments;

(3) Develop, track, and review recommendations as a result of the internal system safety program assessments;

- (4) Develop improvement plans based on the internal system safety program assessments. Improvement plans shall, at a minimum, identify who is responsible for carrying out the necessary tasks to address assessment findings and specify a schedule of target dates with milestones to implement the improvements that address the assessment findings; and
- (5) Manage revisions and updates to the SSP plan based on the internal system safety program assessments.

(c)

- (1) Within 60 days of completing its internal SSP plan assessment pursuant to paragraph (a) of this section, the passenger rail operation shall:
  - (i) Submit to FRA a copy of the passenger rail operation's internal assessment report that includes a system safety program assessment and the status of internal assessment findings and improvement plans to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590; and
  - (ii) Outline the specific improvement plans for achieving full implementation of the SSP plan, as well as achieving the goals of the plan.
- (2) The passenger rail operation's chief official responsible for safety shall certify the results of the internal SSP plan assessment.

[85 FR 12849, Mar. 4, 2020]

### § 270.305 External safety audit.

- (a) FRA may conduct, or cause to be conducted, external audits of a system safety program. Each audit will evaluate compliance with the elements required by this part in an approved SSP plan. FRA shall provide the passenger rail operation written notification of the results of any audit.

(b)

- (1) Within 60 days of FRA's written notification of the results of the audit, the passenger rail operation shall submit to FRA for approval an improvement plan to address the audit findings that require corrective action. At a minimum, the improvement plan shall identify who is responsible for carrying out the necessary tasks to address audit findings and specify target dates and milestones to implement the improvements that address the audit findings.
- (2) If FRA does not approve the passenger rail operation's improvement plan, FRA will notify the passenger rail operation of the specific deficiencies in the improvement plan. The affected passenger rail operation shall amend the proposed plan to correct the deficiencies identified by FRA and provide FRA with a corrected copy of the improvement plan no later than 30 days following its receipt of FRA's written notice that the proposed plan was not approved.
- (3) Upon request, the passenger rail operation shall provide to FRA and States participating under part 212 of this chapter for review a report upon request regarding the status of the implementation of the improvements set forth in the improvement plan established pursuant to paragraph (b)(1) of this section.

[85 FR 12849, Mar. 4, 2020]

## Subpart E - Fatigue Risk Management Programs

**Source:** 87 FR 35671, June 13, 2022, unless otherwise noted.

### § 270.401 Definitions.

As used in this subpart -

**Contributing factor** means a circumstance or condition that helps cause a result.

**Fatigue** means a complex state characterized by a lack of alertness and reduced mental and physical performance, often accompanied by drowsiness.

**Fatigue-risk analysis** means a railroad's analysis of its operations that:

- (1) Identifies and evaluates the fatigue-related railroad safety hazards on its system(s); and
- (2) Determines the degree of risk associated with each of those hazards.

**FRMP** means a Fatigue Risk Management Program.

**FRMP plan** means a Fatigue Risk Management Program plan.

**Safety-related railroad employee** means:

- (1) A person subject to 49 U.S.C. 21103, 21104, or 21105;
- (2) Another person involved in railroad operations not subject to 49 U.S.C. 21103, 21104, or 21105;
- (3) A person who inspects, installs, repairs or maintains track, roadbed, signal and communication systems, and electric traction systems including a roadway worker or railroad bridge worker;
- (4) A hazmat employee defined under 49 U.S.C. 5102(3);
- (5) A person who inspects, repairs, or maintains locomotives, passenger cars, or freight cars; or
- (6) An employee of any person who utilizes or performs significant railroad safety-related services, as described in § 270.103(d)(2), if that employee performs a function identified in paragraphs (1) through (5) of this definition.

### § 270.403 Purpose and scope of a Fatigue Risk Management Program (FRMP).

- (a) **Purpose.** The purpose of an FRMP is to improve railroad safety through structured, systematic, proactive processes and procedures that a railroad subject to this part develops and implements to identify and mitigate the effects of fatigue on its employees.
- (b) **Scope.** A railroad shall:
  - (1) Design its FRMP to reduce the fatigue its safety-related railroad employees experience and to reduce the risk of railroad accidents, incidents, injuries, and fatalities where the fatigue of any of these employees is a contributing factor;

- (2) Develop its FRMP by systematically identifying and evaluating the fatigue-related railroad safety hazards on its system, determining the degree of risk associated with each hazard, and managing those risks to reduce the fatigue that its safety-related railroad employees experience. This system-wide fatigue risk identification and evaluation process must account for the varying circumstances of a railroad's operations on different parts of its system; and
- (3) Employ in its FRMP the fatigue risk mitigation strategies a railroad identifies as appropriate to address those varying circumstances.

### § 270.405 General requirements; procedure.

- (a) Each railroad subject to this part shall:
  - (1) Establish and implement an FRMP as part of its SSP; and
  - (2) Establish an FRA-approved FRMP plan as a component of a railroad's FRA-approved SSP plan and then update its FRMP plan as necessary as part of the annual internal assessment of its SSP under § 270.303.
- (b) A railroad's FRMP plan must explain the railroad's method of analysis of fatigue risks and the railroad's process(es) for implementing its FRMP.
- (c)
  - (1) A railroad shall submit an FRMP plan to FRA for approval no later than either the applicable timeline in § 270.201(a) for filing its SSP plan or July 13, 2023, whichever is later.
  - (2) A railroad shall submit updates to its FRMP plan under the process for amending its SSP plan in § 270.201(c).
- (d) FRA shall review and approve or disapprove a railroad's FRMP plan and amendments to that plan under the process for reviewing SSP plans and amendments in § 270.201(b) and (c), respectively. FRA approval of a railroad's FRMP plan amends a railroad's SSP plan to include the FRMP plan as a component.

### § 270.407 Requirements for an FRMP.

- (a) ***In general.*** An FRMP shall include an analysis of fatigue risks and mitigation strategies, as described in paragraphs (b) and (c) of this section.
- (b) ***Analysis of fatigue risks.*** A railroad shall conduct a fatigue-risk analysis as part of its FRA-approved FRMP, which includes identification of fatigue-related railroad safety hazards, assessment of the risks associated with those hazards, and prioritization of risks for mitigation. At a minimum, a railroad shall consider the following categories of risk factors:
  - (1) General health and medical conditions that can affect the fatigue levels among the population of safety-related railroad employees;
  - (2) Scheduling issues that can affect the opportunities of safety-related railroad employees to obtain sufficient quality and quantity of sleep; and
  - (3) Characteristics of each job category of safety-related railroad employees work that can affect fatigue levels and risk for fatigue of those employees.

- (c) **Mitigation strategies.** A railroad shall develop and implement mitigation strategies to reduce the risk of railroad accidents, incidents, injuries, and fatalities where fatigue of any of its safety-related employees is a contributing factor. At a minimum, in developing and implementing these mitigation strategies, a railroad shall consider the railroad's policies, practices, and communication related to its safety-related railroad employees.
- (1) **Policies.** A railroad shall consider developing and implementing policies to reduce the risk of the exposure of its safety-related railroad employees to fatigue-related railroad safety hazards on its system. At a minimum, a railroad shall consider these policies:
- (i) Providing opportunities for identification, diagnosis, and treatment of any medical condition that may affect alertness or fatigue, including sleep disorders;
  - (ii) Identifying methods to minimize accidents and incidents that occur as a result of working at times when scientific and medical research have shown increased fatigue disrupts employees' circadian rhythms;
  - (iii) Developing and implementing alertness strategies, such as policies on napping, to address acute drowsiness and fatigue while an employee is on duty;
  - (iv) Increasing the number of consecutive hours of off-duty rest, during which an employee receives no communication from the employing railroad or its managers, supervisors, officers, or agents; and
  - (v) Avoiding abrupt changes in rest cycles for employees.
- (2) **Practices.** A railroad shall consider developing and implementing operational practices to reduce the risk of exposure of its safety-related railroad employees to fatigue-related railroad safety hazards on its system. At a minimum, a railroad shall consider these practices:
- (i) Minimizing the effects on employee fatigue of an employee's short-term or sustained response to emergency situations, such as derailments and natural disasters, or engagement in other intensive working conditions;
  - (ii) Developing and implementing scheduling practices for employees, including innovative scheduling practices, on-duty call practices, work and rest cycles, increased consecutive days off for employees, changes in shift patterns, appropriate scheduling practices for varying types of work, and other aspects of employee scheduling to reduce employee fatigue and cumulative sleep loss; and
  - (iii) Providing opportunities to obtain restful sleep at lodging facilities, including employee sleeping quarters provided by the railroad carrier.
- (3) **Communications.** A railroad shall consider developing and implementing training, education, and outreach methods to deliver fatigue-related information effectively to its safety-related railroad employees. At a minimum, a railroad shall consider including in its employee education and training information on the physiological and human factors that affect fatigue, as well as strategies to reduce or mitigate the effects of fatigue, based on the most current scientific and medical research and literature.
- (d) **Evaluation.** A railroad shall develop and implement procedures and processes for monitoring and evaluating its FRMP to assess whether the FRMP effectively meets the goals its FRMP plan describes, as required under § 270.409(b).

- (1) The evaluation shall include, at a minimum:
  - (i) Periodic monitoring of the railroad's operational environment to detect changes that may generate new hazards;
  - (ii) Analysis of the risks associated with any identified hazards; and
  - (iii) Periodic safety assessments to determine the need for changes to its mitigation strategies.
- (2) A railroad shall evaluate newly-identified hazards, and hazards associated with ineffective mitigation strategies, through processes for analyzing fatigue risks described in the railroad's FRMP plan.
- (3) Any necessary changes not addressed prior to a railroad's annual internal assessment must be included in the internal assessment improvement plans required under § 270.303.

### § 270.409 Requirements for an FRMP plan.

- (a) **In general.** 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 must contain the elements described in this section. A railroad must submit the plan to FRA for approval under the criteria of subpart C.
- (b) **Goals.** An FRMP plan must contain a statement that defines the specific fatigue-related goals of the FRMP and describes strategies for reaching those goals.
- (c) **Methods -**
  - (1) **Analysis of fatigue risk.** An FRMP plan shall describe a railroad's method(s) for conducting its fatigue-risk analysis as part of its FRMP. The description shall specify:
    - (i) The scope of the analysis, which is the covered population of safety-related railroad employees;
    - (ii) The processes a railroad will use to identify fatigue-related railroad safety hazards on its system and determine the degree of risk associated with each fatigue-related hazard identified;
    - (iii) The processes a railroad will use to compare and prioritize identified fatigue-related risks for mitigation purposes; and
    - (iv) The information sources a railroad will use to support ongoing identification of fatigue-related railroad safety hazards and determine the degree of risk associated with those hazards.
  - (2) **Mitigation strategies.** An FRMP plan shall describe a railroad's processes for:
    - (i) Identifying and selecting fatigue risk mitigation strategies; and
    - (ii) Monitoring identified fatigue-related railroad safety hazards.
  - (3) **Evaluation.** An FRMP plan shall describe:
    - (i) A railroad's processes for monitoring and evaluating the overall effectiveness of its FRMP and the effectiveness of fatigue-related mitigation strategies the railroad uses under § 270.407; and
    - (ii) 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).
- (d) **FRMP implementation plan.** 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:

- (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;
- (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;
- (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).

## Appendix A to Part 270 [Reserved]

## Appendix B to Part 270 - Federal Railroad Administration Guidance on the System Safety Program Consultation Process

A passenger rail operation required to develop a system safety program under this part must in good faith consult with and use its best efforts to reach agreement with its directly affected employees on the contents of the SSP plan. See § 270.107(a). This appendix discusses the meaning of the terms “good faith” and “best efforts,” and provides non-mandatory guidance on how to comply with the requirement to consult with directly affected employees on the contents of the SSP plan.

The guidance is provided for employees who are represented by a non-profit employee labor organization and employees who are not represented by any such organization. The guidance is not legally binding in its own right and will not be relied upon by the U.S. Department of Transportation as a separate basis for affirmative enforcement action or other administrative penalty. Conformity with this guidance (as distinct from existing statutes and regulations) is voluntary only, and nonconformity will not affect rights and obligations under existing statutes and regulations.

### The Meaning of “Good Faith” and “Best Efforts”

“Good faith” and “best efforts” are not interchangeable terms representing a vague standard for the § 270.107 consultation process. Rather, each term has a specific and distinct meaning. When consulting with directly affected employees, therefore, a passenger rail operation must independently meet the standards for both the good faith and best efforts obligations. A passenger rail operation that does not meet the standard for one or the other will not be in compliance with the consultation requirements of § 270.107.

The good faith obligation requires a passenger rail operation to consult with employees in a manner that is honest, fair, and reasonable, and to genuinely pursue agreement on the contents of an SSP plan. If a passenger rail operation consults with its employees merely in a perfunctory manner, without genuinely pursuing agreement, it will not have met the good faith requirement. For example, a lack of good faith may be found if a passenger rail operation's directly affected employees express concerns with certain parts of the SSP plan, and the passenger rail operation neither addresses those concerns in further consultation nor attempts to address those concerns by making changes to the SSP plan.

On the other hand, “best efforts” establishes a higher standard than that imposed by the good faith obligation, and describes the diligent attempts that a passenger rail operation must pursue to reach agreement with its employees on the contents of its system safety program. While the good faith obligation is concerned with the passenger rail operation's state of mind during the consultation process, the best efforts obligation is concerned with the specific efforts made by the passenger rail operation in an attempt to reach agreement. This would include considerations such as whether a passenger rail operation had held sufficient meetings with its employees to address or make an attempt to address any concerns raised by the employees, or whether the passenger rail operation had made an effort to respond to feedback provided by employees during the consultation process. For example, a passenger rail operation would not meet the best efforts obligation if it did not initiate the consultation process in a timely manner, and thereby failed to provide employees sufficient time to engage in the consultation process. Generally, best efforts are measured by the measures that a reasonable person in the same circumstances and of the same nature as the acting party would take. Therefore, the standard imposed by the best efforts obligation may vary with different railroads, depending on a railroad's size, resources, and number of employees.

When reviewing SSP plans, FRA will determine on a case-by-case basis whether a passenger rail operation has met its § 270.107 good faith and best efforts obligations. This determination will be based upon the consultation statement submitted by the passenger rail operation pursuant to § 270.107(b) and any statements submitted by employees pursuant to § 270.107(c). If FRA finds that these statements do not provide sufficient information to determine whether a passenger rail operation used good faith and best efforts to reach agreement, FRA may investigate further and contact the passenger rail operation or its employees to request additional information. If FRA determines that a passenger rail operation did not use good faith and best efforts, FRA may disapprove the SSP plan submitted by the passenger rail operation and direct the passenger rail operation to comply with the consultation requirements of § 270.107. Pursuant to § 270.201(b)(3), if FRA does not approve the SSP plan, the passenger rail operation will have 90 days, following receipt of FRA's written notice that the plan was not approved, to correct any deficiency identified. In such cases, the identified deficiency would be that the passenger rail operation did not use good faith and best efforts to consult and reach agreement with its directly affected employees. If a passenger rail operation then does not submit to FRA within 90 days an SSP plan meeting the consultation requirements of § 270.107, FRA could impose penalties for failure to comply with § 270.201(b)(3).

## Guidance on How a Passenger Rail Operation May Consult With Directly Affected Employees

Because the standard imposed by the best efforts obligation will vary depending upon the passenger rail operation, there may be countless ways to comply with the consultation requirements of § 270.107. Therefore, FRA believes it is important to maintain a flexible approach to the § 270.107 consultation requirements, to give a passenger rail operation and its directly affected employees the freedom to consult in a manner best suited to their specific circumstances.

FRA is nevertheless providing guidance in this appendix as to how a passenger rail operation may proceed when consulting (utilizing good faith and best efforts) with employees in an attempt to reach agreement on the contents of an SSP plan. FRA believes this guidance may be useful as a starting point for those that are uncertain about how

to comply with the § 270.107 consultation requirements. This guidance distinguishes between employees who are represented by a non-profit employee labor organization and employees who are not, as the processes a passenger rail operation may use to consult with represented and non-represented employees could differ significantly.

This guidance does not establish prescriptive requirements but merely outlines a consultation process a passenger rail operation may choose to follow. A passenger rail operation's consultation statement could indicate that it followed the guidance in this appendix as evidence that it utilized good faith and best efforts to reach agreement with its employees on the contents of an SSP plan.

## Employees Represented by a Non-Profit Employee Labor Organization

As provided in § 270.107(a)(2), a passenger rail operation consulting with the representatives of a non-profit employee labor organization on the contents of an SSP plan will be considered to have consulted with the directly affected employees represented by that organization.

A passenger rail operation may utilize the following process as a roadmap for using good faith and best efforts when consulting with represented employees in an attempt to reach agreement on the contents of an SSP plan.

- Pursuant to § 270.107(a)(3)(i), a passenger rail operation must meet with representatives from a non-profit employee labor organization (representing a class or craft of the passenger rail operation's directly affected employees) no later than July 2, 2020, to begin the process of consulting on the contents of the SSP plan. A passenger rail operation must provide notice at least 60 days before the scheduled meeting.
- During the time between the initial meeting and the applicability date of § 270.105 the parties may meet to discuss administrative details of the consultation process as necessary.
- Within 60 days after the applicability date of § 270.105 a passenger rail operation should have a meeting with the directed affected railroad employees to discuss substantive issues with the SSP.
- Pursuant to § 270.201(a)(1), a passenger rail operation would file its SSP plan with FRA no later than March 4, 2021, or not less than 90 days before commencement of new passenger service, whichever is later.
- As provided by § 270.107(c), if agreement on the contents of an SSP plan could not be reached, a labor organization (representing a class or craft of the passenger rail operation's directly affected employees) may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining its views on the plan on which agreement was not reached.

## Employees Who Are Not Represented by a Non-Profit Employee Labor Organization

FRA recognizes that some (or all) of a passenger rail operation's directly affected employees may not be represented by a non-profit employee labor organization. For such non-represented employees, the consultation process described for represented employees may not be appropriate or sufficient. For example, FRA believes that a passenger rail operation with non-represented employees should make a concerted effort to ensure that its non-

represented employees are aware that they are able to participate in the development of the SSP plan. FRA therefore is providing the following guidance regarding how a passenger rail operation may utilize good faith and best efforts when consulting with non-represented employees on the contents of its SSP plan.

• By April 20, 2020, a passenger rail operation should notify non-represented employees that -

- (1) The passenger rail operation is required to consult in good faith with, and use its best efforts to reach agreement with, all directly affected employees on the proposed contents of its SSP plan;
- (2) The passenger rail operation is required to meet with its directly affected employees by July 2, 2020, to address the consultation process;
- (3) Non-represented employees are invited to participate in the consultation process (and include instructions on how to engage in this process); and
- (4) If a passenger rail operation is unable to reach agreement with its directly affected employees on the contents of the proposed SSP plan, an employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining the employee's views on the plan on which agreement was not reached.

• This initial notification (and all subsequent communications, as necessary or appropriate) could be provided to non-represented employees in the following ways:

- (1) Electronically, such as by email or an announcement on the passenger rail operation's website;
- (2) By posting the notification in a location easily accessible and visible to non-represented employees; or
- (3) By providing all non-represented employees a hard copy of the notification. A passenger rail operation could use any or all of these methods of communication, so long as the notification complies with the passenger rail operation's obligation to utilize best efforts in the consultation process.

• Following the initial notification and initial meeting to discuss the consultation process (and before the passenger rail operation submits its SSP plan to FRA), a passenger rail operation should provide non-represented employees a draft proposal of its SSP plan. This draft proposal should solicit additional input from non-represented employees, and the passenger rail operation should provide non-represented employees 60 days to submit comments to the passenger rail operation on the draft.

• Following this 60-day comment period and any changes to the draft SSP plan made as a result, the passenger rail operation should submit the proposed SSP plan to FRA, as required by this part.

• As provided by § 270.107(c), if agreement on the contents of an SSP plan cannot be reached, then a non-represented employee may file a statement with the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining employee's views on the plan on which agreement was not reached.

[85 FR 12849, Mar. 4, 2020]

## Appendix C to Part 270 - Procedures for Submission of SSP Plans and Statements From Directly Affected Employees

This appendix summarizes procedures for the submission of an SSP plan and statements by directly affected employees consistent with the requirements of this part.

### Submission by a Passenger Rail Operation and Directly Affected Employees

As provided for in § 270.101, a system safety program shall be fully implemented and supported by a written SSP plan. Each passenger rail operation must submit its SSP plan to FRA for approval as provided for in § 270.201.

As provided for in § 270.107(c), if a passenger rail operation and its directly affected employees cannot come to agreement on the proposed contents of the SSP plan, the directly affected employees have 30 days following the submission of the proposed SSP plan to submit a statement to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer explaining the directly affected employees' views on the plan on which agreement was not reached.

The passenger rail operation's and directly affected employees' submissions shall be sent to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590. When a passenger rail operation submits its SSP plan and consultation statement to FRA pursuant to § 270.201, it must also simultaneously send a copy of these documents to all individuals identified in the service list pursuant to § 270.107(b)(3).

Each passenger rail operation and directly affected employee is authorized to file by electronic means any submissions required under this part. Before any person submits anything electronically, the person shall provide the FRA Associate Administrator for Railroad Safety and Chief Safety Officer with the following information in writing:

- (1) The name of the passenger rail operation or directly affected employee(s);
- (2) The names of two individuals, including job titles, who will be the passenger rail operation's or directly affected employees' points of contact and will be the only individuals allowed access to FRA's secure document submission site;
- (3) The mailing addresses for the passenger rail operation's or directly affected employees' points of contact;
- (4) The system or main headquarters address located in the United States;
- (5) The email addresses for the passenger rail operation's or directly affected employees' points of contact; and
- (6) The daytime telephone numbers for the passenger rail operation's or directly affected employees' points of contact.

A request for electronic submission or FRA review of written materials shall be addressed to the FRA Associate Administrator for Railroad Safety and Chief Safety Officer, Mail Stop 25, 1200 New Jersey Avenue SE, Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program or statement. A passenger rail operation that electronically submits an initial SSP plan or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices

from FRA by email. FRA may electronically store any materials required by this part regardless of whether the passenger rail operation that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A passenger rail operation that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

*[85 FR 12851, Mar. 4, 2020]*