



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

[Docket No. FRA-2009-0041, Notice No. 3]

49 CFR Part 234

RIN 2130-AC38

Systems for Telephonic Notification of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

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

ACTION: Final rule; response to petition for reconsideration.

SUMMARY: This document responds to a petition for reconsideration of FRA's final rule published on June 12, 2012, mandating that certain railroads establish and maintain systems that allow members of the public to call the railroads, using a toll-free telephone number, and report an emergency or other unsafe condition at highway-rail and pathway grade crossings. This document amends and clarifies the final rule.

DATES: This final rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

This rule implements Section 205 (Sec. 205) of the Rail Safety Improvement Act of 2008 (RSIA), Public Law No. 110-432, Division A, which was signed into law on October 16, 2008. Sec. 205 of the RSIA mandates that the Secretary of Transportation require certain railroad carriers (railroads) to take a series of specified actions related to setting up and using systems by which the public is able to notify the railroad by toll-free telephone number of safety problems at its highway-rail and pathway grade crossings. Such systems are commonly known as Emergency Notification Systems (ENS) or ENS programs. On March 4, 2011, FRA issued a notice of proposed rulemaking (NPRM) (76 FR 11992) that would require railroads to implement an ENS, through which they receive reports of unsafe conditions at crossings. See 76 FR 11992. A public hearing on the proposal was held on September 29, 2011. 76 FR 55622(Sept. 8, 2011). On June 12, 2012, following consideration of written comments received in response to the NPRM, FRA published a final rule in this rulemaking (Final Rule). See 77 FR 35164.

On August 9, 2012, FRA received a petition for reconsideration of the Final Rule from the Association of American Railroads (AAR) (AAR Petition or Petition). On September 25, 2012, FRA received comments on the AAR Petition from the Brotherhood of Railroad Signalmen (BRS). The specific issues raised by the AAR Petition, the comments on the Petition from BRS, and FRA's responses to the Petition and comments, are discussed in detail below in the "Section-by-Section Analysis" portion of the

preamble. The Section-by-Section Analysis also contains a detailed discussion of each provision of the Final Rule that FRA has amended or clarified. The amendments contained in this document generally clarify or reduce requirements currently contained in the Final Rule or allow for greater flexibility in complying with the Final Rule, and are within the scope of the issues and options discussed, considered, or raised in the NPRM.

Separately, on September 24, 2012, FRA received a public submission of comments from the co-owner of the company 1-800 RR Emergency on behalf of that company. The comments were unrelated to the AAR Petition and raised a new issue. The commenter 1-800 RR Emergency had ample time to raise its concerns between the time that the NPRM was published on March 4, 2011, and the publication of the Final Rule on June 12, 2012. The comment period for the NPRM remained open until May 3, 2011. Furthermore, FRA held a public hearing on September 29, 2011, to receive oral comments in response to the NPRM. Additionally, following the publication of the Final Rule, petitions for reconsideration of the Final Rule were accepted until August 13, 2012. FRA is unable to comment on the issue raised by 1-800 RR Emergency at this late date because doing so would deny the public the opportunity to comment on the issue. If the company would like FRA to address the issue, it is welcome to file a petition for rulemaking on this subject in accordance with the provisions of 49 CFR part 211. See 49 CFR 211.7 and 211.9.

II. Section-by-Section Analysis

Amendments to 49 CFR Part 234

Subpart E—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

Section 234.305 Remedial Actions in Response to Reports of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings

AAR Petition: “FRA Should Clarify the Effective Date for Compliance with Requirements to Respond to Reports of Unsafe Conditions”

Section 234.305 addresses the actions that a railroad must take in response to an ENS-generated report of an unsafe condition at a highway-rail or pathway grade crossing. In the Petition, AAR points out that the Final Rule does not explicitly state an effective date for this section with respect to railroads that, as of August 13, 2012, were using an ENS telephone service or a third-party ENS telephone service that did not conform to the requirements in § 234.303 or § 234.307, respectively. Compliance with the requirements in § 234.305 is dependent upon a railroad’s establishment of a compliant ENS telephone service, pursuant to § 234.303 or § 234.307. Accordingly, FRA is amending the Final Rule to state expressly in § 234.317(b), “Compliance Dates,” that a railroad with a non-conforming ENS telephone service as of August 13, 2012, must implement an ENS that conforms to this subpart no later than March 1, 2014, subject to the exceptions in paragraphs (c), (d), and (e) of § 234.317. Additionally, FRA is amending paragraph (e) of § 234.317 to extend the deadline from September 1, 2013, to March 1, 2014, for railroads to bring their recordkeeping into compliance. Since proper recordkeeping also depends upon a railroad implementing a conforming ENS telephone service, FRA believes that the deadline for compliance with § 234.313 and § 234.315 should also be March 1, 2014. BRS did not respond to the AAR Petition on this issue.

AAR Petition: “FRA Should Clarify the Responsibility to Respond to Obstructions on Non-Railroad Property”

Paragraph (f) of § 234.305 is the general rule on response to a report of an obstruction to the view of a pedestrian or a vehicle operator for a reasonable distance in either direction of a train's approach to the highway-rail or pathway grade crossing (i.e., visual obstruction). Paragraph (g) of § 234.305 is the general rule on response to a report of other unsafe conditions at a highway-rail or pathway grade crossing not covered by other subsections of § 234.305. Paragraphs (f) and (g) of § 234.305, respectively, require the maintaining railroad either to remove an obstruction of view or to correct an unsafe condition at a highway-rail or pathway grade crossing, if it is lawful and feasible to do so.

In the Petition, AAR requests confirmation that it correctly interprets the clause "if it is lawful and feasible to do so" in paragraphs (f) and (g) of § 234.305 to mean that "[t]hese mandates do not cover obstructions and unsafe conditions on non-railroad property." AAR explains that "[r]ailroads . . . cannot control what takes place on property belonging to others." FRA confirms that the mandates in paragraphs (f) and (g) of § 234.305, respectively, only require a railroad to take action to remedy an obstruction of view or other unsafe condition on the railroad's property, to the extent that the railroad is operating within the confines of the law and such action is feasible. However, in circumstances where the property at issue does not belong to the railroad, the railroad may still be in a position to discuss the situation with the property owner, and work jointly to reach a legal agreement with the owner to remedy the condition if possible. FRA encourages such cooperation between the railroad and property owner, but it would most likely depend upon the railroad's willingness to take the initiative to attempt to resolve the situation, as well as the willingness of the property owner to work with the railroad. BRS did not respond to the AAR Petition on this issue.

Section 234.306 Multiple Dispatching or Maintaining Railroads with Respect to the Same Highway-Rail or Pathway Grade Crossing; Appointment of Responsible Railroad

AAR Petition: “FRA Should Clarify the Compliance Deadline for Signs at Crossings where Multiple Railroads Operate”

Section 234.306 addresses the situation of multiple railroads that dispatch trains through the same crossing, as well as the possibility that multiple railroads have maintenance responsibilities for the same crossing. In this section in the Final Rule, FRA recognizes that there are some situations where there are multiple tracks at a grade crossing where each railroad dispatches trains over its own track. Under these circumstances, FRA believes it would create confusion if each railroad posts a sign with its own emergency telephone number. Having more than one emergency number posted at such crossings would not only be more confusing for the users of the crossing and an unnecessary cost for the multiple railroads, but also a less effective method of responding to reports of unsafe conditions.

As AAR points out in its Petition, at a single crossing, there may currently be one ENS sign displaying the emergency telephone number for one railroad and another ENS sign displaying the emergency telephone number for a different railroad. AAR requests that for crossings where multiple railroads dispatch trains through the same crossing and/or maintain the same crossing, and there are currently multiple signs at these crossings, that railroads be granted a deadline of September 1, 2017, to bring these crossings into compliance with this subpart. AAR states that since this is “[a]n issue of taking down signs due to multiple signs being present at crossings, the lowest priority should be placed on bringing these crossings into compliance.” FRA disagrees with

AAR's assessment that bringing these crossings into compliance should be a low priority compared to other highway-rail and pathway grade crossings covered by this subpart.

There are approximately 212,000 public and private at-grade highway-rail and pathway grade crossings in the United States. FRA estimates that there are approximately 2,500 highway-rail and pathway grade crossings (i.e., approximately one percent of the total number of highway-rail and pathway grade crossings) where more than one railroad dispatches trains through the crossing. As stated previously in the preamble to the Final Rule, FRA believes that having more than one emergency number posted at such crossings is confusing for the users of the crossing. Furthermore, the existence of multiple signs with different emergency numbers at the same crossing could result in miscommunication or a delay in communication of an unsafe condition to the responsible railroad, thereby stalling remedial action efforts and potentially placing users of the crossing at greater risk. BRS expressed concern, similar to that of FRA, that granting an extension for these crossings to come into compliance would result in “[c]onfusion for the traveling public as to which railroad to contact in case of an emergency.” Approximately one percent of all public and private highway-rail and pathway grade crossings are at issue here, and even fewer of these crossings currently have multiple ENS signs posted at them. FRA believes that the railroads that dispatch trains through these crossings and maintain these crossings have ample time to comply with the March 1, 2014, deadline in amended paragraph (b) of § 234.317 for railroads with nonconforming ENS telephone service.

Section 234.311 ENS Sign Placement and Maintenance

AAR Petition: “FRA Should Delete the Requirement to Place a Sign at Private Industrial Facilities”

Section 234.311(a)(1) requires a sign of the type specified by § 234.309 to be placed and maintained on each approach to a highway-rail and pathway grade crossing with certain exceptions. The maintaining railroad for the crossing would be responsible for the proper placement and maintenance of the sign. The dispatching railroad for the crossing would be responsible for providing the telephone number that should be displayed on the sign to the maintaining railroad, if the two are not the same railroad.

Paragraph (a)(2)(ii) of § 234.311 permits an exception, requiring a railroad to only place and maintain one sign at each vehicular entrance to a railroad yard, a port or dock facility, or a private industrial facility that does not meet the definition of a “plant railroad” in § 234.5, rather than placing and maintaining signs at each approach to a crossing within the yard, port or dock facility, or private industrial facility. In the Petition, AAR contends that with respect to private industrial facilities this requirement is “impractical” because these entrances are not on railroad property, and thus the railroad lacks the authority to carry out such a requirement. Additionally, AAR points out that typically a railroad does not have dispatching responsibility for a crossing inside a private industrial facility, so this subpart would not even apply under such circumstances.

In considering the AAR Petition, FRA has decided to amend the requirement in paragraph (a)(2)(ii) of § 234.311 to require a railroad only to place and maintain one sign at each vehicular entrance to a railroad yard, or a port or dock facility, eliminating the requirement as it pertains to private industrial facilities. BRS commented that it is concerned for the safety of vehicular and pedestrian traffic inside of these private

industrial facilities. FRA shares similar concerns, but as stated previously in the preamble to the Final Rule, trains typically operate in these facilities at very low speed, and thus the hazards of a collision are reduced. Additionally, FRA agrees with AAR that the railroad does not own the property at the entrances to private industrial facilities, nor does a railroad own the track inside of these facilities. Consequently, it is not practical to require a railroad to place and maintain ENS signs in these locations on rights-of-way that it does not own. Furthermore, such a requirement is outside of the scope of Sec. 205 of the RSIA, which mandates that FRA require each railroad to “ensure the placement at each grade crossing on rights-of-way that it owns of appropriately located signs.”

AAR Petition: “FRA Should Address Missing and Damaged Signs”

In the Final Rule, this subpart does not address the issue of missing and damaged ENS signs at highway-rail and pathway grade crossings. In the Petition, AAR contends that a railroad should not be held responsible for ENS signs that are missing or damaged when the railroad is unaware of the problem or had insufficient time to remedy the situation. Consequently, AAR requests that FRA amend the Final Rule to add a provision that grants a railroad 30 days from first learning of the problem with an ENS sign to repair or replace the sign. FRA understands AAR’s concern that the repair or replacement of an ENS sign takes some time, particularly because an ENS sign is specific to each crossing, by identifying the U.S. DOT National Crossing Inventory number for that crossing. BRS in its comments also agrees with AAR that it takes time to replace a damaged or missing ENS sign, but notes that a railroad should be inspecting its ENS signs on a regular basis.

Pursuant to FRA regulations, a railroad is required to routinely inspect its grade crossing signal systems, as well as its tracks, and it is during such inspections that it most likely would learn of a problem with an ENS sign at a crossing. FRA did not intend in the Final Rule to implement a strict liability standard for missing and damaged ENS signs. Accordingly, FRA has decided to amend the Final Rule to add paragraph (c), “Repair or replacement of ENS sign,” to § 234.311. This new paragraph states that “If an ENS sign required by this subpart is discovered by the responsible railroad to be missing, damaged, or in any other way unusable to vehicular or pedestrian traffic, the responsible railroad shall repair or replace the sign no later than 30 calendar days from the time of detection.” Additionally, as BRS notes in its response to the AAR Petition, 49 CFR 234.245 (a provision of 49 CFR part 234, subpart D, Maintenance, Inspection, and Testing) already has a separate requirement that signs mounted on a highway-rail grade crossing signal post be maintained in “good condition and be visible to a highway user.”

Section 234.317 Compliance Dates

AAR Petition: “The Grandfathering Clause is too Narrow”

Section 234.317 provides the date by which each of various groups of railroads must comply with this subpart. As explained above in the discussion of § 234.305, in response to the AAR Petition, FRA has decided to amend paragraph (b) of § 234.317. The revised paragraph (b) grants a railroad with a nonconforming ENS telephone service until March 1, 2014, to comply with this subpart, subject to the exceptions in paragraphs (c), (d), and (e) of § 234.317.

In the Petition, AAR states that the dimensional requirements in paragraph (c)(1)(i) of § 234.317 exclude approximately 33,000 ENS signs already in place at

highway-rail and pathway grade crossings through which Canadian Pacific (CP), CSX Transportation (CSXT), and Union Pacific Railroad (UP) dispatch trains. Specifically, for these signs currently in use by CP, CSXT, and UP, the lettering on the signs that explains the purpose of the sign (e.g., “Report emergency or problem to ____”) is smaller than the minimum ¾-inch height mandated by paragraph (c)(1)(i). AAR requests that FRA amend paragraph (c)(1)(i) of § 234.317 so that these signs may continue to be used for the remainder of their useful life. Furthermore, AAR explains in the Petition that replacement of these ENS signs by CP, CSXT, and UP is estimated to cost a total of approximately \$3.7 million. BRS contends that this is an inflated cost estimate because the crossings where these signs are located are likely visited on a routine basis for testing purposes, which would reduce the labor costs associated with replacing the signs. BRS also expresses concern that smaller lettering on the ENS sign might compromise the safety of vehicular traffic, by requiring the operator or passenger to exit the vehicle to read the sign.

All three railroads—CP, CSXT, and UP—supplemented the AAR Petition by submitting to FRA the actual grade crossing signs at issue. Additionally, in a letter sent to FRA dated August 29, 2012, CSXT explained that beginning in 2010 it installed approximately 10,000 ENS signs at its grade crossings that meet all the dimensional requirements of paragraph (c)(1)(i) except for the lettering requirement for the words that explain the purpose of the sign. In a letter sent to FRA dated September 7, 2012, CP explained that its decal sign is applied to an aluminum sheet before being installed on the cross buck posts at passive at-grade crossings, and at active at-grade crossings the decal is applied directly to the signal mast. CP also indicated that the sign at issue here is

currently in use on territories trading as CP that are or were once part of the Soo Line Railroad Company and Milwaukee Road Railroad in the States of Illinois, Minnesota, North Dakota, South Dakota, and Wisconsin. However, CP does not use this sign on its Dakota, Minnesota & Eastern Railroad Corporation or the Delaware & Hudson Railway Co., Inc. territories.

In the Petition, AAR suggests that FRA eliminate the minimum height requirement for the lettering on the sign that explains the purpose of the sign, or alternatively suggests that FRA permit a $\frac{3}{8}$ -inch minimum letter height for these words. In preparation of the Final Rule, FRA conducted extensive research on the size and lettering requirements for highway signs, consulting the Manual on Uniform Traffic Control Devices (MUTCD) and independently surveying ENS signs that are currently in place at crossings throughout the country. After careful consideration of the AAR Petition and the supplemental information and signs provided to FRA by CP, CSXT, and UP, FRA has decided to amend paragraph (c)(1)(i) to allow for a minimum height of $\frac{3}{8}$ inch for the lettering that explains the purpose of the ENS sign. FRA does not believe that this change will adversely impact the safety of a vehicular operator or passenger. FRA also has made a parallel modification to paragraph (c)(1)(ii) to distinguish the various letter-height requirements for the information displayed on the ENS sign.

III. Regulatory Impact

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

Prior to issuing the Final Rule, FRA prepared and placed in the docket a regulatory evaluation addressing the economic impact of the Final Rule. The rule was evaluated in accordance with existing policies and procedures and determined to be non-

significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034; February 26, 1979. The present final rule and response to the AAR Petition is likewise considered to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. This regulatory action generally clarifies, reduces, or makes technical amendments to the requirements contained in the Final Rule and allows for greater flexibility in complying with the Final Rule as amended.

These amendments and clarifications respond to the AAR Petition and will provide greater flexibility in the implementation of the Final Rule as amended. In particular, FRA has amended the Final Rule to eliminate the requirement in § 234.311(a)(2)(ii) to post ENS signs at each vehicular entrance to a private industrial facility, which will reduce some costs. FRA also has amended the Final Rule by adding paragraph (c) to § 234.311, to permit a railroad to replace or repair an ENS sign within 30 calendar days from the time that the railroad discovers that the sign is missing or damaged. This was in response to the AAR Petition and comments from BRS. Generally, railroads currently replace or repair signs within this timeframe; therefore, this will not increase the burden on the railroads that currently have compliant signs. However, for railroads required to install new signs due to this final rule, the estimated replacement cost is \$76,553¹ annually or \$1,071,735 over the 15-year period with a present value (7%) of approximately \$625,689. Additionally, FRA has amended § 234.317(c)(1)(i) in the Final Rule to allow for a minimum height of $\frac{3}{8}$ inch for the lettering that explains the purpose of the ENS sign, permitting an estimated 33,000 signs

¹ Calculation: 3,000 signs per year * [(\$15 per sign) + (.25 installation labor hours per sign * \$42.07 per hour)] = \$76,553.

currently in place to be used for the remainder of their useful life. This change reduced the costs by approximately \$918,035² with a present value (7%) of approximately \$712,849. In the Final Rule cost estimates, FRA had inadvertently assumed that these 33,000 signs would have been allowed under the requirements in the Final Rule, even though, the signs actually would not have been allowed for their useful life under the Final Rule requirements. With the new lettering size requirements in the amendments to the Final Rule, these signs are now permitted to be used for their useful life. Thus the estimated costs in the Final Rule's regulatory evaluation reflected the requirements as modified in these amendments. In summary, FRA has concluded that these amendments will reduce the costs, but will have a minimal net effect on FRA's original estimate of the benefits associated with the Final Rule. For the 15-year period analyzed, the estimated quantified cost that will be imposed on railroads by the Final Rule as amended by this action totals \$16.6 million, with a present value (PV, 7 percent) of \$10.7 million. FRA estimates that \$57.8 million in cost savings will accrue through casualty prevention and damage avoidance over the 15-year period, justifying the cost. The discounted value of this is \$31.7 million (PV, 7 percent).

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA developed this action and the original Final Rule in accordance with Executive Order 13272 ("Proper Consideration of Small Entities in Agency Rulemaking") and DOT's procedures and policies to promote compliance with the Regulatory Flexibility

² Calculation: 33,000 signs * [(\$15 per sign) + (.25 installation labor hours per sign * \$42.07 per hour) + (5% of signs needing posts * \$25 per post) + (5% of signs needing posts * .5 installation labor hours per post * \$42.07 per hour)] = \$918,035.

Act (5 U.S.C. 601 et seq.). Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this action would not have a significant economic impact on a substantial number of small entities.

“Small entity” is defined in 5 U.S.C. 601 (Section 601). Section 601(3) defines the term “small entity” as having the same meaning as “small business concern” under Section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of “small entity” a not-for-profit enterprise that is independently owned and operated, and not dominant in its field of operations.

The U.S. Small Business Administration (SBA) stipulates in its “Size Standards” that the largest a railroad business firm that is “for-profit” may be, and still be classified as a “small entity,” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.” See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with SBA, and in conjunction with public comment. Pursuant to the authority provided to it by SBA, FRA has published a final policy, which formally establishes small entities as railroads that meet the line haulage revenue requirements of a Class III railroad. See 68 FR 24891 (May 9, 2003), codified at Appendix C to 49 CFR part 209. Currently, the revenue requirements are \$20 million or less in annual operating revenue, adjusted annually for inflation. The \$20 million limit (adjusted annually for inflation) is based on the STB’s threshold for a Class III railroad, which is adjusted by applying the railroad revenue deflator adjustment. For further information on the

calculation of the specific dollar limit, see 49 CFR part 1201. FRA is using the STB's threshold in its definition of "small entities" for this rule.

The amendments contained in this action may have a minimal, if any, impact on small entities. FRA expects that any impact these amendments do have on small entities would be positive because they generally clarify or reduce the requirements contained in the Final Rule or allow for greater flexibility in complying with the Final Rule as amended. Accordingly, FRA has concluded that there are no substantial economic impacts on small entities resulting from this action.

C. Federalism

Executive Order 13132, "Federalism" (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" are defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications

and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

As stated in the preamble to this final rule, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. Accordingly, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. See 76 FR 18083. This final rule and response to the AAR Petition generally clarifies or reduces the requirements contained in the rule or allows for greater flexibility in complying with the rule.

D. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This rulemaking is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

E. Paperwork Reduction Act

Paperwork Statement – Emergency Notification System

The information collection requirements in this final rule and response to the AAR Petition are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. The sections

of the final rule that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

| CFR Section/Subject | Respondent Universe | Total Annual Responses | Average Time per Response | Total Annual Burden Hours |
|--|---------------------|---------------------------------|---------------------------|---------------------------|
| 234.303(b) – Receipt by Dispatching RR of Report of Unsafe Condition at Highway-Rail Grade Crossing | 594 railroads | 63,891 reports | 1 minute | 1,065 hours |
| 234.303(d) – Receipt by Dispatching RR of Report of Unsafe Condition at Pathway Grade Crossing | 594 railroads | 1,860 reports/ 1,860 records | 1 minute + 1 minute | 62 hours |
| 234.305 (a)(2) - Immediate Contact by Dispatching RR Not Having Maintenance Responsibility of All Trains Authorized to Operate through That Crossing in Response to Credible Report of Warning System Malfunction at Highway-Rail Grade Crossing | 594 railroads | 465 contacts | 1 minute | 8 hours |
| - (a)(2) Contact of Crossing Maintenance RR by Dispatching RR Not Having Maintenance Responsibility in Response to Credible Report of Warning System Malfunction at Highway-Rail Grade Crossing | 594 railroads | 465 contacts + 465 records | 1 minute + 1 minute | 16 hours |
| - (b)(1) In Response to Public Report of Warning System Malfunction at Highway-Rail Grade Crossing | 594 railroads | 925 contacts + 925 records | 1 minute + 1 minute | 30 hours |
| Immediate Contact by Dispatching RR Having Maintenance Duty for Crossing of All Trains Authorized to Operate Through That Crossing | 594 railroads | 925 contacts | 1 minute | 15 hours |
| - Dispatching RR Having Maintenance Duty for Crossing Contact of Appropriate Law Enforcement Authority with Necessary Information regarding Reported Malfunction | 594 railroads | 925 contacts | 1 minute | 15 hours |

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| - 234.305 (b)(2) In Response to Public Report of Warning System Malfunction at Highway-Rail Grade Crossing Immediate Contact by Dispatching RR Not Having Maintenance Duty for that Crossing of All Trains Authorized to Operate Through That Crossing | 594 railroads | 920 contacts | 1 minute | 15 hours |
| - Dispatching RR Contact of Law Enforcement Authority to Direct Traffic/Maintain Safety | 594 railroads | 920 contacts | 1 minute | 15 hours |
| - Dispatching RR Contact of Maintaining RR re: Reported Malfunction and Maintaining RR Record of Unsafe Condition | 594 railroads | 920 contacts + 920 records | 1 minute + 1 minute | 30 hours |
| 234.305(c)(1) – In Response to Report of Warning System Failure at Pathway Grade Crossing Dispatching RR Having Maintenance Duty Contact of All Trains Authorized to Operate Thru It & Record of Unsafe Condition | 594 railroads | 2 contacts + 2 records | 1 minute + 1 minute | .06666 hour |
| - In Response to Report of Warning System Failure at Pathway Grade Crossing Dispatching RR Having Maintenance Duty Contact of Law Enforcement Agencies to Direct Traffic & Maintain Safety | 594 railroads | 2 contacts | 1 minute | .03333 hour |
| -234.305(d)(1) Upon Receiving Report of Disabled Vehicle or Other Obstruction Dispatching RR Having Maintenance Duty Contact of All Trains Authorized to Operate Through Highway-Rail or Pathway Grade Crossing & Record of Unsafe Condition | 594 railroads | 7,440 contact + 7,440 rcds. | 1 minute + 1 minute | 248 hours |
| - Dispatching RR Having Maintenance Duty Contact of Law Enforcement Authority Upon Receiving Report of Disabled Vehicle or Other Obstruction | 594 railroads | 7,440 contacts | 1 minute | 124 hours |
| - (d)(2) Dispatching RR Not Having Maintenance Duty Contact of All Trains Authorized to Operate through Highway-Rail or Pathway Grade Crossing After Report of Disabled Vehicle or Other Unsafe Condition | 594 railroads | 2,556 contacts | 1 minute | 43 hours |
| - Dispatching RR Not Having Maintenance Responsibility Contact of Law Enforcement Authority regarding Disabled Vehicle/Unsafe Condition | 594 railroads | 2,556 contacts | 1 minute | 43 hours |
| - Dispatching RR Contact of Maintaining RR regarding Unsafe Condition at Crossing & Record of Unsafe Condition | 594 railroads | 2,556 contacts + 2,556 records | 1 minute + 1 minute | 86 hours |
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| 234.305(h) – Provision of Contact Information by Maintaining RR to Dispatching RR in Order to Be Contacted regarding Reports of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings | 594 railroads | 10 info. contacts | 1 minute | .1667 hour |
| 234.306(a) – Appointment of One Dispatching RR as Primary Dispatching RR Where Multiple RRs Dispatch Trains through Same Highway-Rail or Pathway Grade Crossing to Provide Info. for ENS Sign | 594 railroads | 50 appointments & records | 60 minutes | 50 hours |
| (b) -- Appointment of One Maintaining RR As Primary Maintaining RR Where Multiple RRs Maintain Same Highway-Rail or Pathway Grade Crossing for Placement and Maintenance of ENS Sign | 594 railroads | 50 appointments & records | 60 minutes | 50 hours |
| 234.307(b) – 3 rd Party Telephone Service Report of Unsafe Conditions at Highway-Rail or Pathway Grade Crossings to Maintaining Railroad and Maintaining RR Record of Unsafe Condition | 594 railroads | 50 reports + 50 records | 1 minute + 1 minute | 2 hours |
| (c) – 3 rd Party Telephone Service Report to Dispatching RR of Unsafe Condition | 594 railroads | 50 reports | 1 minute | 1 hour |
| (d)(1) – Provision of Contact Information to 3 rd Party Telephone Service by Dispatching RR or Maintaining RR Using That Service to Receive Reports of Unsafe Conditions at Highway-Rail or Pathway Grade Crossings | 594 railroads | 17 contact calls | 15 minutes | 4 hours |
| (d)(2) – Written Notice to FRA by Railroad of Intent to Use 3 rd Party Svc. | 594 railroads | 17 letters | 60 minutes | 17 hours |
| (d)(3) – Railroad Written Notification to FRA of Any Changes in Use or Discontinuance of 3 rd Party Service | 594 railroads | 5 letters | 60 minutes | 5 hours |

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|---|---------------|-----------------|------------|--------------|
| 234.309(a) - ENS Signs – General - Provision of ENS Telephone Number to Maintaining RR by Dispatching RR If Two RRs Are Not the Same | 594 railroads | 10 contacts | 30 minutes | 5 hours |
| -(b) ENS Signs Located at Highway-Rail or Pathway Grade Crossings as required by § 234.311 with Necessary Information to Receive Reports Required under § 234.303 | 594 railroads | 81,948 signs | 30 minutes | 40,974 hours |
| 234.311(c) – Repair or replacement of ENS Signs after discovery by responsible railroad of a missing, damaged, or otherwise unusable/illegible sign to vehicular/ pedestrian traffic (New) | 594 railroads | 4,000 signs | 15 minutes | 1,000 hours |
| 234.313 – Recordkeeping - Records of Reported Unsafe Conditions Pursuant to § 234.303 | 594 railroads | 186,000 records | 4 minutes | 12,400 hours |

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan at 202-493-6292 or Ms. Kimberly Toone at 202-493-6132 or via e-mail at the following addresses: Robert.Brogan@dot.gov; Kimberly.Toone@dot.gov.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Office of Information and Regulatory Affairs, Washington, D. C. 20503, Attention: FRA Desk Officer. Comments may also be sent via e-mail to OMB at the following address: oira_submissions@omb.eop.gov

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of

having its full effect if OMB receives it within 30 days of publication.

FRA is not permitted to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of this final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

F. Environmental Assessment

FRA has evaluated the present final rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this final rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. (See 64 FR 28547, May 26, 1999.) Section 4(c)(20) reads as follows: “Actions categorically excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * *

The following classes of FRA actions are categorically excluded: * * * Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation.”

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) [\$140,800,000 or more in 2010] in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement" detailing the effect on State, local, and tribal governments and the private sector. This final rule and response to the AAR Petition will not result in the expenditure, in the aggregate, of more than \$140,800,000 or more in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any "significant energy action." 66 FR 28355 (May 22, 2001). Under the Executive Order, a "significant energy action" is defined as any action by an agency (normally published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule and response to the AAR Petition in accordance with Executive Order 13211. FRA has determined that this final rule will not have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a "significant energy action" within the meaning of Executive Order 13211.

I. Privacy Act Statement

Interested parties should be aware that anyone is able to search the electronic form of all comments received into any agency docket by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (Volume 65, Number 70; Pages 19477-78), or you may visit <http://www.regulations.gov>.

List of Subjects in 49 CFR Part 234

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

The Final Rule

In consideration of the foregoing, FRA amends part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234— GRADE CROSSING SAFETY, INCLUDING SIGNAL SYSTEMS, STATE ACTION PLANS, AND EMERGENCY NOTIFICATION SYSTEMS

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

Authority: 49 U.S.C. 20103, 20107, 20152, 21301, 21304, 21311, 22501 note; Pub. L. 110-432, Div. A, Secs. 202, 205; 28 U.S.C. 2461, note; and 49 CFR 1.89.

2. Section 234.311 is amended by revising paragraph (a)(2)(ii) and adding paragraph (c), to read as follows:

§ 234.311 ENS sign placement and maintenance.

(a) * * *

(2) * * *

(ii) At a railroad yard, or a port or dock facility that does not meet the definition of “plant railroad” in § 234.5, the responsible railroad shall place and maintain a minimum of one sign at each vehicular entrance to the yard, or the port or dock facility in accordance with § 234.309, in lieu of placing signs at each crossing within the yard, or the port or dock facility. Each sign must be placed so that it is clearly visible to a driver of a motor vehicle located at the vehicular entrance to the yard, or the port or dock facility.

* * * * *

(c) Repair or replacement of ENS sign. If an ENS sign required by this subpart is discovered by the responsible railroad to be missing, damaged, or in any other way unusable to vehicular or pedestrian traffic, the responsible railroad shall repair or replace the sign no later than 30 calendar days from the time of detection.

3. Section 234.317 is amended by revising paragraphs (b), (c)(1)(i) and (ii), and (e) to read as follows:

§ 234.317 Compliance dates.

* * * * *

(b) Railroads with nonconforming ENS telephone service. If a railroad subject to this subpart already has its own ENS telephone service or is using a third-party ENS telephone service, and that telephone service does not conform to the requirements in § 234.303 or § 234.307, respectively, on August 13, 2012, the railroad shall comply with this subpart no later than March 1, 2014, pursuant to the exceptions in paragraphs (c), (d), and (e) of § 234.317.

(c) * * *

(1) * * *

(i) If the railroad's sign size is greater than or equal to 60 square inches and the height of the lettering on the sign is greater than or equal to $\frac{3}{4}$ inch for the information required in § 234.309(b)(1) and (b)(3), and greater than or equal to $\frac{3}{8}$ inch for the information required in § 234.309(b)(2) on August 13, 2012, the railroad may maintain the sign for its useful life.

(ii) If the railroad's sign size is greater than or equal to 60 square inches but the height of the lettering is either less than $\frac{3}{4}$ inch for the information required in §

234.309(b)(1) and (b)(3), or less than $\frac{3}{8}$ inch for the information required in § 234.309(b)(2) on August 13, 2012, the railroad's sign must conform to § 234.309 no later than September 1, 2017.

* * * * *

(e) Railroads with nonconforming ENS recordkeeping. If a railroad subject to this subpart already conducts recordkeeping as part of its ENS, and that recordkeeping does not conform to § 234.313 or § 234.315, the railroad's recordkeeping shall conform to § 234.313 or § 234.315 no later than March 1, 2014.

Issued in Washington, DC, on March 11, 2013_____.

Joseph C. Szabo,
Administrator,
Federal Railroad Administration.

[FR Doc. 2013-06083 Filed 03/14/2013 at 8:45 am; Publication Date: 03/15/2013]