



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 272

[Docket No. FRA-2008-0131, Notice No. 1]

RIN 2130-AC00

Critical Incident Stress Plans

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

ACTION: Notice of proposed rulemaking (NPRM)

SUMMARY: FRA issues this proposed rule in accordance with a statutory mandate that the Secretary of Transportation require certain major railroads to develop, and submit to the Secretary for approval, critical incident stress plans that provide for appropriate support services to be offered to their employees who are affected by a “critical incident” as defined by the Secretary. The NPRM proposes a definition of the term “critical incident,” the elements appropriate for the rail environment to be included in a railroad’s critical incident stress plan, the type of employees to be covered by the plan, a requirement that a covered railroad submit its plan to FRA for approval, and a requirement that a railroad adopt and comply with its FRA-approved plan.

DATES: Written comments must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Comments received after

that date will be considered to the extent possible without incurring additional delay or expense.

FRA does not believe that a public, oral hearing will be necessary. However, if FRA receives a specific request for a public, oral hearing prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], FRA will schedule a hearing and publish a supplemental notice in the Federal Register to inform interested parties of the date, time, and location of any such hearing.

ADDRESSES: Comments: Comments related to Docket No. FRA-2008-0131, Notice No. 1, may be submitted by any of the following methods:

- Web site: The Federal eRulemaking Portal, www.Regulations.gov. Follow the Web site's online instructions for submitting comments.
- Fax: 202-493-2251.
- Mail: Docket Management Facility, U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590.
- Hand Delivery: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Room W12-140 on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments received will be posted without change to <http://www.Regulations.gov>, including any personal information provided. Please see the discussion under the Privacy Act heading in the SUPPLEMENTARY INFORMATION section of this document.

Docket: For access to the docket to read background documents or comments received, go to <http://www.Regulations.gov> at any time or visit the Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, Room W12-140, on the Ground level of the West Building, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: For program issues: Dr. Bernard J. Arseneau, Medical Director, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: (202) 493-6232), Bernard.Arseneau@dot.gov; or Ronald Hynes, Director, Office of Safety Assurance and Compliance, Office of Railroad Safety, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20590 (telephone: (202) 493-6404), Ronald.Hynes@dot.gov. For legal issues: Veronica Chittim, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20950 (telephone: (202) 493-0273), Veronica.Chittim@dot.gov.

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I. Executive Summary

This NPRM proposes a regulation that would require each Class I railroad, intercity passenger railroad, and commuter railroad to establish and implement a critical incident stress plan for certain employees of the railroad who are directly involved in, witness, or respond to, a critical incident. FRA seeks comment on all aspects of this proposal.

Although FRA has never regulated critical incident stress plans, many railroads have had some form of critical incident stress plan in place for many years. This rulemaking responds to the Rail Safety Improvement Act of 2008 (Public Law 110-432, Div. A) (RSIA) mandate that the Secretary of Transportation establish regulations to define “critical incident” and to require certain railroads to develop and implement critical incident stress plans.

As discussed in detail below, FRA reviewed the applicable science and information received through the Railroad Safety Advisory Committee (RSAC), and as required by Congress, FRA proposes a definition for “critical incident” and proposes a set of minimum standards for critical incident stress plans. This approach provides covered employees with options for relief following a critical incident, yet allows for substantial flexibility within the regulatory framework so that railroads may adapt their plans commensurate with their needs. The proposal defines a “critical incident” as either — (1) An accident/incident reportable to FRA under 49 CFR part 225 that results in a fatality, loss of limb, or a similarly serious bodily injury; or (2) A catastrophic accident/incident reportable to FRA under part 225 that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely. The proposed set of minimum standards for critical incident stress plans include allowing a directly-involved employee to obtain relief from the remainder of the tour of duty, providing for the directly-involved employee’s transportation to the home terminal (if applicable), and offering a directly-involved employee appropriate support services following a critical incident. The proposed rule would require each applicable railroad to submit its plan to FRA for approval.

FRA has analyzed the economic impacts of this proposed rule against a “status quo” baseline that reflects present conditions (i.e. primarily what applicable railroads are already doing with respect to critical incident policy). Based on both RSAC meetings and discussions with the rail industry, FRA’s analysis assumes that all railroads affected by the proposed rule currently have policies that include a critical incident stress plan, thereby reducing the costs of compliance associated with the proposed rule. In estimating

these compliance costs, FRA included costs associated with training supervisors on how to interact with railroad employees who have been affected by a critical incident, employee training, counseling, and other support services, and costs associated with the submission of the critical incident stress plan to FRA for approval. FRA estimates that the costs of the proposed rule for a 20-year period would total \$1,943,565. Using a 7 percent and a 3 percent discount rate, the total discounted costs will be \$1,337,830 and \$1,615,519, respectively.

The proposed rule contains minimum standards for employee training, leave, counseling, and other support services. These standards would help create benefits by providing employees with knowledge, coping skills, and services that would help them: (1) recognize and cope with symptoms of normal stress reactions that commonly occur as a result of a critical incident; (2) reduce their chance of developing a disorder such as depression, Post-Traumatic Stress Disorder (PTSD), or Acute Stress Disorder (ASD) as a result of a critical incident; and (3) recognize symptoms of psychological disorders that sometimes occur as a result of a critical incident and know how to obtain prompt evaluation and treatment of any such disorder, if necessary. FRA anticipates that implementation of the proposed rule would yield benefits by reducing long-term healthcare costs associated with treating PTSD, ASD, and other stress reactions; and costs that accrue either when an employee is unable to return to work for a significant period of time or might leave railroad employment due to being affected by PTSD, ASD, or another stress reaction. In addition, safety risk posed by having a person who has just been involved in a critical incident performing safety critical functions is also reduced. The majority of the quantifiable benefits identified by FRA's analysis are associated with

railroad employee retention and a reduction of long-term healthcare costs associated with PTSD cases that were not treated appropriately after a critical incident. FRA expects that the proposed rule would decrease the number of employees who leave the railroad industry due to PTSD, ASD, or other stress reactions, as early treatment for potential PTSD cases following exposure to a critical incident would reduce both the likelihood of developing PTSD and the duration of PTSD or another stress reaction. The proposed rule would therefore increase the early identification of PTSD and provide more immediate healthcare to the cases that develop. FRA estimates that the present value of the quantifiable benefits for a 20-year period would total \$2,630,000. Using a 7 percent and a 3 percent discount rate, the total discounted benefits would be \$1,505,622 and \$2,023,548, respectively. Overall, FRA finds that the value of the anticipated benefits would justify the cost of implementing the proposed rule. FRA seeks comments on all aspects of the economic impacts of its proposal.

II. Overview of Critical Incidents and Critical Incident Stress Plans

A. Statutory Mandate and Authority to Conduct this Rulemaking

On October 16, 2008, the RSIA was enacted. Section 410 of the RSIA (Section 410) mandates that the Secretary of Transportation (Secretary) require “each Class I railroad carrier, each intercity passenger railroad carrier, and each commuter railroad carrier to develop and submit for approval to the Secretary a critical incident stress plan that provides for debriefing, counseling, guidance, and other appropriate support services to be offered to an employee affected by a critical incident.” See Section 410(a). RSIA mandates that the plans include provisions for relieving employees who are involved in, or who witness, critical incidents from their tours of duty, and for providing leave for

such employees from their normal duties as may be necessary and reasonable to receive preventive services and treatment related to the critical incident. See Section 410(b).

The Secretary is specifically required to define the term “critical incident” for purposes of this rulemaking. See Section 410(c). The Secretary has delegated his responsibilities under the RSIA to the Administrator of FRA. See 49 CFR 1.89(b). In the Section-by-Section Analysis below, FRA discusses how the proposed regulatory text addresses each portion of the Section 410 mandates. This proposed rule is also issued pursuant to FRA’s general rulemaking authority at 49 U.S.C. 20103.

As required by Section 410(c), within 30 days after enactment of the RSIA, FRA initiated action within the DOT to commence a rulemaking to define the term “critical incident.” Additionally, as required by Section 410(a), FRA consulted with the Department of Health and Human Services (HHS) and the Department of Labor (DOL) in preparing this proposed rule. Specifically, in addition to consulting with representatives of HHS and DOL, FRA provided those departments with an advance copy of this proposed regulation and requested input on FRA’s approach. FRA has incorporated the suggestions provided by both HHS’s Substance Abuse and Mental Health Services Administration (SAMHSA) and DOL’s Wage and Hour Division.

B. Factual Background¹

Highway-rail grade crossing accidents and trespasser incidents along the railroad right-of-way are an unfortunate reality for employees in the railroad industry. Railroad

¹ Much of this background information and review of the literature is derived from the independent final report prepared by FRA grantee, Dr. Richard Gist, in support of Grant FR-RRD-0024-11-01, titled, “Proposed Key Elements of Critical Incident Intervention Program For Reducing the Effects of Potentially Traumatic Exposure On Train Crews to Grade Crossing and Trespasser Incidents.” See Docket No. FRA-2008-0131. Articles cited in this NPRM are available for viewing at FRA upon request.

work carries the risk that a covered employee will be directly involved in a critical incident, often outside the control of the railroad employees, which can lead to severe emotional and psychological distress, including Post Traumatic Stress Disorder (PTSD) and the more immediate Acute Stress Disorder (ASD).² There are concerns about the impact of exposure to traumatic incidents on employees in safety-sensitive jobs, most notably engineers and conductors.

Until this proposed rule, a national, uniform approach to critical incident response in the railroad industry did not exist, with only a handful of States taking action through statutes or regulations to aid critical incident response in the railroad industry. With this proposed rule, FRA seeks to define the term “critical incident” in the railroad setting, which if met, would trigger the requirement that appropriate support services be offered to railroad employees affected by such incidents.

PTSD and ASD can develop following any traumatic event that threatens personal safety or the safety of others, or causes serious physical, cognitive or emotional harm. While such disorders are most often initiated by a threat to one’s life or the witnessing of brutal injury or traumatic death—in combat situations, for example, or during violent accidents or disasters—any overwhelming life experience can trigger the disorders, especially if the event is perceived as unpredictable and uncontrollable. Individuals exposed to traumatic events experience alterations in their neurologic, endocrine, and

² ASD is “a mental disorder that can occur in the first month following a trauma. The symptoms that define ASD overlap with those for PTSD.” ASD can lead to PTSD, but does not always. A “PTSD diagnosis cannot be given until symptoms have lasted for one month.” U.S. Department of Veterans Affairs, National Center for PTSD, available at <http://www.ptsd.va.gov/public/pages/acute-stress-disorder.asp> (last accessed January 28, 2013).

immune systems, which have been linked to adverse changes in overall health.³ These changes and symptoms can be ameliorated if treated appropriately, usually with psychotherapy and/or medications. However, PTSD and ASD often go undiagnosed, as few primary care providers routinely assess for it and more often than not, attribute the symptoms to less serious forms of depression, anxiety, and general emotional distress.⁴

In recent years approximately 2,500 highway-rail crossing accidents and 900 casualties to persons trespassing on railroad property (trespassers) have occurred in the United States annually. Each one of these incidents, as well as other traumatic events such as railroad accidents or incidents resulting in serious injury or death to railroad employees, hold potential for causing ASD, PTSD, or other health and safety-related problems, in any railroad employee who is present. Some locomotive engineers and conductors have had the misfortune of experiencing multiple potential PTSD/ASD-invoking events over the course of their careers.⁵

Exposure of railroad employees, particularly locomotive engineers and conductors, to prototypical potentially traumatic exposures is well established. Incursion

³ In a study of 830 train drivers in Norway, the 48 percent of participants who had experienced at least one on-the-track accident reported considerably more health problems than those who reported no such exposure. Their symptoms included musculoskeletal, gastrointestinal, and sleep pattern issues and continued from the incident to the time of the study (for some participants up to ten years). This study also revealed that the more pronounced initial reactions to on-the-track accidents, the more severe and persistent were the health complaints post-exposure. Vatshelle, A. & Moen, B. E. (1996). Serious on-the-track accidents experienced by train drivers: Psychological reactions and long-term health effects. *Journal of Psychosomatic Research*, 42(1), 43-52. See also Wignall, E. L., Dickson, J. M., Vaughan, P., Farrow, T. F. D., Wilkinson, I. D., Hunter, M. D., & Woodruff, P. W. R. (2004). Smaller hippocampal volume in patients with recent-onset posttraumatic stress disorder. *Biological Psychiatry*, 56(11), 832-836.

⁴ Gerrity M. S., Corson, K., & Dobscha S. K. (2007). Screening for posttraumatic stress disorder in Veterans' Affairs primary care patients with depression symptoms. *Journal of General Internal Medicine*, 22(9), 1321-1324.

⁵ The Associated Press, Fatal Collisions Traumatize Nation's Train Engineers, August 14, 2009. Saed Hindash, *The Star-Ledger*. Death by Train. June 18, 2009. http://www.nj.com/insidejersey/index.ssf/2009/06/death_by_train.html ("Over a 40-year career, the average engineer will be involved in five to seven incidents, says Darcy, who has had seven fatalities.").

events, such as vehicular accidents at highway-rail grade crossings and pedestrian incursions onto the railroad right-of-way (frequently as a method of suicide) often involve fatalities and the injuries sustained may be gruesome. Locomotive engineers and conductors, because of their proximity to the accident scene, must often tend to the injured and secure the scene, compounding the extent and the duration of exposure. In particular, locomotive engineers may be alone in the cab when an on-the-track accident occurs. Further, train crews are required to report the incident, secure the train, and often leave the train and examine the victims. Crew members may even provide first aid if victims are alive, and wait, sometimes for long periods, for assistance or instructions.

Systematic empirical studies of the health impact on railroad personnel of this kind of experience are limited. The best designed studies have been European and show clinically diagnosed PTSD in 7 to 14 percent of those exposed. FRA has found no empirical studies of treatment efficacy and impact within the U.S. railroad population, presumably due to the relatively small population annually treated and the different locations and systems involved in railroad employees' identification and care.

If left untreated, mental health conditions carry significant costs for employers in the form of "presenteeism," when employees come to work, but have lowered productivity.⁶ Presenteeism can have catastrophic safety consequences for railroads. Symptoms such as sleep difficulties, trouble concentrating, hypervigilance and exaggerated sensory reactions—often leading sufferers to misuse alcohol to reduce the

⁶ Kessler, R.C. (2000). Posttraumatic stress disorder: The burden to the individual and society. Journal of Clinical Psychiatry, 61(suppl. 5), 4-12. Kessler, R.C., & Greenberg, P.E. (2002). The economic burden of anxiety and stress disorders. In K.L. Davis, D. Charney, J.T. Coyle, & C. Nemeroff (Eds.), Neuropsychopharmacology: The Fifth Generation of Progress. Philadelphia: Lippincott, Williams & Wilkins. Pilette, P. C. (2005). Presenteeism and productivity: Two reasons employee assistance programs make good business cents. Annals of the American Psychotherapy Association, 8(1), 12-14.

stress–compromise workers’ safety at work and the safety of others, and lower employees’ productivity on the job. One study revealed that employees are more likely to engage in workplace presenteeism than calling in sick (absenteeism).⁷

Most major railroads have plans to provide their employees with assistance and intervention following traumatic events. Most of these programs have been in existence for a number of years, usually as part of a railroad’s “Employee Assistance Program” (EAP). The descriptions of interventions, timing, and delivery in these programs are often “transplanted” from programs created for fire, rescue, and emergency services personnel in the 1980s and 1990s. These approaches, particularly those built around “critical incident stress debriefing” and related interventions, have come under increasing scrutiny as independent research has reported such interventions to not be helpful in certain situations and even to paradoxically inhibit the natural recovery of certain vulnerable participants. Accordingly, most authoritative guidelines now caution against the routine application of these approaches and some now list them as directly contraindicated.

While there are variations among railroads’ existing programs, there are also substantial similarities reflected with respect to critical elements mandated by statute.⁸ For example, many railroads provide assistance and intervention following critical incidents, often through the use of the railroad’s EAP. The majority of existing plans allow for immediate relief from duty upon request for the remainder of the tour of duty,

⁷ Caverley, N., Cunningham, J. B., & MacGregor, J. M. (2007). Sickness presenteeism, sickness absenteeism, and health following restructuring in a public service organization. Journal of Management Studies, 44(2), 304-319.

⁸ The Association of American Railroads (AAR) provided a matrix to the RSAC Critical Incident Working Group (CIWG) summarizing key characteristics of programs as submitted by nine member railroads. Several railroads also submitted their current policies regarding critical incidents in the workplace.

as well as transportation to the home terminal for affected employees. Finally, many plans allow for additional leave following the tour of duty upon request, often involving contact with occupational medicine or EAP representatives.⁹ Therefore, several of these common elements are incorporated into this proposed rule.

III. Overview of the RSAC

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to the Administrator of FRA on rulemakings and other safety program issues. 61 FR 9740 (Mar. 11, 1996). RSAC's charter under the Federal Advisory Committee Act (Public Law 92-463) was most recently renewed in 2012. 77 FR 28421 (May 14, 2012).

RSAC includes representation from all of FRA's major stakeholders, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. An alphabetical list of RSAC members includes the following:

AAR;

American Association of Private Railroad Car Owners (AAPRCO);

American Association of State Highway and Transportation Officials (AASHTO);

American Chemistry Council (ACC);

American Petroleum Institute (API);

American Public Transportation Association (APTA);

American Short Line and Regional Railroad Association (ASLRRA);

American Train Dispatchers Association (ATDA);

⁹ Unpaid, job-protected leave under the Family and Medical Leave Act (FMLA) may be available to an employee involved in a critical incident. FMLA leave may be considered where an eligible employee of a covered employer suffers a serious health condition as a result of the incident. For additional guidance on the FMLA, please contact the United States Department of Labor or visit www.dol.gov.

Association of Railway Museums (ARM);

Association of State Rail Safety Managers (ASRSM);

Brotherhood of Locomotive Engineers and Trainmen (BLET);

Brotherhood of Maintenance of Way Employes Division (BMWED);

Brotherhood of Railroad Signalmen (BRS);

The Chlorine Institute, Inc.;

Federal Transit Administration (FTA);*

The Fertilizer Institute;

High Speed Ground Transportation Association;

Institute of Makers of Explosives;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Electrical Workers (IBEW);

Labor Council for Latin American Advancement;*

League of Railway Industry Women;*

National Association of Railroad Passengers;

National Association of Railway Business Women;*

National Conference of Firemen & Oilers;

National Railroad Passenger Corporation (Amtrak);

National Railroad Construction and Maintenance Association (NRCMA);

National Transportation Safety Board (NTSB);*

Railway Passenger Car Alliance;

Railway Supply Institute;

Safe Travel America;

Secretaria de Comunicaciones y Transporte;*

Sheet Metal Workers International Association;

Tourist Railway Association Inc.;

Transport Canada;*

Transport Workers Union of America;

Transportation Communications International Union/BRC (TCIU);

Transportation Security Administration (TSA); and

United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration.

If a working group comes to a unanimous consensus on recommendations for action, the proposal is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff members play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation.

However, FRA is in no way bound to follow the RSAC recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations would be noted and explained in the rulemaking document issued by FRA. If the working group or RSAC is unable to reach consensus on recommendations for action, FRA will proceed to resolve the issue through traditional rulemaking proceedings.

IV. RSAC Critical Incident Working Group

The Critical Incident Task Force (Task Force) was formed as part of the Medical Standards Working Group, and its task statement (Task No. 09-02) was accepted by RSAC on September 10, 2009. On July 2, 2010, FRA solicited bids for a grant to assess the current knowledge of post-traumatic stress interventions and to advance evidence-based recommendations for controlling the risks associated with traumatic exposures in the railroad setting. On March 11, 2011, FRA awarded the grant to the National Fallen Firefighters Foundation. On May 20, 2011, the Task Force was reformulated into an independent working group, the Critical Incident Working Group (CIWG). Task No. 09-02 (amended to reflect the new independent working group) specifies that the purpose of the CIWG is to provide advice regarding the development of implementing regulations for Critical Incident Stress Plans as required by the RSIA. The Task further assigns the CIWG to do the following: (1) define what a "critical incident" is that requires a response; (2) review available data, literature, and standards of practice concerning critical incident programs to determine appropriate action when a railroad employee is

involved in, or directly witnesses, a critical incident; (3) review any evaluation studies available for existing railroad critical incident programs; (4) describe program elements appropriate for the rail environment, including those requirements set forth in the RSIA; (5) provide an example of a suitable plan (template); and (6) assist in the preparation of an NPRM.

The CIWG met on June 24, 2011; September 8-9, 2011; October 11-12, 2011; and December 13, 2011. At the conclusion of the December 2011 meeting, an informal task force was formed to consider the substantive agreements made by the CIWG and to draft regulatory language around those agreements for the CIWG's consideration and vote. The small task force presented the language to the full CIWG for an electronic vote on August 6, 2012. The CIWG reached a consensus on all but one item¹⁰ and forwarded a proposal to the full RSAC on August 21, 2012. RSAC voted to approve the CIWG's recommended text on September 27, 2012 and that recommended text provided the basis for this NPRM. While the CIWG did discuss a general template flow chart of a suitable critical incident stress plan, as recommended by the Grantee's Final Report, a specific model plan that could be adapted and adopted by railroads was not developed by the CIWG. Instead, the CIWG focused its efforts on the definition of critical incident and the program elements essential for the proposed regulatory text.

In addition to FRA staff, the members of the CIWG include the following:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc.

¹⁰ Consensus was not reached on the issue of whether a railroad should be required to provide labor organizations' general chairpersons (in addition to the international/national president of the labor organization) with a copy of a railroad's critical incident stress plan.

(CSX), The Kansas City Southern Railway Company (KCS), Norfolk Southern Railway Company (NS), Northeast Illinois Regional Commuter Railroad Corporation (Metra), and Union Pacific Railroad Company (UP);

Amtrak;

APTA, including members from Greater Cleveland Regional Transit Authority; Long Island Rail Road (LIRR); MTA - Metro-North Railroad; and Southern California Regional Rail Authority (SCRRA);

ASLRRA (representing short line and regional railroads);

ATDA;

BLET;

BMWED;

BRC/TCIU;

BRS;

NRCMA; and

UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center attended all of the meetings of the CIWG and contributed to the technical discussions.

FRA has greatly benefited from the open, informed exchange of information during the meetings. In developing this NPRM, FRA relied heavily upon the work of the CIWG.

V. FRA's Approach to Critical Incident Stress Plans

In this NPRM, FRA proposes a definition for the term "critical incident" and proposes minimum criteria that must be addressed by each railroad's critical incident

stress plan. The proposed regulatory text would allow a railroad to utilize its existing critical incident stress plan as a base, making modifications as necessary to ensure compliance with the minimum standards proposed in this NPRM. The proposed rule would provide each railroad with the opportunity to conform its critical incident stress plan's screening and intervention components to current best practices and standards for evidence-based care. This flexible, standards-based approach allows for innovation and plan modification in response to new scientific developments in this field.

VI. Section-by-Section Analysis

Subpart A—General

Subpart A of the proposal contains the general provisions of the rule, including a statement of the rule's purpose, an application section, a statement of general duty, the critical incident stress plan coverage section, a definitions section that includes the central definition of a "critical incident," and a statement pertaining to penalties. As discussed further in the definitions section, § 272.9, this proposal defines a "critical incident" as either — (1) An accident/incident reportable to FRA under 49 CFR part 225 that results in a fatality, loss of limb, or a similarly serious bodily injury; or (2) A catastrophic accident/incident reportable to FRA under part 225 that could be reasonably expected to impair a directly-involved employee's ability to perform his or her job duties safely.

Section 272.1 Purpose

Proposed paragraph (a) of section 272.1 includes a formal statement of the rule's purpose. Proposed paragraph (b) of this section effectively explains that the proposed rule would set a minimum standard for critical incident stress plans and that the rule would not constrain a railroad from implementing a critical incident stress plan

containing provisions beyond those proposed, provided that any additional provisions are not inconsistent with the rule.

Section 272.3 Application

Consistent with Section 410(a), proposed section 272.3 provides that the requirements of this part only apply to each Class I railroad, including the National Railroad Passenger Corporation, each intercity passenger railroad, and each commuter railroad. However, FRA encourages other railroads to implement critical incident stress plans and procedures consistent with this proposed regulation. FRA understands that many Class II and Class III railroads that would not be subject to this rule in fact do have critical incident stress plans in place. FRA notes that critical incident stress plans would be particularly useful for Class II and Class III railroads that are located in geographical locations prone to critical incidents, such as those locations with a large number of highway-rail grade crossings.

Section 272.5 General duty

This proposed paragraph provides that a railroad subject to this part must adopt a written critical incident stress plan approved by the FRA under § 272.103 and must comply with that plan. Should a railroad subject to this part make a material modification to the approved plan, the railroad is required to adopt the modified plan approved by the FRA under § 272.103 and to comply with that plan as revised. As discussed in the section-by-section analysis of § 272.103 below, a material modification is a substantive change to a plan, not a minor update such as an address or similar change.

Section 272.7 Coverage of a critical incident stress plan

A large percentage of critical incidents occur where persons intentionally place themselves in front of a moving train (suicides) or drive around highway grade crossing warning signs, shortly before a train approaches, and a train crew is unable to stop the train in time to avoid hitting them. The crewmembers involved may be traumatized after such an event, even though there was nothing they could have done to prevent the collision. The purpose of this proposed rule is to effectuate the intent of the RSIA that train crews will be assisted following such events. After extensive discussions in the CIWG, FRA believes that other railroad-related accidents, such as those that occur in car shops, maintenance-of-way situations, or other non-main-track locations involving railroad operations, should also be covered by this proposed regulation. This extension provides additional benefits, but with little additional cost, as many railroad critical incident stress plans already extend beyond the grade crossing and trespasser context. Thus, as explained below FRA intends in this proposal that railroads make use of these critical incident stress plans to aid directly involved employees in situations other than suicides and trespassers.

To make it clear which railroad employees would be covered by this regulation, FRA is proposing language similar to the RSIA for safety-related employees and similar to existing regulatory language pertaining to railroad employees who perform safety sensitive functions. See 49 U.S.C. 20102(4) (defining “safety-related railroad employee”) and 49 CFR 209.303. As proposed, this part would cover railroad employees subject to the hours of services laws or regulations (49 U.S.C. 21103, 21104, 21105 or 49 CFR part 228, subpart F), railroad employees that inspect, repair, or maintain railroad

right-of-way or structures, and railroad employees who inspect, repair, or maintain locomotives, passenger cars, or freight cars, when directly involved in a critical incident.

Thus, this regulation would include an employee who performs work covered under the hours of service laws or regulations, as well as an employee who performs work that is not typically subject to the hours of service laws, but during a tour of duty, performs work covered by the hours of service laws. This regulation would also cover employees who are responsible for inspecting, repairing, and maintaining the right-of-way of a railroad, such as a person who would be included in the definitions of “roadway worker” and “railroad bridge worker” found in 49 CFR 214.7. Also included would be railroad employees who inspect, install, repair, or maintain track, roadbed, and signal and communication systems of a railroad and railroad employees who inspect, repair, or maintain locomotives, passenger cars, or freight cars. Paragraph (c) of this section was adjusted from the consensus CIWG language to maintain consistency with 49 CFR Part 209, as suggested during the full RSAC meeting on September 27, 2012. The words “inspect, install, repair, or” were added to the original phrase “[r]ailroad employees who maintain the right-of-way or structures.”

In this manner, FRA proposes to cover other employees besides locomotive engineers and conductors who could be psychologically affected or even traumatized by a critical incident as a result of railroad operations. But, by including a coverage section that would be more limited than the entire field of railroad employees, FRA is reducing the costs to railroads while ensuring that those employees who could most benefit from the regulation are included. For example, a railroad track maintainer is welding track on a siding and sees a train collide with an automobile at a nearby highway-rail grade

crossing. Since the track maintainer witnessed the incident while performing his or her job duties arising from railroad operations (maintaining track), as proposed, the maintainer would be covered by the rule. In contrast, a railroad administrative assistant who works in a railroad's headquarters building would not be specifically covered by this proposed regulation if he or she witnesses an injury in the office. Although FRA does not propose to cover office injuries or accidents, FRA encourages railroads to apply their critical incident stress plans in any situation where it could be beneficial to the railroad and its employees, even if this proposed regulation would not cover the particular situation at issue or the specific railroad employee involved.

Section 272.9 Definitions

Proposed § 272.9 defines a number of terms used in this proposed part. A few of these terms have definitions that are similar to, but may not exactly mirror, definitions of the same terms used elsewhere in FRA's regulations. Definitions may differ from those in other FRA regulations because a particular word or phrase used in the definition in another FRA regulation does not have context within this proposed part.

FRA proposes to define the term accident/incident to mean an accident/incident that is reportable under FRA's accident/incident reporting regulations at 49 CFR part 225 (Part 225). While substantially the same as the consensus CIWG definition, "an accident or incident reportable under part 225 of this chapter," the phrasing was altered for clarity to say that accident/incident has the meaning assigned to that term by part 225 of this chapter.

The definitions of Administrator and Associate Administrator are standard definitions used in other parts of this chapter of the Code of Federal Regulations.

Consistent with its use in other parts of FRA's regulations, in this part, the term Associate Administrator means the Associate Administrator for Railroad Safety/Chief Safety Officer.

FRA proposes to define Class I to have the same meaning as assigned to the term by the regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1-1). This instruction states that for purposes of accounting and reporting, Class I railroads have "annual carrier operating revenues of \$250 million or more after applying the railroad revenue deflator formula shown in Note A." Note A states that "[t]he railroad revenue deflator formula is based on the Railroad Freight Price Index developed by the Bureau of Labor Statistics. The formula is as follows: Current Year's Revenues \times (1991 Average Index/Current Year's Average Index)." This proposed definition of "Class I" is similar to the definitions of "Class I" found elsewhere in FRA's regulations. See, e.g., 49 CFR 217.4; 219.5; and 244.9. See also 49 U.S.C. 20102(1).

FRA proposes to define commuter railroad to mean a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, that provides regularly-scheduled passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979. In this manner, FRA proposes to mirror the applicability language in 49 CFR 239.3. See also 49 CFR Part 209, Appendix A.

Railroads operated entirely by contract operators, such that the contractor organization itself meets the definition of a Class I railroad, intercity passenger railroad, or commuter railroad, would be subject to this rule. In these circumstances, FRA

assumes that the contract operator would utilize the critical incident stress plan developed by the reporting railroad.

FRA proposes to define critical incident to reflect the recommendations made by the CIWG. By limiting the definition of “critical incident” to a subset of those accidents/incidents that are reportable under Part 225, FRA proposes to exclude from the definition all incidents that do not arise from the operation of the railroad. This language is consistent with the CIWG language, but was modified to replace “accident/incident” with “accident/incident reportable to FRA under part 225 of this chapter” to enhance the understanding of that term. To clarify FRA’s position, FRA provides the following examples. If a train crewmember that is being transported in a van (i.e., the crewmember is in deadhead status and on duty) is directly involved in an accident/incident that results in a fatality, loss of limb, or a similarly serious bodily injury, that crewmember would be included in the scope of this proposed regulation, as that event arose from the operation of a railroad, and would be reportable under Part 225. In contrast, if a deadheading crewmember riding in the van sees a motor-vehicle accident on a public highway that does not otherwise involve the van, this incident would not be an accident/incident arising from railroad operations nor would it be reportable under Part 225, and thus would be excluded from the scope of the proposed definition of “critical incident.” While a reportable accident/incident could cover many incidents that relate to railroad operations, this proposed definition of “critical incident” includes only an accident/incident that results in a fatality, loss of limb, or a similarly serious bodily injury or a catastrophic accident/incident reportable to FRA under part 225 of this chapter that could be reasonably expected to impair a directly-involved employee’s ability to perform

his or her job duties safely. Accordingly, minimal injuries in the railroad workplace would not be included in the scope of this proposed definition. Similarly, as explained below, “near miss” scenarios (i.e., situations which when seen in hindsight could have resulted in an accident, but did not) would not be included.

Paragraph (1) of the definition is designed to reflect the presumed statutory intent to include an event that results in a fatality, loss of limb, or a similarly serious bodily injury. This element is intended to encompass the typical events that occur along the railroad right-of-way, involving highway-rail grade crossing accidents and trespasser incursions that could affect a directly-involved employee. This element also includes events resulting from railroad operations such as those in a railroad shop where an employee witnesses a workplace accident that results in another person’s death or extreme injury.

Paragraph (2) of the definition expands the definition beyond an accident/incident leading to another person’s actual physical harm, to include a catastrophic accident/incident reportable to FRA under part 225 of this chapter that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely. FRA understands this paragraph to mean an accident/incident that had the potential for catastrophic consequences (i.e., could have caused a fatality, loss of limb, or other similarly serious bodily injury), that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely. In this manner, a critical incident is intended to include an event, such as a serious derailment or accident that could have caused a fatality, loss of limb, or similarly serious

bodily injury, but fortunately did not. The following examples are meant to clarify the meaning of the definition.

Example 1: A fuel tanker truck is blocking a grade crossing. The train crew cannot stop their approaching train in enough time to avoid striking the tanker truck. Although the accident could have caused serious injury or death to the driver of the tanker truck and/or to the train crew, it is learned later that the tanker truck was unoccupied and the tanker truck was not loaded with fuel. The accident/incident causes damage to the locomotive, the tanker truck, and nearby track structure, causing sufficient damage to exceed the dollar reporting threshold under 49 CFR 225.19(c) and thereby making the accident reportable under 49 CFR 225.11. This type of accident/incident had the potential for catastrophic consequences (i.e., could have caused a fatality, loss of limb, or other similarly serious bodily injury), that could be reasonably expected to impair a directly-involved employee's ability to perform his or her job duties safely. Thus, this proposed rule intends to cover the employees involved in this type of event as the event would be considered a "critical incident."

Example 2: A train derails, and railroad employees who have been working alongside the track are in danger of being seriously hurt, but in fact, the employees are able to run to safety and avoid being harmed by the derailling equipment. The employees' legitimate, reasonable fear for their own safety may cause a negative stress-reaction that could be reasonably expected to impair a directly-involved employee's ability to perform his or her job duties safely. Therefore the event of running to save one's own life is included in the term "critical incident" and those directly involved employees are covered by this proposed rule. In contrast, if several freight cars derail, but there is no

involvement of the train crew or a high risk of serious injury, that type of event will not fall under the definition of a critical incident.

Additionally, this proposed rule does not directly apply to “near miss” scenarios. A “near miss” is an event, seen in hindsight, in which an accident could have occurred, but was narrowly avoided. For example, an automobile is rendered inoperable on the railroad tracks at a highway-rail grade crossing, but the automobile is able to get out of the way of the oncoming train, so that a collision is averted. While a “near miss” event could cause a negative stress-reaction in the train crew in the example above, research demonstrates that such reaction would typically only occur in situations where, for example, an individual had been involved in a prior similar incident which had catastrophic consequences or there were other issues at play. FRA believes that such “near miss” issues should be handled by each railroad on an individual basis, as the applicable science does not appear to support including “near miss” scenarios in the rule generally. Although FRA requests comment on all aspects of this proposed rule, FRA specifically requests comment on this proposed definition of “critical incident.” In particular, FRA requests comment as to whether the proposed definition should contain explicit language excluding “near miss” scenarios.

FRA proposes that a directly-involved employee mean a railroad employee covered in proposed § 272.7 who falls into any of three stated subcategories: (1) whose actions are closely connected to the critical incident; (2) who witnesses the critical incident in person as it occurs or who witnesses the immediate effects of the critical incident in person; or (3) who is charged to directly intervene in, or respond to, the critical incident (excluding railroad police officers or investigators who routinely respond

to and are specially trained to handle emergencies). The first subcategory would include an employee covered under § 272.7 whose actions are closely connected to the critical incident, such as the locomotive engineer or the conductor who operates the train that hits a car or pedestrian at a crossing. The second subcategory is an employee covered under § 272.7 who is a witness to the critical incident, such as an employee who is working alongside the track when the highway-rail grade crossing collision occurs, and either sees the incident happen or comes upon the casualties of the incident. The phrase “witnesses . . . in person” is intended to exclude employees who only hear about the accident/incident (such as over the radio) and are not otherwise directly involved in the accident/incident. The third subcategory would include an employee covered under § 272.7 who is charged to directly intervene in, or respond to, the highway-rail grade crossing accident/incident, such as craft and supervisory employees who are called out to the scene. In this way, a first line or second line railroad supervisor, or a shop or other railroad employee who responds to a critical incident, is able to seek counseling and guidance as outlined in the critical incident stress plan if needed. Consistent with the intent of the CIWG, specific regulatory language was added to clarify that this definition is not intended to cover non-railroad emergency responders, such as emergency medical technicians, local police officers, or local firefighters. Nor is the proposed rule intended to cover railroad police officers and railroad investigators who routinely respond to such incidents and are specially trained to handle such emergency matters.

FRA proposes to define FRA as the Federal Railroad Administration, 1200 New Jersey Ave., SE, Washington, DC 20590.

FRA proposes that home terminal mean an employee's regular reporting point at the beginning of the tour of duty.

FRA proposes that intercity passenger railroad mean a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, which provides regularly-scheduled passenger service between large cities. In this manner, FRA proposes to mirror the applicability language in 49 CFR 239.3. See also 49 CFR Part 209, Appendix A.

Section 272.11 Penalties

Consistent with other FRA regulations, the proposed rule lists the penalties that may be imposed for noncompliance. This section provides minimum and maximum civil penalty amounts determined in accordance with 49 U.S.C. 21301 and 21304 and the Federal Civil Penalties Inflation Adjustment Act of 1990, Public Law 101-410, 104 Stat. 890, 28 U.S.C. 2461, note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-373, April 26, 1996.

Subpart B—Plan Components and Approval Process

This subpart contains the basic components of the critical incident stress plan required by this proposed rule and the elements of the approval process. This proposed rule affords railroads considerable discretion in the administration of their critical incident stress plans.

Section 272.101 Content of a critical incident stress plan

The objective of the regulation is to allow each railroad to utilize its existing critical incident stress plan (if any) as a base, making modifications as necessary to ensure compliance with the minimum standards proposed and to enhance conformity of

the plan's screening and intervention components to current best practices and standards for evidence-based care. Each plan to be presented to FRA for review and approval should document that the railroad has taken sufficient steps to establish how each element of the plan can be satisfactorily executed in covered critical incidents.

Proposed § 272.101 would require that a railroad's critical incident stress plan contain at least provisions for carrying out the objectives described in paragraphs (a)-(g) of the section. Among these designated objectives are allowing a directly-involved employee to obtain relief from the remainder of the tour of duty, providing for the directly-involved employee's transportation to the home terminal (if applicable), and offering a directly-involved employee appropriate support services following a critical incident. The specific details of each plan may vary, but the plans must be consistent with this section.

Under proposed paragraph (a) of the section, the plan must provide for "[i]nforming each directly-involved employee as soon as practicable of the stress relief options that he or she may request[.]" Paragraph (a) would require that a critical incident stress plan contain a provision that the railroad will notify directly-involved employees as soon as it is practicable after the critical incident in question that they may choose to be relieved from the remainder of the tour of duty. Although all employees covered under § 272.7 should already be cognizant of the opportunity to request relief following a critical incident, directly-involved employees must be reminded of this option for relief as soon as it is practicable after the occurrence of an incident. FRA's intent with this provision is to emphasize that an employee's opportunity for relief from service must be effectively communicated to covered employees. Of course, if a covered employee has

been seriously injured and has already been relieved from duty for the remainder of the tour, it is not necessary to notify the employee of the opportunity to be relieved.

FRA recommends that a typical plan specify an appropriate time to notify affected employees of the option to seek relief, such as, “employees must be notified at the incident site of their opportunity to be relieved.” This reminder of the option to seek relief must be made during the early communications between the employee and the dispatcher and/or railroad management, before the employee has already continued on his or her tour of duty or much time has elapsed.

Under proposed paragraph (b) of the section, the plan must provide for “[o]ffering timely relief from the balance of the duty tour for each directly-involved employee, after the employee has performed any actions necessary for the safety of persons and contemporaneous documentation of the incident.” In accordance with proposed paragraph (a), FRA would expect directly-involved employees to be informed of their opportunity for relief from service. Consistent with that notification, in accordance with proposed paragraph (b), employees that choose to avail themselves of that opportunity for relief must be relieved of duty in a timely fashion. A directly-involved employee may have to perform certain actions following a critical incident, such as rendering aid to injured persons, tending to important safety issues, securing the train, notifying appropriate personnel, and assisting in documenting the circumstances of the critical incident. FRA recommends that critical incident stress plans outline an instructive protocol that explains what tasks and responsibilities the employee is expected to perform following a critical incident. For example, this instructive protocol might establish the proper points of contact and other communication procedures (both within the

organization and official emergency responders), identify tasks that must be completed, and describe how to evaluate the incident.

While it may not be feasible to relieve employees within the first few minutes following a critical incident, relief should be provided as soon as possible. Directly-involved employees should be relieved in an efficient manner, without jeopardizing the safety of persons (themselves, other employees, and any victims of a critical incident, whether or not they are employees). If the directly-involved employees are waiting for an essential railroad official or a coroner to arrive on the scene, relief may not be feasible until such official arrives, but directly-involved employees should not have to remain at a critical incident site for any time beyond what is necessary. FRA recognizes that bad weather or other circumstances could delay the safe transportation of employees. However, directly-involved employees must be relieved without delay to the extent practicable.

FRA notes that not every employee will take advantage of the relief that must be offered. However, each plan must allow for the directly-involved employee to request relief even if the employee initially stated after the event that he or she wished to continue on with the tour of duty. FRA expects the option to seek relief to remain available for the duration of the directly-involved employee's tour of duty.

Finally, there are some instances where the immediate relief of an employee is not the most constructive aid. Many employees simply want to get to their home terminal without having to wait for the train to be re-crewed. Although relief must be offered to all directly-involved covered employees, and the railroad must not deny a request for relief, this part does not require an employee to avail him or herself to this option. If

leave from the tour of duty were mandated by this part, it could hinder some instances where an employee's continuation of duty serves as a coping mechanism, which has been shown, at least in some instances, to provide certain benefits to the employee. However, FRA does not intend for this option to supersede a railroad's authority to decide that an employee should not continue his or her tour of duty and must be relieved for safety-reasons, for the well-being of the employee, or for other reasons.

Under proposed paragraph (c) of the section, the plan must provide for "offering timely transportation to each directly-involved employee's home terminal, if necessary." As outlined in proposed paragraph (b), FRA intends to convey with the proposed term "timely relief" that the directly-involved employee must be relieved as soon as practicable following the critical incident, provided that all essential tasks have been performed. Similarly, FRA understands that it may take some time to arrange and provide transportation to an employee's home terminal. Railroads must make a good faith, reasonable effort to transport directly-involved employees safely from the incident site as soon as possible after their request for such relief, with the understanding that this transportation may not be immediate (a directly-involved employee may need to wait for a van to arrive). Directly-involved employees must not, however, be required to remain at the critical incident site for any time beyond what is necessary.

Under proposed paragraph (d) of the section, the plan must provide for "offering counseling, guidance, and other appropriate support services to each directly-involved employee." For purposes of this paragraph, the statutory term "appropriate support services" means early and proximal intervention according to evidence-based standards.

This interpretation allows providers to adapt their work as necessary, without any single, limiting approach being required.

The railroad’s plan should contain elements that have been demonstrated to help mitigate, attenuate, and limit stressful impacts as well as provide intervention and treatment after the fact. The phrase “other appropriate support services” is designed to be flexible to account for new approaches. Research shows that five basic principles hold a demonstrated positive impact on resiliency and resolution: (1) restoring a sense of safety; (2) calming anxiety and agitation; (3) enhancing self-efficacy; (4) building connectedness; and (5) facilitating hope.¹¹ As suggested by the Grantee’s final report, railroad plans should consider an evidence-based approach to early assistance designed to facilitate resiliency and establish a basis for subsequent intervention based on systematic screening and stepped care employing evidence-based treatment as indicated. A series of well researched, public domain resources is available to support each step of early intervention and stepped care, including the following: (1) several approaches have been developed around the principles of “psychological first aid,” evidence-informed approaches to early interactions with those affected by potentially traumatic events intended to facilitate these basic principles (e.g., Psychological First Aid, a manual on early assistance developed by the National Center for Post Traumatic Stress Disorder (NCPTSD) and the Substance Abuse and Mental Health Services Administration (SAMHSA);¹² Curbside Manner: Stress First Aid for the Street from the National Fallen

¹¹ Hobfoll, S. E., Watson, P. J., Bell, C. C., et al. (2007). Five essential elements of immediate and mid-term mass trauma intervention: empirical evidence. *Psychiatry*, 70(4), 283-315.

¹² Brymer, M., Jacobs, A., Layne, C., Pynoos, R., Ruzek, J., Steinberg, A., Vernberg, E., & Watson, P. (2006). Psychological first aid: Field operations guide (2d. Ed.). National Center for PTSD. Available online at http://www.ptsd.va.gov/professional/manuals//manual-pdf/pfa/PFA_2ndEditionwithappendices.pdf. Accessed January 2, 2013.

Firefighters Foundation Everyone Goes Home project; Mental Health First Aid from the National Council for Behavioral Health Centers); (2) Trauma Screening Questionnaire, a 10-item quick screen with documented sensitivity, specificity, and efficiency to identify those for whom further assessment and treatment may be indicated;¹³ and (3) Web-based approaches to clinician training to enable journeyman providers open access at little or no cost to training and consultation in evidence-based treatments for PTSD, anxiety, and depression.¹⁴

Taken together, these resources provide a foundation for the adaptation of any analogous existing railroad programs to meet current standards of care. For example, programs for fire and emergency medical services personnel have been substantially redesigned to be more consistent with empirical evidence respecting variability in individual reactivity and resilience; organizational roles in preparation, response, and recovery; and implementation of standards respecting screening, assessment, and specialty care.¹⁵ Similar adaptations are underway in other workplace settings.¹⁶

FRA notes that the specific intervention element of “critical stress debriefing” in the scientific literature is contraindicated, as it has not been shown to be effective and

¹³ Brewin, C. R., Rose, S., Andrews, B., Green, J., Tata, P., McEvedy, C., Turner, S., & Foa, E. B. (2002). Brief screening instrument for post-traumatic stress disorder. British Journal of Psychiatry, 181, 158-162.

¹⁴ National Crime Victims Center, Trauma-Focused Cognitive-Behavioral Therapy (2005) (Web training site accessible at <http://tfcbt.musc.edu>). National Crime Victims Center, Cognitive Processing Therapy (2009) (Web training site accessible at <https://cpt.musc.edu>).

¹⁵ Gist, R. & Taylor, V. H. (2008). Occupational and organizational issues in emergency medical services behavioral health. Journal of Workplace Behavioral Health, 23(3), 309-330. Gist, R., & Taylor, V. H. (2009). Prevention and intervention for psychologically stressful events. In R. Bass, J. H. Brice, T. R. Delbridge, & M. R. Gunderson (Eds.), Medical Oversight of EMS (Vol. 2, pp. 386-396). Dubuque, IA: Kendall/Hunt Publishing.

¹⁶ VandePol, B., Labardee, L., & Gist, R. (2006). The evolution of Psychological First Aid. Journal of Employee Assistance, 36, 18-20. VandePol, B., Labardee, L., Gist, R., & Braverman, M. (2006). Strategic specialty partnerships: Enabling the EAP for evidence informed best practices in workplace crisis response. In R. P. Maiden, R. Paul, & C. Thompson (Eds.), Workplace disaster preparedness, response, and management, pp. 119-131.

may actually be harmful in some instances. “Critical stress debriefing” is an intervention approach that requires a participant, through a formal interview process, to relive and discuss the traumatic experience, shortly following a traumatic event. The intent of “critical stress debriefing” is to resolve the emotional aftermath of the incident. According to current research, however, “critical stress debriefing,” the central intervention of most critical incident programs, shows no preventive efficacy and well-controlled studies suggests risk of impaired recovery for some participants, especially the most severely symptomatic.¹⁷ Thus, FRA interprets the RSIA requirement in Section 410(a) that critical incident stress plans “provide for debriefing, counseling, guidance, and other appropriate services” to require services that provide effective, appropriate guidance and support, rather than requiring a rigid application of “critical stress debriefing” intervention methods. FRA expects that the questioning and investigatory purposes involved in “debriefing” will still occur as part of any response to a critical incident, but that the specific intervention element of “critical stress debriefing” will not be a component of a railroad’s plan as an appropriate support service.

Further, by including “appropriate support services” in the regulatory text, mirroring the statutory text, it is not FRA’s intent to assess or approve the clinical quality of services or providers. However, if a railroad’s plan proposes to utilize a method that is shown to be contraindicated and may cause harm, the plan will not be approved. For example, if a plan requires “critical stress debriefing,” FRA will disapprove the plan, as this would not be an “appropriate support service.” While volunteer “peer-to-peer” support services and psychoeducation services may be helpful, they lack direct empirical

¹⁷ McNally, R. J., Bryant, R. A., & Ehlers, A. (2003). Does early psychological intervention promote recovery from posttraumatic stress? Psychological Science in the Public Interest, 4(2).

demonstrations of efficacy and, in some settings, have also raised concern.¹⁸ Thus, if a peer support program is utilized, it should follow specific protocols: it should complement but not supplant professional roles, the definition of roles and boundaries should be emphasized, and the relationship to occupational medicine and/or EAP should be specified in the plan.

Under proposed paragraph (e) of the section, the plan must provide for “[p]ermitting relief from the duty tour(s) subsequent to the critical incident, for an amount of time to be determined by each railroad, if requested by a directly-involved employee as may be necessary and reasonable[.]” In this provision, FRA proposes that railroad plans address how much additional time off an employee affected by a critical incident may receive at the employee’s option and what procedures must be followed in that event. Many railroads currently offer relief from the immediate tour of duty along with transportation to the employee’s home terminal, then provide up to three days off along with consultation with an EAP, if any, and/or occupational medicine staff. This section would provide directly-involved employees with an opportunity, away from the railroad environment, to cope with having experienced a critical incident. This is an amount of time to be determined by each railroad to allow for a reasonable amount of rest and time following a critical incident (without necessitating a clinical diagnosis). This proposed part is neutral on the amount of additional relief a railroad should permit beyond the tour of duty during which the critical incident occurred. The specific language in this proposal was modified from the RSAC-approved language to include a

¹⁸ Lohr, J.M., Hooke, W., Gist, R., & Tolin, D.F. (2003). Novel and controversial treatments for trauma-related stress disorders. In S.O. Lilienfeld, S.J. Lynn, & J.M. Lohr (Eds.), Science and pseudoscience in clinical psychology (pp. 243-272). New York: Guilford Press.

qualifier on the requirement: “for an amount of time to be determined by each railroad... as may be necessary and reasonable” to add context and clarity on the intent of the provision.

Under paragraph (f) of the section, the plan must provide for “[p]ermitting each directly-involved employee such additional leave from normal duty as may be necessary and reasonable to receive preventive services or treatment related to the incident or both.” Beyond an initial “coping” period, as specified in paragraph (e), additional time must be provided to affected employees for preventive services and treatment as needed for the adverse effects of the critical incident. Many railroads’ plans currently permit leave in addition to the duty tour(s) subsequent to the critical incident discussed in paragraph (e) if a clinical diagnosis supports the need to fulfill the employee’s request. Paragraph (f) reinforces that each railroad’s critical incident stress plan must provide for additional relief to be provided as necessary and reasonable to receive the preventive services or treatment related to the incident, as required by the RSIA.

Under proposed paragraph (g) of this section, the plan must provide for “[a]ddressing how the railroad’s employees operating or otherwise working on track owned by or operated over by a different railroad will be afforded the protections of the plan.” This proposal was not discussed specifically in the CIWG, but was added to ensure that situations where railroad employees operate or otherwise work on track owned by or operated over by a different railroad are addressed. FRA recognizes that there may be instances where a critical incident occurs while one railroad’s employees are operating over another railroad’s track. For example, if track maintainers employed by Railroad A witness a critical incident involving Railroad B’s train, both Railroad A’s

track maintainers and Railroad B's train crew must be covered by an approved critical incident stress plan. In this example, provided that this proposed regulation applies to Railroad A, Railroad A's employees would logically be covered by Railroad A's critical incident stress plan, even if the critical incident did not specifically occur with Railroad A's equipment. As such, each railroad's plan must address how the critical incident stress plan would be implemented to account for situations where multiple railroads are involved.

Section 272.103 Submission of critical incident stress plan for approval by FRA

FRA encourages railroads to which this part would apply and labor organizations representing employees to whom this part would apply to discuss the railroad's proposed critical incident stress plan prior to formal submission of the plan to FRA for approval. This collaborative discussion should help ensure that plans are drafted and adapted to meet the needs of all potentially affected by the plan. This proposed section envisions that at a minimum, potentially-affected employees would have an opportunity to comment and to discuss the contents of the plan at an early stage, prior to implementation. Because collaborative efforts will likely benefit railroad employees and railroad management, each railroad required to submit a critical incident stress plan should aspire to consult with, employ good faith, and use its best efforts to reach agreement with all of its covered employees on the contents of the plan. However, such endeavors would not be required by this proposed regulation.

In paragraphs (b) and (c) of this section, the railroad must provide the international/national president of any non-profit employee labor organization representing a class or craft of the railroad's employees subject to this part with a copy of

the railroad's critical incident stress plan and any material modification thereof. This requirement is intended to be consistent with other proposed and final FRA regulations, such as the NPRM on training standards (77 FR 6412, Feb. 7, 2012) and the final rule on conductor certification (76 FR 69802, Nov. 9, 2011). FRA encourages the union officials to distribute the notice broadly within each organization, so that all covered employees are made aware of the elements of the railroad's plan.

FRA notes that some members of the CIWG expressed their wish that this part require each railroad to notify not only the international/national president, but also the general chairpersons, of any non-profit employee labor organization representing a class or craft of the railroad's employees subject to this part. The issue of whether to require notification of the general chairpersons (in addition to the international/national president) was a point of contention in the CIWG, and a consensus was not reached. Labor representatives argued that general chairpersons are the designated collective bargaining representatives, and in many cases, the international/national presidents do not have standing on railroad property. For these reasons, labor representatives believe notifications should be sent to the general chairpersons because each plan is an on-property issue unique to each railroad and because a railroad would not be unduly burdened by contacting the relevant general chairpersons.

In response, railroad representatives and AAR argue that nothing in the RSIA requires that each railroad to send a copy of its plans to each general chairperson, and they do not want to set a precedent that might be cited in a future rulemaking. Prior FRA regulations have required informing only the international/national presidents, rather than general chairpersons. Railroad and AAR representatives expressed the view that it would

be less burdensome for each railroad to notify a single person at each organization, who can then pass along the information to the most relevant persons. There are many general chairpersons in each organization,¹⁹ which would add to the cost of compliance of the proposed rule, if FRA proposed to require each railroad to notify general chairpersons directly. FRA notes that the recent publication of the System Safety Program NPRM, 77 FR 55372 (Sept. 7, 2012), includes a consultation requirement, in proposed § 270.102(b)(4), and “a service list containing the names and contact information for the international/national president and general chairperson of any non-profit employee labor organization representing a class or craft of the railroad’s directly affected employees.” The RSIA mandate for system safety and risk reduction programs specifically required consultation. The RSIA mandate for critical incident stress plans does not. FRA seeks comments on this issue.

The proposal contemplates that railroads may submit existing critical incident stress plans to FRA for approval that have previously been established through any applicable collective bargaining agreement. However, FRA proposes that, in order to satisfy the eventual final rule, any preexisting critical incident stress plan would have to contain all prescribed elements of the plan as set forth in the regulation, and such a plan would have to be submitted to FRA pursuant to this section for review. Thus, FRA would approve critical incident stress plans previously vetted through the collective bargaining agreement process, provided that those plans meet the criteria specified in the

¹⁹ For example, one organization for a Class I railroad has as many as 40 general chairpersons. AAR states that on BNSF, CSX, NS, and UP, there are 154 general chairpersons. During the RSAC process, AAR indicated its intent to provide cost estimates related to this issue during this NPRM’s comment period.

final regulation. As proposed, FRA's regulation would constitute a minimum standard and would not negate any higher standards set by a collective bargaining agreement.

Under paragraph (e) of proposed § 272.103, “[a]fter FRA’s initial approval of a railroad’s critical incident stress plan, if the railroad makes a material modification of the plan, the railroad shall submit to FRA for approval a copy of the plan as it has been revised to reflect the material modification within 30 days of making the material modification.” The plan should be reviewed periodically for effectiveness and updated when it is prudent to do so. When material modifications are made, the railroad must submit the materially modified plan to FRA for approval. “Material modification” refers to substantive changes made to the plan, and is not intended to refer to minor updates, such as address modifications, or the like.

Under paragraph (f) of proposed § 272.103, “[u]pon FRA approval of a railroad’s critical incident stress plan and any material modification of the critical incident stress plan, the railroad must make a copy of the railroad’s plan and the material modification available to the railroad’s employees identified in § 272.7.” This paragraph is intended to ensure that all relevant employees of the railroad are aware of the railroad’s critical incident stress plan and the specific requirements of the plan. For a railroad to implement its critical incident stress plan so as to fulfill the objective of the plan, which is to aid employees who experience critical incidents, all relevant employees of the railroad, from managers at headquarters to employees at the local level, must be made aware of the

railroad's critical incident stress plan and the specific requirements of the plan and must be trained on how to implement the requirements of the plan relevant to the employee.²⁰

Under paragraph (g) of proposed § 272.103, “[e]ach railroad subject to this part must make a copy of the railroad’s plan available for inspection and reproduction by the Federal Railroad Administration.” This section addresses FRA’s specific authority to inspect and enforce the proposed regulation, as is stated in other FRA regulations.

Section 272.105 Option to file critical incident stress plan electronically

This section proposes the option for each railroad to which this part applies to file any plan submissions electronically. FRA intends to create a secure document submission site and will need basic information from each railroad before setting up the user’s account. The points of contact information in proposed paragraph (b) are necessary in order to provide secure access.

Proposed paragraphs (c), (e), and (f) are intended to allow FRA to make the greatest use of an electronic database. It is anticipated that FRA may be able to approve or disapprove all or part of a critical incident stress plan and generate automated notifications by email to a railroad’s points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the railroad is consenting to receive approval and disapproval notices from FRA by email. Railroads that allow notice from FRA by email would gain the benefit of receiving such notices quickly and efficiently.

²⁰ FRA intends that any training requirements for implementing these plans would be covered by the new training regulation, 49 CFR part 243. FRA would expect all railroad plans to provide for training to employees and supervisors concerning what each covered employee should do following a critical incident.

Proposed paragraph (d) is necessary to provide FRA's mailing address for those railroads that need to submit something in writing to FRA. For those railroads, requesting electronic submission, the list of information specified in proposed paragraph (b) is required. Otherwise, those railroads that choose to submit printed materials to FRA must deliver them directly to the specified address. Some railroads may choose to deliver a CD, DVD, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database; although this will be an acceptable method of submission, FRA would encourage each railroad to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA can reject the submission.

Finally, FRA is considering whether to mandate electronic submission. FRA is strongly leaning toward finalizing this option because the agency will be devoting significant resources to develop the electronic submission process. It will be more costly for the agency to develop the electronic submission process and have to upload written submissions into the electronic database itself. FRA expects that there are few, if any, railroads who do not have Internet access and an email address, or who cannot otherwise meet the minimum requirements for electronic submission. FRA requests comments on whether mandatory electronic submission is objectionable to any railroad.

Appendix A to Part 272—Schedule of Civil Penalties

In the final rule, Appendix A will contain a detailed penalty schedule similar to that FRA has issued for most of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. See 5

U.S.C. 553(b)(3)(A). Nevertheless interested parties are invited to submit their views on what penalties may be appropriate.

VII. Regulatory Impact and Notices

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

This proposed rule has been 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. FRA has prepared and placed in the docket a Regulatory Impact Analysis (RIA) addressing the economic impact of this proposed rule. As part of the RIA, FRA has assessed the quantitative costs and benefits from the implementation of this proposed rule.

The purpose of the proposed rule is to enhance safety by mandating that certain railroads (each Class I railroad, intercity passenger railroad, and commuter railroad) have a critical incident stress plan intended to mitigate the long-term negative effects of critical incidents upon railroad employees. Specifically the proposal would help ensure that every railroad employee covered by the rule who works for these railroads and who is affected by a critical incident can receive the support services needed.

The Railroad Safety Advisory Committee (RSAC) formed a working group to provide advice and recommendations on the regulatory matters involving critical incident stress plans.²¹ Based on both RSAC meetings and discussions with the rail industry, FRA's analysis in the RIA assumes that all railroads affected by the proposed rule currently have policies that include a critical incident stress plan, thereby reducing the

²¹ This RSAC working group reached consensus on all items but one: whether a railroad should be required to provide its critical incident stress plan to the general chairperson of a labor organization, in addition to the organization's international/national president.

costs of compliance associated with the proposed rule. FRA requests comments on this assumption.

FRA's analysis follows DOT's revised "Guidance on the Economic Value of a Statistical Life in US Department of Transportation Analyses," published in March 2013. Based on real wage growth forecasts from the Congressional Budget Office, DOT's guidance estimates that there will be an expected 1.07 percent annual growth rate in median real wages over the next 20 years (2013-2033) and assuming an income elasticity of 1.0 adjusts the Value of Statistical Life (VSL) in future years in the same way. Real wages represent the purchasing power of nominal wages. VSL is the basis for valuing avoided casualties. FRA's analysis further accounts for expected wage growth by adjusting the taxable wage component of labor costs. Other non-labor hour based costs and benefits are not impacted. FRA estimates that the costs of the proposed rule for a 20-year period would total \$1.9 million, with a present value (PV, 7%) of \$1.3 million and (PV, 3%) of \$1.6 million. In estimating these compliance costs, FRA included costs associated with training supervisors on how to interact with railroad employees who have been affected by a critical incident, additional costs associated with greater use of Employee Assistance Programs, and costs associated with the submission of critical incident stress plans to FRA. FRA also estimates that the quantifiable benefits of the proposed rule for a 20-year period would total \$2.6 million, with a present value (PV, 7%) of \$1.5 million and (PV, 3%) of \$2.0 million. FRA is confident that potential benefits of the proposed rule would exceed the total costs.

Table 1: 20-Year Costs for Proposed Rulemaking	Present Value (7 Percent)	Present Value (3 Percent)
Training	\$1,135,685	\$1,342,391
Submission of Critical Incident Stress Plans for approval by FRA	\$114,266	\$153,415
EAP Specialist	\$87,879	\$119,713
Total	\$1,337,830	\$1,615,519

The RIA also explains the likely benefits of this proposed rule, providing quantified estimates of the benefits where feasible. The proposed rule contains minimum standards for employee training, leave, counseling, and other support services. These standards would help create benefits by providing employees with knowledge, coping skills, and services that would help them: (1) recognize and cope with symptoms of normal stress reactions that commonly occur as a result of a critical incident; (2) reduce their chance of developing a disorder such as depression, Post-Traumatic Stress Disorder (PTSD), or Acute Stress Disorder (ASD) as a result of a critical incident; and (3) recognize symptoms of psychological disorders that sometimes occur as a result of a critical incident and know how to obtain prompt evaluation and treatment of any such disorder, if necessary.

Specifically, FRA anticipates that implementation of the proposed rule would yield benefits by reducing long-term healthcare costs associated with treating PTSD, ASD, and other stress reactions; and costs that accrue either when an employee is unable to return to work for a significant period of time or might leave railroad employment due to being affected by PTSD, ASD, or another stress reaction.

The majority of the quantifiable benefits identified are associated with railroad employee retention and a reduction of long-term healthcare costs associated with PTSD cases that were not treated appropriately after a critical incident. FRA estimates that one-half of one percent of railroad employees who develop PTSD exit the railroad industry. According to this estimate, one railroad employee would leave the railroad industry due to PTSD every ten years. If an employee is unable to return to work, the railroad not only loses an experienced employee, but also must train a new employee. FRA expects that the proposed rule would decrease the number of new employees that have to be trained to backfill for those who leave the railroad industry due to PTSD, ASD, or other stress reactions, as early treatment for potential PTSD cases following exposure to a critical incident by reducing both the likelihood of developing and the duration of PTSD or another stress reaction. The proposed rule would also increase the early identification and treatment of PTSD thus reducing long-term healthcare costs. Overall, FRA finds that the value of the anticipated benefits would justify the cost of implementing the proposed rule.

Table 2: 20-Year Benefits for Proposed Rulemaking	Present Value (7 Percent)	Present Value (3 Percent)
Reduction in Long-term Healthcare Costs	\$1,445,288	\$1,953,784
Retention of Employees (reduced backfilling costs)	\$60,334	\$69,764
Total	\$1,505,622	\$2,023,548

B. Initial Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461; August 16, 2002) require agency review of proposed and

final rules to assess their impact on small entities. FRA developed the proposed 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 Act (5 U.S.C. 601 et seq.) to ensure potential impacts of rules on small entities are properly considered.

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must prepare an initial regulatory flexibility analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities (SEIOSNOSE). FRA has not determined whether this proposed rule would have a SEIOSNOSE. Therefore, FRA is publishing this IRFA to aid the public in commenting on the potential small business impacts of the requirements in the proposed rule. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposed rule. FRA will consider all comments received in the public comment process when making a final determination.

The proposed rule would apply to each Class I railroad, intercity passenger railroad, and commuter railroad as defined by this part. Based on information currently available, FRA estimates that no small entities would be required to create a critical incident stress plan, and therefore, no small business would be negatively impacted by the proposed rule. FRA estimates that the total cost of the proposed rule for the railroad industry over a 20-year period would be \$1,943,565, with a present value (PV, 7) of \$1,337,830 and (PV, 3) of \$1,615,519. Based on information currently available as noted

above, FRA estimates that zero percent of the total railroad costs associated with implementing the proposed rule would be borne by small entities. The total regulatory cost in the RIA for this proposed rule is the basis for the estimates in this IRFA, and the RIA has been placed in the docket for public review. It provides extensive information about the total costs of the proposed regulation.

Based on the railroad reporting data from 2011, there are 719 Class III railroads. Due to the applicability of the proposed rule, however, none of these railroads would be impacted. The railroad reporting data also shows that there are 30 intercity passenger and commuter railroads.²² Although two of these railroads are considered small entities, they do not fall within the proposed rule's definition of a "commuter railroad," which means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, that provides regularly-scheduled passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979. Therefore FRA finds that there are 28 intercity passenger and commuter railroads that will incur additional costs by the proposed rule. FRA requests comments on the finding that no small entities would be impacted by this proposed regulation.

In accordance with the Regulatory Flexibility Act, an IRFA must contain:

- 1) A description of the reasons why the action by the agency is being considered.
- 2) A succinct statement of the objectives of, and legal basis for, the proposed rule.

²² This total includes the Alaska Railroad, which is categorized as a Class II railroad.

- 3) A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
- 4) A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirements and the types of professional skills necessary for preparation of the report or record.
- 5) An identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action.

This rulemaking responds to requirements in the Rail Safety Improvement Act of 2008 (RSIA) (Public Law 110-432, Div. A) that the Secretary of Transportation, as delegated to the Administrator of FRA (49 CFR 1.89(b)), establish regulations to define critical incident, and to require certain railroads to develop and implement critical incident stress plans.

The purpose of this proposed rule is to enhance safety by mandating that railroads have a critical incident stress plan that may help mitigate the long-term negative effects of critical incidents upon covered railroad employees. One of the most important assets to the railroad industry is its labor force. The railroads spend significant resources training their workforces. Although all of the railroads potentially affected by the proposed rule have policies that include critical incident stress plans, the proposed rule would promote implementation as intended to every applicable employee covered by a critical incident stress plan and also ensure that all such plans meet certain minimum Federal requirements.

After reviewing the critical incident stress plans of various railroads, FRA determined that the most cost efficient and beneficial way to help ensure implementation of the plan for railroad employees covered who witness a critical incident was to implement the requirements found in this proposed rule. FRA anticipates that the railroad industry will accept the proposed requirements.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule.

The purpose of the proposed rule is to require each Class I, intercity passenger, and commuter railroad to develop a critical incident stress plan. This plan would cover every applicable railroad employee who witnessed a critical incident while working.

Section 410 of RSIA requires the Secretary of Transportation, as delegated to the Administrator of the Federal Railroad Administration, to prescribe a regulation mandating that certain railroads develop and implement critical incident stress plans. A Railroad Safety Advisory Committee (RSAC) working group was formed and tasked to define a critical incident, which made sure that the railroad industry and labor unions were included in the rulemaking process. The working group reached a consensus on all but one item²³ and forwarded a proposal to the full RSAC on August 21, 2012. The full RSAC voted to approve the working group's recommended text on September 27, 2012, and that recommended text provided the basis for this NPRM. This proposed regulation would be codified in Title 49, Code of Federal Regulations, part 272.

²³ Consensus was not reached on the issue of whether a railroad should be required to provide labor organizations' general chairpersons (in addition to the international/national president of the labor organization) with a copy of a railroad's critical incident stress plan.

3. A Description of, and Where Feasible, an Estimate of Small Entities to Which the Proposed Rule Would Apply.

The universe of entities that must be considered in an IRFA generally includes only those small entities that are reasonably expected to be directly regulated by the proposed action. This proposed rule would affect Class I railroads (including the National Railroad Passenger Corporation (“Amtrak”)), intercity passenger railroads, and commuter railroads as defined in the scope of the proposed rule.

“Small entity” is defined in 5 U.S.C. 601. Section 601(3) defines a “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 entities” not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation.

The 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.” Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with the SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous

materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues; and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891, May 9, 2003, codified at 49 CFR part 209, Appendix C. The \$20 million-limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is proposing to use this definition of "small entity" for this rulemaking. Any comments received pertinent to its use will be addressed in the final rule.

Railroads

FRA finds that there are 7 Class I and 28 intercity passenger and commuter railroads, including Amtrak and the Alaska Railroad, affected by this proposed rule. Amtrak, the Alaska Railroad, and the 7 Class I railroads are not considered to be small entities. All of the affected commuter railroads are part of larger public transportation agencies that receive Federal funds and serve major jurisdictions with populations greater than 50,000; based on the definition, therefore, they are not considered small entities.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Will Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record.

For a thorough presentation of cost estimates, please refer to the RIA, which has been placed in the docket for this rulemaking.

As FRA believes that no small entities will be affected by this proposed rule,

there would also be no cost impacts on small businesses. Railroads operated entirely by contract operators, such that the contractor organization itself meets the definition of a commuter railroad, Class I, or intercity passenger railroad, would be subject to this rule. In these circumstances, FRA assumes that the contract operator would utilize the critical incident stress plan developed by the reporting railroad. FRA will hold the reporting railroads responsible for defects or deficiency, not the contracted operators. Therefore, FRA does not expect that the proposed rule will directly impact any contractors that are considered to be small entities.

5. An Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule.

FRA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

FRA invites all interested parties to submit comments, data, and information demonstrating the potential economic impact that would result from adoption of the proposals in this NPRM. FRA will consider all comments received in the public comment period for this NPRM when making a final determination of the rulemaking's economic impact on small entities.

C. Executive Order 13175

FRA analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”).

Because this rule does not significantly or uniquely affect tribes and does not impose substantial and direct compliance costs on Indian tribal governments, the funding

and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

D. Paperwork Reduction Act

The information collection requirements in this proposed rule have been 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 that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
272.103 – RR Submission of Updated/ Modified Existing Critical Incident Stress Plan - RR Copies of Updated Critical Incident Stress Plans to 5 Employee Labor Organizations - Rail Labor Organization Comments to FRA on RR Critical Incident Stress Plan - Rail Labor Organization that Comment Copy has been served on Railroad - Copy to RR Employees of Updated/ Modified Critical Incident Stress Plans - Copy to FRA Inspector Upon Request of Critical Incident Stress Plan	34 Railroads	34 modified plans	16 hours	544 hours
	34 Railroads	170 plan copies	5 minutes	14.17 hours
	5 Labor Organizations	65 comments	3 hours	195 hours
	5 Labor Organizations	65 certifications	15 minutes	16 hours
	170,000 Employees	170,000 copies	5 minutes	14,167 hours
	34 Railroads	136 plan copies	5 minutes	11.33 hours
272.105 – RR Request to FRA for Electronic Submission of Critical Incident Stress Plan or Review of Written Materials	34 Railroads	34 requests	60 minutes	34 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the

functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone at 202-493-6137.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, S.E., 3rd Floor, Washington, D.C. 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Toone at the following address: Robert.Brogan@dot.gov; Kim.Toone@dot.gov.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed 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. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized 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 the final

rule. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

E. Environmental Impact

FRA has evaluated this proposed 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 action 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. 64 FR 28547, May 26, 1999. 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 final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal action significantly affecting the quality of the human environment.

F. Federalism Implications

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 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.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. If adopted, this proposed rule would not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. FRA has also determined that this proposed rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Moreover, FRA notes that RSAC, which endorsed and recommended the majority of this proposed rule, has as permanent members, two organizations representing State and local interests: AASHTO and ASRSM. Both of these State organizations concurred with the RSAC recommendation made in this rulemaking. RSAC regularly provides recommendations to the Administrator of FRA for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the federalism implications of this rulemaking from these representatives or from any other representatives of State government.

However, this proposed rule could have preemptive effect by operation of law under 49 U.S.C. 20106 (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “local safety or security hazard” exception to Section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Section 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 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 the expenditure by State, local, and tribal governments, in the aggregate, or

by the private sector, of \$100,000,000 or more (adjusted annually for inflation) [currently \$140,800,000] in any 1 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 proposed rule will not result in the expenditure, in the aggregate, of \$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.” See 66 FR 28355 (May 22, 2001). Under the Executive Order a “significant energy action” is defined as any action by an agency 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) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this proposed rule in accordance with Executive Order 13211. FRA has determined that this proposed rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this final rule is not a “significant energy action” within the meaning of the Executive Order.

I. Privacy Act Statement

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). Interested parties may also review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477) or visit <http://www.regulations.gov/#!privacyNotice>.

List of Subjects in 49 CFR Part 272

Accidents, Critical incident, Penalties, Railroads, Railroad employees, Railroad safety, Safety, and Transportation.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B of Title 49 of the Code of Federal Regulations as follows:

1. Add a new part 272 to read as follows:

PART 272 CRITICAL INCIDENT STRESS PLANS

Subpart A—General

Sec.

- | | |
|--------|--|
| 272.1 | Purpose. |
| 272.3 | Application. |
| 272.5 | General duty. |
| 272.7 | Coverage of a critical incident stress plan. |
| 272.9 | Definitions. |
| 272.11 | Penalties. |

Subpart B—Plan Components and Approval Process

272.101 Content of a critical incident stress plan.

272.103 Submission of critical incident stress plan for approval by the Federal Railroad Administration.

272.105 Option to file critical incident stress plan electronically.

Appendix A to Part 272—Schedule of Civil Penalties

Authority: 49 U.S.C. 20103, 20107, 20109, note; 28 U.S.C. 2461, note; 49 CFR 1.89; and Sec. 410, Div. A, Public Law 110-432, 122 Stat. 4888.

Subpart A—General

§ 272.1 Purpose.

(a) The purpose of this part is to promote the safety of railroad operations and the health and safety of railroad employees, especially those who are directly involved in a critical incident by requiring that the employing railroad offers and provides appropriate support services, including appropriate relief, to the directly-involved employees following that critical incident.

(b) Nothing in this part constrains a railroad from implementing a critical incident stress plan that contains additional provisions beyond those specified in this rule (including provisions covering additional incidents or persons), provided that such additional provisions are not inconsistent with this rule.

§ 272.3 Application.

This part applies to each

- (a) Class I railroad, including the National Railroad Passenger Corporation;
- (b) Intercity passenger railroad; or

(c) Commuter railroad.

§ 272.5 General duty.

A railroad subject to this part shall adopt a written critical incident stress plan approved by the Federal Railroad Administration under § 272.103 and shall comply with that plan. Should a railroad subject to this part make a material modification to the approved plan, the railroad shall adopt the modified plan approved by the Federal Railroad Administration under § 272.103 and shall comply with that plan, as revised.

§ 272.7 Coverage of a critical incident stress plan.

The critical incident stress plan of a railroad subject to this part shall state that it covers, and shall cover, the following individuals employed by the railroad if they are directly involved (as defined in § 272.9) in a critical incident:

(a) Railroad employees who are subject to the hours of service laws at—

(1) 49 U.S.C. 21103 (that is, train employees not subject to subpart F of part 228 of this chapter regarding the hours of service of train employees engaged in commuter or intercity rail passenger transportation);

(2) 49 U.S.C. 21104 (signal employees); or

(3) 49 U.S.C. 21105 (dispatching service employees);

(b) Railroad employees who are subject to the hours of service regulations at subpart F of part 228 of this chapter (regarding the hours of service of train employees engaged in commuter or intercity rail passenger transportation);

(c) Railroad employees who inspect, install, repair, or maintain railroad right-of-way or structures; and

(d) Railroad employees who inspect, repair, or maintain locomotives, passenger cars, or freight cars.

§ 272.9 Definitions.

As used in this part—

Accident/incident has the meaning assigned to that term by part 225 of this chapter.

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate.

Class I has the meaning assigned to that term by the regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1-1).

Commuter railroad means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, that provides regularly-scheduled passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979.

Critical incident means either—

(1) An accident/incident reportable to FRA under part 225 of this chapter that results in a fatality, loss of limb, or a similarly serious bodily injury; or

(2) A catastrophic accident/incident reportable to FRA under part 225 of this chapter that could be reasonably expected to impair a directly-involved employee's ability to perform his or her job duties safely.

Directly-involved employee means a railroad employee covered under § 272.7—

- (1) Whose actions are closely connected to the critical incident;
- (2) Who witnesses the critical incident in person as it occurs or who witnesses the immediate effects of the critical incident in person; or
- (3) Who is charged to directly intervene in, or respond to, the critical incident (excluding railroad police officers or investigators who routinely respond to and are specially trained to handle emergencies).

FRA means the Federal Railroad Administration, 1200 New Jersey Ave., SE, Washington, DC 20590.

Home terminal means an employee's regular reporting point at the beginning of the tour of duty.

Intercity passenger railroad means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, which provides regularly-scheduled passenger service between large cities.

§ 272.11 Penalties.

(a) Civil penalties. A 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 \$650 and not more than \$25,000 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 \$105,000 per violation may be assessed. Each day that a violation continues is a separate offense. See Appendix A to part 209 for a statement of agency civil penalty policy.

(b) Criminal penalties. A 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.

Subpart B—Plan Components and Approval Process

§ 272.101 Content of a critical incident stress plan.

Each critical incident stress plan under this part shall include, at a minimum, provisions for—

(a) Informing each directly-involved employee as soon as practicable of the stress relief options that he or she may request;

(b) Offering timely relief from the balance of the duty tour for each directly-involved employee, after the employee has performed any actions necessary for the safety of persons and contemporaneous documentation of the incident;

(c) Offering timely transportation to each directly-involved employee's home terminal, if necessary;

(d) Offering counseling, guidance, and other appropriate support services to each directly-involved employee;

(e) Permitting relief from the duty tour(s) subsequent to the critical incident, for an amount of time to be determined by each railroad, if requested by a directly-involved employee as may be necessary and reasonable;

(f) Permitting each directly-involved employee such additional leave from normal duty as may be necessary and reasonable to receive preventive services or treatment related to the incident or both; and

(g) Addressing how the railroad's employees operating or otherwise working on track owned by or operated over by a different railroad will be afforded the protections of the plan.

§ 272.103 Submission of critical incident stress plan for approval by the Federal Railroad Administration.

(a) Each railroad subject to this part shall submit to the Federal Railroad Administration, Office of Railroad Safety, 1200 New Jersey Avenue, SE, Washington, DC 20590, for approval, the railroad's critical incident stress plan no later than 12 months after the effective date of the final rule.

(b) Each railroad subject to this part shall—

(1) Simultaneously with its filing with FRA, serve, either by hard copy or electronically, a copy of the submission filed pursuant to paragraph (a) of this section or a material modification filed pursuant to paragraph (e) of this section on the international/national president of any non-profit employee labor organization representing a class or craft of the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) of this section or a material modification filed pursuant to paragraph (e) of this section a statement affirming that the railroad has complied with the requirements of paragraph (b)(1) of this section, together with a list of the names and addresses of the persons served.

(c) Not later than 90 days after the date of filing a submission pursuant to paragraph (a) of this section or a material modification pursuant to paragraph (e) of this section, a labor organization representing a class or craft of the railroad's employees subject to this part, may file a comment on the submission or material modification.

(1) Each comment shall be submitted to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20590; and

(2) The commenter shall certify that a copy of the comment was served on the railroad.

(d) A critical incident stress plan is considered approved for purposes of this part if and when FRA notifies the railroad in writing that the critical incident stress plan is approved, or 120 days after FRA has received the railroad's critical incident stress plan, whichever occurs first.

(e) After FRA's initial approval of a railroad's critical incident stress plan, if the railroad makes a material modification of the critical incident stress plan, the railroad shall submit to FRA for approval a copy of the critical incident stress plan as it has been revised to reflect the material modification within 30 days of making the material modification.

(f) Upon FRA approval of a railroad's critical incident stress plan and any material modification of the critical incident stress plan, the railroad must make a copy of the railroad's plan and the material modification available to the railroad's employees identified in § 272.7.

(g) Each railroad subject to this part must make a copy of the railroad's plan available for inspection and reproduction by the FRA.

§ 272.105 Option to file critical incident stress plan electronically.

(a) Each railroad to which this part applies is authorized to file by electronic means any critical incident stress plan submissions required under this part in accordance with the requirements of this section.

(b) Prior to the railroad submitting its first critical incident stress plan submission electronically, the railroad shall provide the Associate Administrator with the following information in writing:

(1) The name of the railroad;

(2) The names of two individuals, including job titles, who will be the railroad's points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the railroad's points of contact;

(4) The railroad's system or main headquarters address located in the United States;

(5) The email addresses for the railroad's points of contact; and

(6) The daytime telephone numbers for the railroad's points of contact.

(c) A railroad that electronically submits an initial critical incident stress plan, informational filing, or new portions or revisions to an approved critical incident stress plan required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email.

(d) A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE., Washington, DC 20590.

(e) FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically.

(f) A railroad 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.

APPENDIX A TO PART 272—SCHEDULE OF CIVIL PENALTIES

A civil penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$105,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304 and 49 CFR part 209, Appendix A.

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

Joseph C. Szabo,

Administrator.

[FR Doc. 2013-15417 Filed 06/27/2013 at 8:45 am; Publication Date: 06/28/2013]