



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 239

[Docket No. FRA-2011-0062, Notice No. 2]

RIN: 2130-AC33

Revisions to Passenger Train Emergency Preparedness Regulations

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

ACTION: Final rule.

SUMMARY: FRA is amending its existing regulation entitled Passenger Train Emergency Preparedness by revising or clarifying various provisions. The final rule clarifies that railroad personnel who communicate or coordinate with first responders during emergency situations must receive certain initial and periodic training and be subject to operational tests and inspections related to the railroad's emergency preparedness plan. The final rule also clarifies that railroads must develop procedures in their emergency preparedness plans that specifically address the safety of passengers with disabilities during actual and simulated emergency situations, such as during train evacuations. The rule also limits the need for FRA to formally approve certain purely administrative changes to approved emergency preparedness plans. In addition, the final rule requires that operational tests and inspections be conducted in accordance with a program that meets certain minimum requirements. Finally, the rule removes as unnecessary the provision discussing the preemptive effect of the regulations.

DATES: This final rule is effective July 29, 2014. Petitions for reconsideration must be received on or before May 30, 2014. Comments in response to petitions for reconsideration must be received on or before July 14, 2014.

ADDRESSES: Petitions for reconsideration and comments on petitions for reconsideration: Any petitions for reconsideration or comments on petitions for reconsideration related to this Docket No. FRA-2011-0062, Notice No. 2, 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, 1200 New Jersey Avenue SE., Room W12-140, Washington, DC 20590.
- Hand Delivery: Docket Management Facility, Room W12-140 on the ground level of the West Building, U.S. Department of Transportation, 1200 New Jersey Avenue SE., Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130-AC33). Note that all petitions and comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted petitions, comments or

materials.

Docket: For access to the docket to read background documents, petitions for reconsideration, 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: Daniel Knote, Staff Director, Passenger Rail Division, Office of Railroad Safety, Mail Stop 25, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 631-727-5172); or Anna Nassif Winkle, Trial Attorney, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590 (telephone: 202-493-6166).

SUPPLEMENTARY INFORMATION:

Abbreviations of Terms Frequently Used in this Final Rule

AIS	Abbreviated Injury Scale
CFR	Code of Federal Regulations
DREDF	Disability Rights Education and Defense Fund
e-prep plan	a passenger train emergency preparedness plan under 49 CFR 239.101
ERCC	emergency response communications center as defined by 49 CFR 239.7
FR	<u>Federal Register</u>
NPRM	notice of proposed rulemaking
PTES	passenger train emergency systems

PV	present value
RSAC	Railroad Safety Advisory Committee
U.S.C.	United States Code

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I. Executive Summary

Having considered the public comments in response to the notice of proposed rulemaking (NPRM) in this proceeding, which was published on June 27, 2012 (see 77 FR 38248), FRA issues this final rule amending the passenger train emergency preparedness regulations at 49 CFR part 239 (part 239). This final rule is intended to clarify certain requirements and address issues that have arisen since the regulations were

first published in May 1998. This final rule is based on language developed by the General Passenger Safety Task Force (Task Force), a subgroup of FRA's Railroad Safety Advisory Committee (RSAC), to resolve four main issues involving the regulations. The Task Force developed recommendations principally to (1) ensure that railroad personnel who communicate and coordinate with first responders during emergency situations receive initial and periodic training and are subject to operational tests and inspections under part 239; (2) clarify that railroads must develop procedures in their passenger train emergency preparedness plans under part 239 (e-prep plans) that address the safe evacuation of passengers with disabilities during an emergency situation; (3) limit the need for FRA to formally approve certain purely administrative changes to approved e-prep plans; and (4) specify new operational testing and inspection requirements for both operating and non-operating personnel for railroads covered by part 239. The recommendations developed by the Task Force were approved by the full RSAC, and they formed the basis of the NPRM and this final rule.

The main provisions of the final rule—

- Clarify the types of railroad personnel who are required to be trained or be subjected to operational testing and inspections under part 239, by explicitly including railroad personnel who directly coordinate with emergency responders;
- Clarify that railroads must include procedures in their e-prep plans specifically addressing the safety of persons with disabilities during actual emergency situations as well as during full-scale simulations of emergency situations, such as during train evacuations;

- Allow certain purely administrative changes to e-prep plans to be excluded from the formal review and approval process required for more substantive amendments to e-prep plans under part 239;
- Require that operational tests and inspections be conducted in accordance with a program that meets the minimum requirements specified in this part and provides for such tests and inspections on appropriate courses of action in response to various potential emergency situations;
- Clarify that operational testing and inspections under part 239 may be conducted under, and considered part of, the railroad's operational testing and inspection program under 49 CFR part 217 (part 217); and
- Remove as unnecessary the provision discussing the preemptive effect of part 239.

In analyzing the economic impacts of this final rule, FRA found that the rule's provisions will enhance the emergency planning process currently in place in part 239. FRA has quantified the costs associated with this final rule. Any additional costs associated with amending part 239 will be mostly related to the inclusion of additional personnel in the testing and training programs required by part 239. The industry will also be subject to additional burden from minor new requirements for the submission of e-prep plans to make the review and approval of e-prep plans more efficient. Total costs over the next 10 years are estimated to be \$1,492,792 (undiscounted) with a present value (PV) of \$1,073,755 when discounted at 7 percent.

The following table presents the estimated discounted costs of the final rule,

broken down by section of the rule:

10-Year Estimated Cost of Final Rule*	
Emergency Preparedness Plan (§ 239.101)	\$ 495,530
Debriefing and Critique (§ 239.105)	\$ 200,273
Emergency Preparedness Plan; Filing and Approval (§ 239.201)	\$ 16,911
Operational Tests and Inspections (§ 239.301)	\$ 361,060
Total	\$ 1,073,775

*Dollars are discounted at a present value rate of 7 percent.

FRA has analyzed the benefits associated with this final rule. Benefits will accrue from the expedited arrival of emergency responders to accident scenes, and from the ability of ERCC personnel to minimize health and safety risks through improved internal and external communications. FRA utilized a break-even analysis to quantify the minimum safety benefits necessary for the final rule to be cost-beneficial, considering the estimated quantified costs. The break-even point was found to be a reduction in severity of 5.47 injuries from Abbreviated Injury Scale (AIS) level 2 to AIS level 1. Safety benefits are estimated to total \$1,636,800 (undiscounted) when six injuries are prevented from increasing in severity from AIS 1 to AIS 2. Total discounted benefits are estimated to be \$1,149,620 (PV, 7 percent). The benefits for this final rule will exceed the estimated costs when six injuries are prevented from increasing in severity from AIS 1 to AIS 2. FRA believes that implementation of the amendments in this rulemaking will

more than exceed the break-even estimate.

II. Background

A. Overview of FRA’s Prior Rulemakings concerning Passenger Train Emergency Preparedness and Passenger Train Emergency Systems¹

1. 1998 Final Rule Primarily on Passenger Train Emergency Preparedness and Partly on Passenger Train Emergency Systems

On May 4, 1998, FRA published a final rule primarily on passenger train emergency preparedness that was codified at new part 239, Passenger Train Emergency Preparedness, and that also revised 49 CFR part 223, Safety Glazing Standards. See 63 FR 24630. That final rule addresses passenger train emergencies of various kinds, including security situations, and sets minimum Federal safety standards for the preparation, adoption, and implementation of e-prep plans by certain railroads connected with the operation of passenger trains on standard gage track on the general railroad system of transportation. The rule requires e-prep plans to include seven elements addressing communication, employee training and qualification, joint operations, special circumstances (e.g., identifying tunnels, elevated and depressed track sections, bridges, electrified track sections, where evacuation would be difficult and developing specific evacuation plans for those areas), liaison with emergency responders, on-board emergency equipment, and passenger safety information. Under the requirements of the rule, each covered railroad is required to instruct certain employees on the e-prep plan and their responsibilities under the plan. In addition, the plan adopted by each railroad is

¹ A “passenger train emergency system” may be defined briefly as installed or moveable equipment, equipment components, or materials, or a combination thereof, that is capable of being used to address an emergency on a passenger train.

subject to formal review and approval by FRA. The rule also requires each railroad operating passenger train service to conduct emergency simulations to determine its capability to execute the e-prep plan under the variety of emergency scenarios that could reasonably be expected to occur.

In promulgating the rule, FRA also established specific requirements for passenger train emergency systems at § 239.101(a)(6) and at § 239.107, Emergency exits,² as well as in FRA's Safety Glazing Standards. Among these obligations are requirements that all emergency window exits and windows intended for rescue access by emergency responders be marked accordingly and that instructions be provided for their use. In addition, FRA established requirements that all door exits intended for egress be lighted or marked, all door exits intended for rescue access by emergency responders be marked, and that instructions be provided for their use.

2. 2008 Passenger Train Emergency Systems (PTES) Final Rule

In 2008, FRA revisited requirements for emergency systems on passenger trains by enhancing existing requirements for emergency window exits under FRA's Safety Glazing Standards and establishing new requirements for rescue access windows used by emergency responders to evacuate passengers under FRA's Passenger Equipment Safety Standards (49 CFR part 238). See 73 FR 6369 (February 1, 2008). While this 2008 final rule did not make any changes to part 239, the rule expanded other existing requirements that were previously only applicable to passenger trains operating at speeds in excess of 125 mph but not exceeding 150 mph (Tier II passenger trains) to passenger trains

² Note that, effective January 28, 2014, § 239.107 is removed and reserved, and the requirements have been revised and moved to 49 CFR part 238. See 78 FR 71786 (November 29, 2013).

operating at speeds not exceeding 125 mph (Tier I passenger trains), see § 238.5.

Specifically, Tier I passenger trains were required to be equipped with public address and intercom systems for emergency communication, as well as provide emergency roof access for use by emergency responders. FRA applied certain requirements to both existing and new passenger equipment, while other requirements applied only to new passenger equipment.

3. 2013 Passenger Train Emergency Systems (PTES II) Final Rule

On November 29, 2013, FRA published a final rule that became effective January 28, 2014, amending FRA's Passenger Equipment Safety Standards by enhancing existing requirements for passenger train emergency systems as well as creating new requirements for passenger train emergency systems. See 78 FR 71786. The final rule adds emergency passage requirements for interior vestibule doors as well as enhances emergency egress and rescue access signage requirements. The final rule also adds requirements for low-location emergency exit path markings, creates minimum emergency lighting standards for existing passenger cars, and enhances existing requirements for the survivability of emergency lighting systems in new passenger cars.

Additionally, the final rule amends FRA's passenger train emergency preparedness regulations in part 239. In addition to moving the "emergency exits" provision of part 239, as previously noted, these amendments include clarifying existing requirements for participation in debriefing and critique sessions following both actual passenger train emergency situations and full-scale simulations. Under the current regulation, a debriefing and critique session is required after each passenger train

emergency situation or full-scale simulation to determine the effectiveness of the railroad's e-prep plan. See § 239.105. The railroad is then required to improve or amend its plan, or both, in accordance with the information gathered from the session. The language added in the PTES II final rule clarifies that, to the extent practicable, all on-board personnel, control center personnel, and any other employee involved in the emergency situation or full-scale simulation shall participate in the debriefing and critique session. The final rule also clarifies that employees be provided flexibility to participate in the debriefing and critique sessions through a variety of different methods.

B. Proceedings to Date in the Present Rulemaking

1. The Need for Additional Revisions to the Passenger Train Emergency Preparedness Regulations

Among FRA's reasons for initiating the present rulemaking, FRA learned that there was confusion regarding certain requirements within FRA's passenger train emergency preparedness regulations. For example, FRA learned that some passenger railroads were confused as to which types of railroad personnel were required to be trained or be subjected to operational testing and inspections under part 239. Specifically, these railroads were unclear whether part 239 required certain railroad personnel who directly coordinate with emergency responders and other outside organizations during emergency situations to be trained or be subjected to operational testing and inspections. As a result, FRA believes that it is necessary to clarify the regulatory language in part 239 to ensure that railroad personnel who directly coordinate with emergency responders actually receive the proper training and are subject to

operational testing and inspections. FRA also learned that many railroads were unclear whether operational testing under part 239 was permitted to be considered as part of the railroad's operational testing and inspection program required under part 217. In addition, as a result of FRA's experience in reviewing and approving passenger railroads' e-prep plans that are updated periodically, FRA realized that a number of the changes were purely administrative in nature. While part 239 currently subjects all changes to an e-prep plan to a formal review and approval process, FRA believes that certain purely administrative changes should be excluded from the process so that the agency can focus its resources on more substantive matters.

Finally, FRA believes it is necessary to clarify part 239 to address the requirements of Executive Order 13347. See 69 FR 44573 (July 26, 2004). Executive Order 13347 requires, among other things, that Federal agencies encourage State, local, and tribal governments, private organizations, and individuals to consider in their emergency preparedness planning the unique needs of individuals with disabilities whom they serve. While part 239 already requires railroads' e-prep plans to consider the unique needs of passengers with disabilities (as each railroad subject to part 239 is required to address the safety of each of its passengers in its e-prep plan), this final rule makes this requirement more explicit and clarifies the railroads' responsibilities in that regard.

2. RSAC Overview

In March 1996, FRA established RSAC as a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency's

major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. A list of member groups follows:

- American Association of Private Railroad Car Owners (AAPRCO);
- American Association of State Highway and Transportation Officials (AASHTO);
- American Chemistry Council;
- American Petroleum Institute;
- American Public Transportation Association (APTA);
- American Short Line and Regional Railroad Association (ASLRRA);
- American Train Dispatchers Association (ATDA);
- Association of American Railroads (AAR);
- Association of Railway Museums;
- Association of State Rail Safety Managers (ASRSM);
- Brotherhood of Locomotive Engineers and Trainmen (BLET);
- Brotherhood of Maintenance of Way Employees Division (BMWED);
- Brotherhood of Railroad Signalmen (BRS);
- Chlorine Institute;
- Federal Transit Administration (FTA);*
- Fertilizer Institute;
- High Speed Ground Transportation Association;
- Institute of Makers of Explosives;
- International Association of Machinists and Aerospace Workers;

- International Brotherhood of Electrical Workers;
- Labor Council for Latin American Advancement;*
- League of Railway Industry Women;*
- National Association of Railroad Passengers (NARP);
- National Association of Railway Business Women;*
- National Conference of Firemen & Oilers;
- National Railroad Construction and Maintenance Association (NRCMA);
- National Railroad Passenger Corporation (Amtrak);
- National Transportation Safety Board (NTSB);*
- Railway Supply Institute (RSI);
- Safe Travel America (STA);
- Secretaria de Comunicaciones y Transporte;*
- Sheet Metal Workers International Association (SMWIA);
- Tourist Railway Association, Inc.;
- Transport Canada;*
- Transport Workers Union of America (TWU);
- Transportation Communications International Union/BRC (TCIU/BRC);
- 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 individual task force then provides that information to the working group for consideration. When a working group comes to unanimous consensus on recommendations for action, the package 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 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. However, to the maximum extent practicable, FRA utilizes RSAC to provide consensus recommendations with respect to both proposed and final agency action. If RSAC is unable to reach consensus on a recommendation for action, the task is withdrawn and FRA determines the best course of action.

3. Passenger Safety Working Group

The RSAC established the Passenger Safety Working Group (Working Group) to handle the task of reviewing passenger equipment safety needs and programs and recommending consideration of specific actions that could be useful in advancing the safety of rail passenger service and develop recommendations for the full RSAC to consider. Members of the Working Group, in addition to FRA, include the following:

- AAR, including members from BNSF Railway Company (BNSF), CSX Transportation, Inc. (CSXT), and Union Pacific Railroad Company (UP);
- AAPRCO;
- AASHTO;
- Amtrak;
- APTA, including members from Bombardier, Inc., Herzog Transit Services, Inc., Interfleet Technology, Inc. (Interfleet, formerly LDK Engineering, Inc.), Long Island Rail Road (LIRR), Maryland Transit Administration (MTA), Metro-North Commuter Railroad Company (Metro-North), Northeast Illinois Regional Commuter Railroad Corporation (NIRCRC), Southern California Regional Rail Authority (Metrolink), and Southeastern Pennsylvania Transportation Authority (SEPTA);
- ASLRRA;
- BLET;
- BRS;
- FTA;

- NARP;
- NTSB;
- RSI;
- SMWIA;
- STA;
- TCIU/BRC;
- TSA;
- TWU; and
- UTU.

In 2007, the Working Group tasked the Task Force (General Passenger Safety Task Force) to resolve four issues involving FRA's regulations related to passenger train emergency preparedness. The issues taken up by the Task Force were as follows: (1) ensure that railroad personnel who communicate and coordinate with first responders during emergency situations receive initial and periodic training and are subject to operational tests and inspections under part 239; (2) clarify that railroads must develop procedures in their e-prep plans addressing the safety of passengers with disabilities during an emergency situation, such as during a train evacuation; (3) limit the need for FRA to formally approve certain purely administrative changes to approved e-prep plans and update FRA headquarters' address; and (4) specify new operational testing and inspection requirements for both operating and non-operating employees for railroads covered by part 239.

While the Task Force was initially also charged with updating FRA headquarters'

address as it appeared in various regulations found in part 239, FRA has already amended its regulations to update the address of the physical headquarters of FRA and the U.S. Department of Transportation in Washington, DC. See 74 FR 25169 (May 27, 2009).

4. General Passenger Safety Task Force

Members of the Task Force include representatives from various organizations that are part of the larger Working Group. Members of the Task Force, in addition to FRA, include the following:

- AAR, including members from BNSF, CSXT, Norfolk Southern Railway Co., and UP;
- AASHTO;
- Amtrak;
- APTA, including members from Alaska Railroad Corporation, Peninsula Corridor Joint Powers Board (Caltrain), LIRR, Massachusetts Bay Commuter Railroad Company, Metro-North, MTA, New Jersey Transit Corporation, New Mexico Rail Runner Express, Port Authority Trans-Hudson, SEPTA, Metrolink, and Utah Transit Authority;
- ASLRRA;
- ATDA;
- BLET;
- FTA;
- NARP;
- NRCMA;

- NTSB;
- Transport Canada; and
- UTU.

The full Task Force met together on the following dates and in the following locations to discuss the four e-prep-related issues charged to the Task Force:

- July 18-19, 2007, in Chicago, IL;
- December 12, 2007, in Ft. Lauderdale, FL;
- April 23-24, 2008, in San Diego, CA; and
- December 3, 2008, in Cambridge, MA.

Minutes of each of these Task Force meetings are part of the docket in this proceeding and are available for public inspection.

5. Development of the NPRM

The NPRM was developed to address a number of the concerns raised and issues discussed during the various Task Force and Working Group meetings. Staff from the DOT's Volpe National Transportation Systems Center in Cambridge, MA, attended many of the meetings and contributed to the technical discussions through their comments and presentations. To aid the Task Force in its delegated task, FRA drafted regulatory text for discussion purposes and made various changes to the draft text based upon input from Task Force members, as reflected in the meeting minutes. The Task Force reached consensus on all four assigned tasks and adopted the draft text created from its meetings as a recommendation to the Working Group on December 4, 2008.

FRA revised the Task Force's recommendation to conform to technical drafting

guidelines and to clarify the intent of the recommendation. On June 8, 2009, the Task Force presented both its initial consensus language as well as the consensus language revised by FRA to the Working Group. The Working Group approved the Task Force's initial and revised consensus language at its June 8, 2009 meeting in Washington, DC. The consensus language was then presented before the full RSAC on June 25, 2009, where it was approved by unanimous vote. Thus, the Working Group's recommendation was adopted by the full RSAC as a recommendation to FRA.

While the RSAC's recommendation provided a strong basis for the proposed rule, the language FRA proposed in the NPRM varied from the recommendation principally in one substantive way: FRA declined to adopt the RSAC's recommendation that FRA add language to § 239.101(a)(2)(ii) that would require control center and emergency response communications center (ERCC) personnel to receive initial and periodic training only on those portions of the railroad's e-prep plan that relate to their specific duties under the plan. FRA explained this decision in the section-by-section analysis. FRA had also proposed minor changes for purposes of clarity and formatting in the Federal Register, but these changes were not intended to affect the RSAC's consensus recommendation.

6. Development of the Final Rule and Response to General Comments on the NPRM

FRA notified the public of its options to submit written comments on the NPRM and to request a public, oral hearing on the NPRM as well. No request for a public hearing was received. However, a number of interested parties did submit written comments to the docket in this proceeding, and FRA considered all of these comments in preparing this final rule. Specifically, written comments were received from the

Commuter Rail Division of the Regional Transportation Authority (Metra) and its operating company NIRCRC; MTA; the Disability Rights Education and Defense Fund (DREDF); individual commenter Jeffrey Scott Moore; and the Transportation Communications Union/IAM (TCU/IAM), TWU, UNITE-HERE, and UTU (jointly).

FRA notes that throughout the preamble discussion of this final rule, FRA refers to comments, views, suggestions, or recommendations made by members of the Task Force, Working Group, or full RSAC, as they are identified or contained in meeting minutes or other materials in the public docket. FRA does so to show the origin of certain issues and the nature of discussions concerning those issues at the Task Force, Working Group, and full RSAC level. FRA believes this serves to illuminate factors it has weighed in making its regulatory decisions, as well as the rationale for those decisions.

The majority of the comments received appear to address specific provisions proposed in the NPRM. FRA's response to such comments can be found in the section-by-section analysis of the specific provisions to which the comments apply. However, as there were two comments that were more general in nature and did not directly relate to a particular proposed provision, FRA is discussing these comments in this section.

The first general comment is from an individual, Mr. Jeffrey Scott Moore. Mr. Moore suggests that FRA redefine what "railroad" means in part 239 and which railroads are subject to part 239. He believes that passenger density should be the driving force for meeting the definition of a passenger railroad covered by part 239, rather than the items currently listed in the definition of "railroad" in part 239 and the applicability section at

§ 239.3 (e.g., whether the passenger service is a commuter railroad), and recommends that FRA apply the same standard to all passenger railroads, “right down to the first aid kits.” Mr. Moore’s comment appears to be requesting that FRA reconsider both the definition of “railroad” and the general applicability of part 239, neither of which was raised as an issue in the NPRM. Accordingly, FRA believes that Mr. Moore’s comment is outside of the scope of this rulemaking proceeding. FRA’s rationale for defining the term “railroad” as it is used in § 239.7 and for the criteria determining part 239’s applicability can be found in the preamble to the 1998 final rule at 63 FR 24630, 24643-24645 (May 4, 1998).

The second general comment is a joint comment from TCU/IAM, TWU, UNITE-HERE, and UTU (collectively, the Unions) urging FRA to further modify § 239.7 by eliminating the exclusion of persons performing “food, beverage, or security service” from the definition of “crewmember.”³ The Unions assert that on-board service employees may be called upon, and have been called upon, to assist passengers in an emergency, and note that such employees are often in a unique position to assist passengers with special needs. Further, the Unions submit that passengers do not often differentiate between uniformed employees and, due to more regular interaction with on-board service employees that are on the train point-to-point with passengers, are more likely to go to them for assistance during an emergency situation. While recognizing that “the vast majority of these [on-board service] employees are already trained in safety and

³ The term “crewmember” means “a person, other than a passenger, who is assigned to perform either: (1) On-board functions connected with the movement of the train (*i.e.*, an employee of a railroad, or of a contractor to a railroad, who is assigned to perform service subject to the Federal hours of service laws during a tour of duty) or (2) On-board functions in a sleeping car or coach assigned to intercity service, other than food, beverage, or security service.”

emergency procedures (via Amtrak required training),” the Unions assert that training of “all” on-board service employees (including food, beverage, and security workers, and employees of contractors and subcontractors) should be required, not voluntary, and conclude that this “loophole” in the definition of “crewmember” in § 239.7 has resulted in “a missed opportunity to enhance safety.”

Although the NPRM did raise the issue of which employees needed to be trained on a railroad’s emergency preparedness plan, it did so in the limited context of certain employees that were already assigned a formal and key role in the railroad’s execution of its e-prep plan (*i.e.*, establishing, coordinating, or maintaining communication with emergency responders, representatives of adjacent modes of transportation, or appropriate railroad officials during a passenger train emergency), but that were not technically subject to the training requirements simply because they were not located within a “control center” as that term is defined in § 239.7. The Unions, however, appear to be requesting that FRA mandate that all on-board service employees receive training on a railroad’s e-prep plan (which may be more extensive than the training that Amtrak is currently providing such employees) without regard as to whether these employees have been assigned a formal or key role under the plan. Accordingly, FRA believes that this comment is outside of the scope of this rulemaking proceeding. However, FRA reiterates that in the 1998 final rule, FRA recognized “the practical limits of an expansive definition of “crewmember,” and anticipated that railroads would “voluntarily elect to train most, if not all, on-board personnel in emergency response procedures.” See 63 FR 24630, 24636 (May 4, 1998). FRA remains concerned regarding the cost-effectiveness

of requiring that training be provided to persons performing food, beverage, or security service where such persons may not be assigned a key role under the e-prep plan in precipitating passenger evacuation during the aftermath of an emergency. See 63 FR 24630, 24636-24637 (May 4, 1998).

FRA understands that the overwhelming majority of railroads subject to part 239 have not assigned key roles in their e-prep plans to contractor employees performing food, beverage, or security service. Based on the likelihood that contractor employees performing food, beverage, or security service are either being voluntarily trained by the railroad, as applicable, or are merely performing incidental functions, FRA believes that no further changes to the definition or training requirements, other than those included in this final rule (see e.g., § 239.101(a)(2)(iii)), are necessary at this time.

III. Section-by-Section Analysis, including Response to Other Comments on the NPRM

Subpart A—General

Section 239.5 Preemptive Effect

FRA is eliminating this section on the preemptive effect of part 239, the passenger train emergency preparedness regulations. FRA believes that this section is unnecessary because it is duplicative of statutory law at 49 U.S.C. 20106 and case law, which sufficiently address the preemptive scope of FRA's regulations. FRA is retaining the section number itself rather than deleting it.

Section 239.7 Definitions

FRA is amending this section in one major and two minor ways. Most importantly, FRA is adding a definition for the new term “emergency response communications center” (ERCC) as will be explained in detail below. In addition, FRA is adding a definition for two existing terms “on-line emergency responder” (see § 239.101(a)(5)) and “outside emergency responder” (see § 239.101(a)(1)(ii)) to clarify that FRA intends those terms to have the same meaning as that of the existing, and defined, term “emergency responder.” Finally, FRA is updating the definition of the existing term “crewmember” for technical reasons to reflect that most individuals assigned to be engaged in or connected with the movement of a passenger train are not subject to “the Federal hours of service laws” as the definition presently reads, but are subject to the obligations encompassed by the more generic term, “the Federal hours of service requirements.”

Under the final rule, the new term “ERCC” is defined, in part, as “a central location, or a group of individuals, designated by a railroad with responsibility for establishing, coordinating, or maintaining communication with outside emergency responders, representatives of adjacent rail modes of transportation, or appropriate railroad officials during a passenger train emergency.” The definition continues that the ERCC may be part of the railroad’s “control center,” which has already been defined as “a central location on a railroad with responsibility for directing the safe movement of trains.” See current § 239.7. A control center is commonly called a “train dispatch center.” FRA believes this new definition of “ERCC” is necessary for the reasons stated below.

Currently, the requirements of part 239 do not specifically apply to all personnel assigned to perform the above-described emergency response communication functions, but rather to personnel in the railroad's control center. The individuals working in these control centers are subject to e-prep plan training and operational tests. See current § 239.101. However, requiring only responsible control center personnel (in addition to on-board personnel ("crewmembers" within the meaning of § 239.7)) to receive training on a railroad's e-prep plan may be problematic because, in many railroads' operational structures, train dispatchers only notify internal railroad officials (as opposed to "outside emergency responders") about an emergency situation and provide block protection for the affected train(s) or equipment involved in the incident. While an ERCC may be part of a railroad's dispatch center, many railroads maintain a separate center within their organizational structure that establishes and maintains communications with outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials. In addition, ERCC personnel often assist in coordinating the actual emergency response with outside emergency responders.

This final rule defines an "ERCC," which provides vital services during an emergency situation, and includes the term in various provisions of part 239 that address training, testing, and inspection requirements. By including this definition and inserting this term in the existing regulation, FRA is expressly requiring that ERCC personnel, who directly interact with outside emergency responders and perform other key emergency response communications functions, receive the proper training, testing, and oversight under the regulation to appropriately prepare for and respond to an emergency

situation.

The definition of “ERCC” that FRA is adopting in this final rule provides the railroads with maximum flexibility in designating what centers or groups of individuals within the railroad’s organizational structure are responsible for communicating with the outside emergency responders and other outside entities during an emergency situation on the railroad and would therefore qualify as ERCCs or ERCC personnel. With this flexibility, each affected railroad is permitted to ensure that the correct center or group of individuals within the railroad’s organizational structure responsible for such emergency response communications receives training on the railroad’s e-prep plan, and that the personnel in that center or group of individuals is subject to operational tests and inspections regardless of how the center or group of individuals is organized within the railroad.

For clarity, and in recognizing that a railroad has the flexibility to assign ERCC functions to a group of individuals (see above and 77 FR 38248, 38252 (June 27, 2012)) that, pursuant to its organizational structure, may not necessarily be centrally located, FRA is modifying the definition of “ERCC” that was recommended by the RSAC and proposed by FRA in the NPRM in four ways. The first modification is adding the phrase “, or a group of individuals,” after “a central location” to encompass a group of individuals that are not centrally located, but that nevertheless have an assigned role within the scope of the term “ERCC” in carrying out the railroad’s emergency response communications and who, therefore, have to be properly trained and tested under this part to ensure that they would be able to execute their assigned roles. The second

modification of the definition of “ERCC” is changing the word “and,” in front of “appropriate railroad officials,” to “or” in order to ensure that a central location or a group of individuals designated to perform some, but not all of the functions described in the definition would still be considered an ERCC for purposes of this part. The third and fourth modifications are for clarity and consistency with terms used in current § 239.101(a)(1)(ii) regarding the required notifications to “outside” emergency responders and adjacent “rail” modes of transportation. Accordingly, FRA has added “outside” in front of “emergency responders” and “rail” in front of “modes of transportation” in the definition of the term “ERCC.”

As noted above, FRA is also making two minor revisions to this section. First, FRA is defining the existing term “outside emergency responder,” which currently lacks a definition, to have the same meaning as the already defined term “emergency responder” for purposes of this part. This final rule includes both terms at the beginning of the definition of “emergency responder,” and the rest of the definition remains the same. Second, FRA is making a technical update to the definition of “crewmember” by replacing the word “laws” in the phrase “Federal hours of service laws” with “requirements[.]” This change is necessary for two reasons: (1) the Federal substantive hours of service regulatory scheme applicable to the crews of passenger trains no longer includes only laws passed by Congress (i.e., 49 U.S.C. chapter 211), but also includes regulations issued by FRA (i.e., 49 CFR part 228, subpart F); and (2) currently, train employees providing passenger service are subject to these FRA substantive hours of service regulations at 49 CFR part 228, subpart F and are not subject to the hours of

service laws at 49 U.S.C. chapter 211 except in fairly rare situations where both the hours of service regulations and the hours of service laws apply to the same period of service.

See Second Interim Statement of Agency Policy and Interpretation on the Hours of Service Law as Amended in 2008; 78 FR 58,830, 58,838 (September 24, 2013)

(discussing the applicability of statutory and regulatory hours of service requirements to employees performing multiple types of covered service).

Subpart B—Specific Requirements

Section 239.101 Emergency Preparedness Plan

Each railroad subject to part 239 is required to establish an e-prep plan under this section that is designed to manage emergencies effectively and efficiently and to minimize subsequent trauma and injury to passengers and on-board personnel. FRA is revising this section in several different ways, namely, by adding language to paragraphs (a)(1)(ii) and (a)(2)(ii) through (v), removing language from paragraph (a)(2)(ii), and creating an entire, new paragraph (a)(8). Each change to this section is addressed below, by paragraph or subparagraph.

Paragraph (a)(1)(ii). As currently written, paragraph (a)(1)(ii) requires railroad control center personnel (who may be entirely comprised of railroad dispatchers) to notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials when a passenger train emergency has occurred. However, a number of railroads have found it inefficient to use the control center or railroad dispatcher to perform these duties during an emergency situation because the personnel are likely providing block protection for the incident as well as performing their usual

dispatching duties for other parts of the railroad unaffected by the emergency event. Instead, many railroads currently maintain in their organizational structure a separate center or desk within, or even completely separate from, the railroad dispatch center that is made up of a group of individuals responsible for establishing and maintaining communications with internal and external organizations during a railroad emergency. See the discussion of ERCCs in § 239.7, above. Consequently, FRA is adding specific language to this paragraph that permits railroads to have the flexibility to decide which individuals or which part of the railroad's organizational structure should handle these duties during an emergency situation.

Paragraph (a)(2)(ii). Similar to the change being made to paragraph (a)(1)(ii), FRA is adding language to paragraph (a)(2)(ii) that requires ERCC personnel to receive initial and periodic training on appropriate courses of action for each potential emergency situation. As currently written, this paragraph already requires initial and periodic training for "responsible" control center personnel (i.e., those who are assigned responsibilities under the plan that are more than incidental functions). FRA notes for clarification that a clerk or a dispatcher that is performing merely an incidental function, such as receiving a call from a stalled train, but who does not have an assigned role under the plan, is not required to be trained. See 63 FR 24630, 24651 (May 4, 1998).

FRA is also adding language to this paragraph clarifying that control center or ERCC personnel can be employees of the railroad, as well as contractors, subcontractors, or employees of a contractor or subcontractor to the railroad. FRA notes that contractors, subcontractors, and employees of a contractor or subcontractor to the railroad are already

subject to the requirements of part 239 when performing functions under this part per the requirements of § 239.9. Nonetheless, it appears that there is some confusion as to the training of such employees, as is evident in the joint comment from the Unions indicating that the current regulation excludes contractors from the training requirements and expressing support for applying the same training requirements to contractors, subcontractors, and railroad employees. Accordingly, for clarity, and in response to the joint comment from the Unions, FRA is revising the rule text in paragraph (a)(2)(ii) and the text in various other paragraphs of this part to make clear that contractors, subcontractors, and employees of a contractor or subcontractor are indeed covered under the requirements of this part and must be properly trained. In situations where a contractor is providing training on a railroad's e-prep plan to its covered employees or to the covered employees of a railroad or another contractor to a railroad, FRA has the authority to cite either the railroad, the contractor, or both for any failure to provide e-prep training required by this part, as the railroad's e-prep plan must provide for such training, and a contractor performing any function under part 239 must perform that function in accordance with this part and is subject to a civil penalty for failure to perform the function in accordance with this part. See §§ 239.101(a)(2), 239.9, and 239.11. In making the determination as to whether to assess a civil penalty against the railroad or contractor or both under such situations, FRA will consider the criteria listed in Appendix A to part 209.

FRA notes that the RSAC reached consensus on adding language that would have required that control center and ERCC personnel receive initial and periodic training only on those portions of the railroad's e-prep plan that relate to their specific duties under the plan. However, FRA declined to propose adding such language to this paragraph in the NPRM, due to the concern that a railroad's entire emergency response could be hindered if specific individuals happen to be absent during an actual emergency situation. For example, if a specific control center or ERCC employee is required under the railroad's e-prep plan to notify internal railroad personnel during an emergency situation that an emergency situation on the railroad has occurred, and that employee is absent or incapacitated during an actual emergency, then the railroad's emergency response may be hindered if the remaining individuals had received training only on the very specific parts of the railroad's e-prep plan for which they were directly responsible during an emergency situation. By ensuring that control center and ERCC personnel receive broader initial and periodic training on appropriate courses of action on potential emergency situations beyond the individual's specific duties under the railroad's e-prep plan, these individuals will have a more holistic view of the railroad's emergency response and therefore be better prepared to respond to an emergency situation regardless of the specific circumstances. Although MTA submitted a comment urging FRA to adopt the RSAC recommendation (and suggesting that such training would be consistent with existing protocol and would not compromise passenger safety), the comment did not address the safety concerns that FRA expressed in the NPRM.

FRA believes that training control center and ERCC personnel on the railroad's entire e-prep plan, not just the specific portions of the plan that relate to their specific duties, will not add substantial cost to the railroads because most railroads are already providing this broader level of training to their employees, as the current training requirements are not limited to an employee's specific duties, and specifically require training on coordination of functions. See current § 239.101(a)(2)(ii). Many railroads provide this holistic training on the railroad's e-prep plan through an informational video, which provides useful information to the employees on all levels of the railroad's emergency response. In addition, FRA understands that the RSAC language that would have only required training specific to the employee's duties under the plan was included in the consensus language in response to concerns that, under the current requirement in § 239.101(a)(2)(ii)(A), some railroads were training control center personnel that were not also dispatchers to be familiar with a territory to the same level as a dispatcher. As further discussed below, FRA has already addressed this concern elsewhere in the training requirements by removing the word "dispatch" from the requirement that training include "Dispatch territory familiarization." Accordingly, for the reasons expressed in the NPRM and above, FRA declines to add to this provision the RSAC-recommended language regarding providing training to individuals only on their specific duties under the e-prep plan.

FRA is also amending paragraphs (a)(2)(ii)(A) through (D). In paragraph (a)(2)(ii)(A), FRA is removing the word "dispatch" before "territory familiarization," as noted above. The Task Force recommended that the word "dispatch" be removed from

this paragraph so that control center and ERCC personnel who are not railroad dispatchers would not be required to be as familiar with a territory as dispatchers are required to be under current railroad operating rules. For example, to conduct their duties efficiently and safely, railroad dispatchers are required to memorize the physical characteristics of the railroad territory over which they control train movements. While this is necessary for a railroad dispatcher, the Task Force believed, and FRA agrees, that this level of familiarity with railroad territory is not necessary for individuals working in a control center or ERCC who are not railroad dispatchers.

No comments were received on this amendment. Therefore, for the reasons noted in the NPRM and above, FRA has removed the word “dispatch” from “Dispatch territory familiarization” in paragraph (a)(2)(ii)(A). This amendment clarifies that individuals working in control centers or ERCCs who are not also railroad dispatchers are not required to have complete dispatch territory familiarization in their capacity to assist in emergency situations. Instead, for the purposes of this paragraph, “Territory familiarization” will focus on, but not be limited to the following: access points for emergency responders along the railroad’s right-of-way; special circumstances (e.g., tunnels); parallel operations; and other operating conditions (e.g., elevated structures, bridges, and electrified territory) including areas along the railroad’s right-of-way that are remote and that would likely present challenges for individuals responding to a passenger train emergency.

To complement the language being adopted in paragraph (a)(2)(ii)(A), paragraph (a)(2)(ii)(B) is being amended to require initial and periodic training for responsible

control center and ERCC personnel on how to access and retrieve information that would aid emergency personnel in responding to an emergency situation. (Current paragraph (a)(2)(ii)(B) is being redesignated as paragraph (a)(2)(ii)(C), below.) Under the amended provision, responsible control center and ERCC personnel are required to receive sufficient training to be able to retrieve information to assist emergency personnel in their emergency response. For example, under a railroad's e-prep plan, a railroad employee designated as part of an ERCC might be required to be trained on how to electronically retrieve a map of railroad property, read it properly, and identify and describe important points of access to emergency responders. No comments were received on this amendment, and, except for adding an explanation of "Territory familiarization," FRA has adopted the provision as proposed in the NPRM for the reasons stated above.

FRA is also adding language to paragraph (a)(2)(ii)(C) (redesignated from (a)(2)(ii)(B)). This new language requires responsible control center and ERCC personnel to receive initial and periodic training on the railroad's e-prep plan, including what protocols govern internal communications between these two groups when an actual emergency situation occurs. The language "as applicable under the plan," is also being added to the regulatory text to emphasize that, due to the variety of possible organizational designs on how railroads handle emergency responses, it is ultimately each individual railroad's decision on what protocols will be followed to govern internal communication between control center and ERCC personnel. No comments were received on this amendment, and FRA is adopting the provision as proposed in the NPRM for the reasons stated above.

Finally, FRA is adding a new paragraph (a)(2)(ii)(D). This new paragraph reflects the Task Force's recommendation that initial and periodic e-prep plan training should include the protocols for establishing and maintaining external communications between the railroad's control center or ERCC, or both, and emergency responders. The Task Force recommended, and FRA agrees, that adding this requirement will ensure that responsible control center and ERCC personnel receive initial and periodic training on what protocols need to be followed to establish and maintain communications with external organizations assisting in the emergency response. Like the Task Force, FRA believes that it is just as important for control center and ERCC personnel to learn the protocols for establishing and maintaining communications with external organizations as for the protocols governing internal communications between centers in newly-designated paragraph (a)(2)(ii)(C). No comments were received on this amendment, and FRA is adopting the provision as proposed in the NPRM for the reasons stated above.

FRA also realizes that railroads may have to amend their e-prep plans in order to comply with the new requirements. FRA noted in the NPRM that it intended to provide railroads sufficient time to have their amended e-prep plans submitted to FRA for review after the issuance of this final rule, and invited comment as to whether FRA should lengthen the usual period before the final rule would become effective. No comments were received on this issue. FRA believes that a total of 120 days should provide railroads with sufficient time to amend their plans and submit them to FRA for review, and has therefore decided to make the rule effective on July 29, 2014.

Paragraph (a)(2)(iii). FRA is adding language to paragraph (a)(2)(iii) that

requires ERCC personnel to be included in the initial training after the e-prep plan is approved under § 239.201(b)(1). It is important that ERCC personnel be included in this training because, depending on the organizational structure of the railroad, the actions of ERCC personnel during an emergency response situation may be more pivotal to the successful implementation of the plan than the actions of control center personnel. FRA is also adding clarifying language to paragraph (a)(2)(iii) to specify that responsible control center and ERCC personnel are subject to the training requirements regardless of whether they are railroad employees, railroad contractors and subcontractors, or employees of these contractors and subcontractors. This clarification addresses the joint comment from the Unions, as discussed in the section-by-section analysis of paragraph (a)(2)(ii) of this section, above. No further comments were received on these amendments, and other than a simplification of the heading (i.e., replacing “employees of the railroad, current employees of contractors and subcontractors to the railroad, and individuals who are contracted or subcontracted by the railroad” with “personnel”), FRA is adopting the provision as proposed in the NPRM for the reasons stated above.

Paragraph (a)(2)(iv). For the same reasons that FRA is adding language to paragraph (a)(2)(iii), FRA is adding similar language to paragraph (a)(2)(iv), namely, to ensure that ERCC personnel hired after the e-prep plan is approved by FRA receive initial training within 90 days after the individual’s initial date of service with the railroad. Currently, this paragraph expressly requires that only on-board and control center personnel receive initial training within 90 days after their initial date of service with the railroad. Depending on how a railroad has chosen to organize its response to a

specific emergency situation, failure to train a new ERCC employee within 90 days of starting his or her service on the railroad could create inefficiencies in the railroad's response to an emergency situation.

In addition, FRA is adding language to paragraph (a)(2)(iv) clarifying that the requirements of this paragraph are not limited to on-board and control center personnel that are railroad employees, but include ERCC personnel that are railroad employees, as well as on-board, control center, and ERCC personnel that are contractors, subcontractors, and employees of contractors or subcontractors. This clarification also addresses the joint comment from the Unions, as discussed in the section-by-section analysis of paragraph (a)(2)(ii) of this section, above. No further comments were received on these amendments. Other than three minor edits (i.e., the modification of the header for simplicity and consistency with § 239.101(a)(2)(iii), the addition of the word "responsible" in front of "control center personnel" for consistency with its use in the training requirements in § 239.101(a)(2), and the revision of "and" to "as well as" in front of "any emergency response communications center personnel" for consistency with § 239.101(a)(2)(v)), FRA is adopting the provision as proposed in the NPRM for the reasons stated above.

Paragraph (a)(2)(v). FRA is adding language to this paragraph to clarify that railroads need to develop testing procedures not only for employees, but also for contractors and subcontractors, as well as employees of contractors and subcontractors who are being evaluated for qualification under the railroad's e-prep plan. The current regulatory text expressly requires railroads to develop testing procedures for railroad

employees only. This final rule clarifies that employees, as well as contractors, subcontractors, and employees of contractors and subcontractors, are required to be evaluated for qualification under the railroad's e-prep plan using appropriate testing procedures. The heading of this paragraph is also being amended for simplicity (and consistency with paragraphs (a)(2)(iii) and (a)(2)(iv)) and to clarify that railroads need to develop testing procedures for ERCC personnel as well as on-board and control center personnel.

Finally, FRA is modifying paragraph (a)(2)(v)(A) to require that testing procedures developed by the railroads accurately measure an individual's, rather than an individual employee's, knowledge of his or her responsibilities under the railroad's e-prep plan. Currently, paragraph (a)(2)(v)(A) expressly applies only to railroad employees, and this modification ensures that railroad contractors and subcontractors are covered by the provision as well. This clarification addresses the joint comment from the Unions, as discussed in the section-by-section analysis of paragraph (a)(2)(ii) of this section, above. No further comments were received on these amendments, and FRA is adopting the provision as proposed in the NPRM for the reasons stated above.

Paragraph (a)(8). For the reasons stated below, FRA has adopted the provision as proposed in the NPRM, except that FRA has added an explanation of the term "knowledge." Executive Order 13347 ("Individuals with Disabilities in Emergency Preparedness") requires the Federal government to appropriately support safety and security for individuals with disabilities in all types of emergency situations. See 69 FR 44573 (July 26, 2004). Currently, each railroad subject to part 239 is required to address

the safety of each of its passengers in its emergency preparedness planning. Nonetheless, FRA is adding a new paragraph (a)(8) that clarifies that these railroads must include in their e-prep plans specific procedures addressing the safety of persons with one or more disabilities during emergency situations and full-scale simulations (such as while evacuating a train, while moving passengers from car to car in the same train, or while ensuring that the passengers remain in place), and for notifying emergency responders of the presence and general location of any person with a disability when the railroad has knowledge that the passenger is on board the train. FRA expects the railroads to address the responsibilities of on-board personnel to carry out these specific procedures on their own until response personnel arrive. For example, if a train has a failure or is involved in an incident and an evacuation or other action is deemed necessary, a crewmember in the body of the train, most likely someone other than the engineer as he or she would typically be in the cab managing communications, would need to search for and identify those passengers who cannot reasonably be evacuated by stairs or steps.

This new paragraph does not require a railroad to maintain any list of train passengers (nor does any other language currently in part 239 require this), whether or not they have a disability. At the same time, the railroad must have a process for notifying emergency response personnel in an emergency situation about the presence and general location of persons with disabilities when the railroad has knowledge that such passengers are on board a train

In particular, the railroad must have in place procedures calling on a crewmember (who is generally stationed in the body of the train) to identify the locations of any persons with a discernable disability on board its trains and, in the event of an emergency, to notify emergency responders, to the extent of the crewmember's knowledge, of the presence and general whereabouts of such passengers. Further, the railroad must have "readiness procedures designed to ensure passenger safety" addressing how any such person(s) with a disability can be evacuated during a potential emergency situation that would require evacuation in conditions that could reasonably be expected to occur, including in conditions identified under the "Special Circumstances" portion of the railroad's e-prep plan, when applicable, as required by paragraph (a)(4) of this section. In this regard, the railroad's readiness procedures must address what protocol on-board personnel should follow in situations requiring immediate passenger evacuation either with or without the assistance of emergency response personnel or railroad personnel not on board its trains, as the non-availability of emergency responders in a situation requiring immediate action would be a "condition on the railroad's property that is likely to affect emergency response." See § 239.101(a).

FRA received comments from MTA and Metra indicating that this paragraph, as proposed in the NPRM, presents a practical challenge in that some passengers may have cognitive, emotional, or other disabilities that are not readily identifiable to on-board crewmembers. While both MTA and Metra note that the voluntary participation in Reduced Fare or Ride Free programs by some passengers with disabilities may help crews identify such passengers, other passengers with disabilities may outwardly appear

as any other passenger. Therefore, Metra asks FRA to clarify that the railroad's obligation to implement procedures that would identify the general location of passengers with disabilities be based on the on-board crew's actual knowledge of the disability.

DREDF commented in support of proposed paragraph (a)(8), and encouraged FRA to include additional provisions. Specifically, DREDF suggests that FRA (1) mandate that staff receive training on the major categories of disability and the types of assistance associated with each; (2) develop more specific procedures for addressing the safe evacuation of persons with disabilities during emergency situations; (3) designate an individual with "formal authority" for the evacuation of persons with disabilities; (4) require that training include "people from the disability community" and emphasize that assistance provided to persons with disabilities during an emergency should take into account individual needs as expressed by the passenger or by the passenger's companions, if the passenger cannot express his or her own needs; and (5) provide that mobility equipment utilized by persons with disabilities should be evacuated with the person when at all possible. Additionally, DREDF acknowledges the difficulty in identifying some passengers with disabilities, as raised by MTA and Metra, but urges FRA and the railroads to continue to identify such passengers to the greatest extent possible, including by using the information available from Disability Reduced Fare Cards and Disabled Ride Free Cards.

The language in paragraph (a)(8) requires that the railroads have a process for notifying emergency responders in an emergency situation about the presence and general location of each passenger with a disability "when the railroad has knowledge

that the passenger is on board the train.” For purposes of this paragraph, FRA notes that a railroad would have “knowledge” when a reasonable person should have known that a passenger has a disability, such as under circumstances where the passenger is participating in a reduced fare or ride free program for persons with disabilities, or due to the presence of a mobility device (e.g., wheelchair, scooter, walker, cane, or crutches) or a service animal that is plainly visible. Metra’s comment indicates that their crewmembers have been able to identify passengers with disabilities that are visible, but expresses concern that the rule may be requiring their crewmembers to identify each passenger with a disability, including those disabilities that are not visible.

In response to the comments from MTA and Metra, FRA has added language to this paragraph that makes it clear that under circumstances where a passenger’s disability is not readily apparent (e.g., where the passenger may not outwardly appear to have a disability and is not participating in any reduced fare or ride free program), the railroad would not be considered to have knowledge that the passenger has a disability unless the crewmember has actual knowledge, such as where a passenger (or his or her companion or fellow passenger) has expressly informed a crewmember on the train of the disability. Regarding the additional provisions proposed by DREDF, FRA strongly encourages railroads to consider adopting the suggested provisions in their plans where possible and appropriate under the circumstances of the emergency situation, but FRA notes that the comments have not provided enough of a safety justification to mandate such provisions as written. For example, evacuating a person with his or her mobility equipment may be considered “possible,” but should not be required if there is a fire and a quick exit is

needed such that leaving the mobility equipment behind would speed the exit of any person. In addition, while FRA believes railroads would benefit from having one or more participants from the disability community present during the training, just as railroads benefit from having emergency responders participate in emergency simulations (see 63 FR 24630, 24656 (May 4, 1998)), such participation is clearly voluntary.

Section 239.105 Debriefing and Critique

This section requires a railroad operating passenger train service to conduct debriefing and critique sessions after each of its passenger train emergency situations or full-scale emergency simulations to determine the effectiveness of the railroad's e-prep plan. FRA is adding language to paragraph (c)(3) of this section so that the debriefing and critique session will be designed to determine whether the ERCC, as well as the control center, promptly initiated the required notifications. In addition, FRA makes clear that the plan's effectiveness in the evacuation of any passengers with a disability must be addressed during debrief and critique sessions as part of the assessment already required by paragraph (c)(5) of this section (regarding how efficiently the passengers exited from the car through the emergency exits). To ensure that railroads will be mindful of discussing how efficiently the evacuation was for all passengers, including any passengers with a disability or injury (when the railroad has knowledge of any such passengers), FRA has revised paragraph (c)(5) by adding the above clarifying language to the end of the existing language in paragraph (c)(5). The paragraph now reads "How efficiently the passengers exited from the car through the emergency exits, including any passengers with a disability or injury (when the railroad has knowledge of any such

passengers).”

Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans

Section 239.201 Emergency Preparedness Plan; Filing and Approval

This section specifies the process for review and approval by FRA of each passenger railroad’s e-prep plan. As proposed in the NPRM, FRA is dividing paragraph (a) of this section into paragraphs (a)(1) and (a)(2). Paragraph (a)(1) contains the regulatory requirements on how to file an e-prep plan, while paragraph (a)(2) contains the requirements on how to file an amendment to an FRA-approved plan. Paragraph (a)(2) is then further subdivided. Paragraph (a)(2)(i) describes what procedures a railroad must follow when filing amendments, other than certain purely administrative changes, to its e-prep plan with FRA. Paragraph (a)(2)(ii) lists the limited circumstances in which a railroad is permitted to implement an amendment to its approved e-prep plan without first obtaining FRA approval of the amendment. Consistent with this exception, FRA is also adding language to paragraph (b)(3) to clarify that FRA will not formally review the limited purely administrative amendments that are permitted to be implemented without prior FRA approval as described in paragraph (a)(2)(ii). Each of these changes is discussed in further detail, below.

Specifically, FRA is modifying paragraph (a)(1) in four minor ways. First, FRA is updating the title of the FRA official who must receive a railroad’s e-prep plan, from “Associate Administrator for Safety” to the current title of “Associate Administrator for Railroad Safety and Chief Safety Officer.” Additionally, since the time part 239 was issued, FRA’s “Office of Safety” was officially renamed the “Office of Railroad Safety.”

Therefore, FRA is updating the language in paragraph (a)(1) to reflect the name change of this FRA office. The RSAC also recommended that FRA modify the time period that new-start passenger railroads have to submit their e-prep plans to FRA before commencing passenger service. Currently, e-prep plans must be submitted by these passenger railroads no less than 45 days prior to commencing passenger operations. Consistent with the RSAC's consensus recommendation, and with what FRA proposed in the NPRM, FRA is requiring that such railroads submit their plans to FRA no less than 60 days prior to commencing passenger operations. This change provides FRA safety officials more time to review a railroad's e-prep plan, identify any safety concerns, and notify the railroad of any such concerns so that changes to the plan can be made before passenger operations commence. FRA notes that the original filing deadline for passenger railroads in operation during the time part 239 went into effect was "not more than 180 days after May 4, 1998." For those passenger railroads then in existence and for those passenger railroads that have commenced operations since and have already filed and received approval on their plans as of the effective date of the rule (July 29, 2014, which has been specifically added to this paragraph of the final rule for easy reference), FRA considers that those plans are timely filed. Finally, regarding the requirement that the e-prep plan must include the "address" of the primary person on each affected railroad to be contacted with regard to review of the plan, FRA is adding "(street address and, if available, email address)" following the word "address" in order to facilitate communication between FRA and the railroad concerning review of the plan.

FRA is also redesignating as paragraph (a)(2)(i) the regulatory requirement

(currently part of paragraph (a)) that all amendments to approved e-prep plans be filed with FRA 60 days prior to the effective date of the amendment. As discussed above, FRA is permitting an exception to this requirement for the limited purely administrative amendments that are permitted to be implemented without FRA approval, as listed in paragraph (a)(2)(ii). Although these limited types of amendments to e-prep plans must continue to be filed with FRA, they are permitted to become effective immediately, and do not require formal approval from FRA.

However, pursuant to paragraph (a)(2)(i), e-prep plan amendments that do not qualify for the exception in paragraph (a)(2)(ii) must be submitted to FRA with a written summary of what the proposed amendment would change in the approved e-prep plan and, as applicable, a training plan describing how and when current and new employees and contractors would be trained on any amendment. For example, if the amendment would affect how current and new railroad employees and contractors assist emergency responders, then under this paragraph the railroad must also submit a training plan with the amendment stating how and when these employees and contractors would be trained on these changes to the railroad's e-prep plan. As another example, if the railroad wants to identify new access roads to railroad property in its e-prep plan, then a training plan for employees and contractors must be included with the proposed amendment. Requiring railroads to include a summary with their proposed e-prep plan amendments that are not exempted by paragraph (a)(2)(ii) is necessary to permit FRA to review the plan amendments more efficiently. Currently, railroads have been submitting their entire approved e-prep plans with the amendment changes already incorporated in the plan

without identifying to FRA what changes the railroad is specifically seeking to make to its approved e-prep plan. This has delayed FRA's ability to review the railroad's proposed amendment(s) and respond to the railroad within the 45 days specified in paragraph (b)(3)(i). Requiring the railroads to include such summaries will help FRA efficiently review the proposed amendments and respond back to the railroad normally within 45 days; nevertheless, some reviews may take longer. This paragraph has been slightly modified from what was proposed in the NPRM for clarity, namely by adding "of the amendment" after "effective date" and changing "contractors" to "others within the scope of the training requirement at § 239.101(a)(2)."

As previously stated, FRA is adding a new paragraph (a)(2)(ii) under which qualifying amendments are not subject to FRA's formal approval process as outlined in paragraph (b)(3)(i). As proposed in the NPRM, amendments that add or amend the name, title, address, or telephone number of the e-prep plan's primary contact person qualify for the exception in paragraph (a)(2)(ii). In this final rule, FRA has adopted the above proposal and added "email address" as another amendment that FRA considers to be purely administrative in nature, and FRA has changed "address" to "street address" for clarity. In addition, FRA has added a requirement that a summary of the purely administrative changes be filed with FRA (in addition to the existing requirement to file the amendment itself), in order to assist FRA in determining whether the amendment is in fact subject to the exception. Railroads filing amendments under this paragraph are permitted to implement each amendment upon filing the amendment and a written summary of the changes with FRA's Associate Administrator for Railroad Safety and

Chief Safety Officer. All other e-prep plan amendments not covered by paragraph (a)(2)(ii) are required to be filed in accordance with paragraph (a)(2)(i) and are subject to the formal approval process in paragraph (b)(3)(i). FRA believes that paragraph (a)(2)(ii) is necessary in order to limit the need for FRA to formally approve certain purely administrative changes to previously-approved e-prep plans. This new paragraph allows these specific types of amendments to become effective immediately upon filing with FRA and thereby help to streamline the approval process.

FRA is also modifying paragraph (b)(3) in order to clarify that the limited types of amendments containing only the administrative changes described in paragraph (a)(2)(ii) are exempt from the formal FRA review that is described in this paragraph.

Subpart D—Operational Tests and Inspections; Records, Recordkeeping, and Availability of Records

Although not proposed in the NPRM, conforming, non-substantive revisions are being made to the title of subpart D. Before these revisions, the title read “Operational (Efficiency) Tests; Inspection of Records and Recordkeeping.” FRA notes that one such revision to the title was to delete the parenthetical reference to the term “Efficiency” in the phrase “Operational (Efficiency) Tests.” The word “efficiency” as used in this context is a vernacular term that was originally included in the rule to ensure that railroads would not interpret the requirement to conduct “tests” to mean that classroom-style written exams were required by this subpart. As the regulated community is now much more familiar with operational tests and inspections, FRA believes that the parenthetical reference to “efficiency” tests in the title to subpart D is no longer

necessary. Accordingly, FRA has decided to delete this parenthetical reference to “efficiency” tests in the title, as well as throughout § 239.301, for consistency with 49 CFR part 217 (part 217) and for easier readability.

Section 239.301 Operational Tests and Inspections

This section requires a railroad to monitor the routine performance of personnel who have one or more responsibilities under its e-prep plan to verify that they can perform the duties required under the plan in a safe and effective manner. FRA is modifying this section in several ways. First, FRA is amending the title and subsequent references within this section to include not only operational tests, but also inspections. These amendments better reflect the broader types of monitoring for compliance that many railroads have already been implementing (in addition to the operational tests currently required) and that are now explicitly required under this section, as well as under part 217, after which this section is modeled. In doing so, FRA has deleted all parenthetical references to “efficiency” tests throughout § 239.301, for the reasons noted above in the discussion regarding the revisions to the title of subpart D. Second, FRA is adding headings to each main paragraph for clarity and readability. Third, FRA is adding language clarifying that railroads are required to state in their e-prep plans the specific intervals at which they will, per the requirement in paragraph (a), periodically conduct operational tests and inspections of individuals with responsibilities under the e-prep plans. Fourth, FRA is adding language to paragraph (a) that requires any ERCC personnel, railroad contractors or subcontractors, or employees of railroad contractors or subcontractors, to which part 239 applies, to be subject to operational tests and

inspections. Note that this paragraph has been slightly modified from that proposed in the NPRM by changing the words “on-board, control center” to “on-board personnel, responsible control center personnel” to better reflect the scope of the current requirement. Additionally, FRA is adding language to paragraphs (c) and (d) in response to comments in order to clarify that the records required to be kept by paragraphs (a)(1) and (b) and retained by paragraphs (c) and (d) of this section may be retained either in hard copy or electronically, provided that the records are retained pursuant to the conditions set forth in § 239.303. Finally, FRA is adding new paragraphs (a)(1), (a)(1)(i) through (vi), (a)(2), (d), (e), and (f). The specific requirements being adopted in each new paragraph are discussed below.

In paragraph (a), FRA is adding the heading, “Requirement to conduct operational tests and inspections.” FRA believes that this heading will help the regulated community identify that paragraph (a) of this section specifically addresses operational test and inspection requirements. Additionally, FRA is adding language to paragraph (a) that requires ERCC personnel, railroad contractors or subcontractors, as well as employees of railroad contractors to be subject to the same periodic operational tests (and inspections) as those to which on-board and control center employees are subject under the current regulation. Adding this language to the regulation is necessary to ensure that all individuals who are assigned a role in the railroad’s emergency response are subject to operational tests and inspections. As modified, this requirement will help railroads determine whether they are prepared to provide an appropriate response in the event of an emergency situation, and, when railroads take measures to address any shortfalls

discovered through these tests and inspections, will ultimately help ensure that they will be prepared for the various emergency situations that may arise.

Paragraph (a)(1). New paragraph (a)(1) requires that the operational tests and inspections be conducted in accordance with the railroad’s program that must include, at a minimum, the six basic elements identified in new paragraphs (a)(1)(i) through (a)(1)(vi). RSAC recommended that FRA adopt these requirements, which were modeled from regulations found in § 217.9, Program of operational tests and inspections; recordkeeping. In fact, in several instances, the language in these new paragraphs mirrors existing language in various provisions of § 217.9—specifically, § 217.9(c)(3) through (c)(5). While part 217 prescribes processes for railroad operating employees only (e.g., train and engine crews), its approach to operational tests and inspections in the above-cited provisions is useful for governing individuals covered by FRA’s emergency preparedness requirements in part 239. However, the employees subject to these part 239 tests and inspections include not only certain railroad operating employees (e.g., train and engine crewmembers that are assigned to passenger trains), but all on-board “crewmembers” within the meaning of § 239.7, control center, and ERCC employees, as well as contractors and sub-contractors in these roles, regardless of whether the employees are operating employees, as applicable under the railroad’s e-prep plan. In adopting this paragraph, FRA varied from the language proposed in the NPRM in two minor ways for clarity, namely, by changing “pursuant to a” to “in accordance with the railroad’s” and changing “New railroads” to “A new railroad.”

Before discussing the six new paragraphs under paragraph (a)(1) that detail the

basic elements required in a railroad's program of operational tests and inspections, FRA believes it would be helpful to note the potential overlap of part 217 and part 239 tests, inspections, and programs, and explain its effect on compliance with the requirements in part 239. For clarification, FRA notes that part 239 operational tests and inspections also qualify as operational tests and inspections under § 217.9 if the employee, contractor, or subcontractor being tested is also performing functions that are covered by part 217. Likewise, operational tests and inspections conducted under part 217 also qualify as operational tests and inspections under part 239 as long as the criteria for operational tests and inspections in part 239 are met. For example, passenger train conductors are subject to operational testing under both parts 217 and 239. An operational test of a passenger train conductor that involves the procedures for passenger train emergency preparedness would satisfy requirements under both parts 217 and 239. In contrast, an operational test of a passenger train conductor that involves the procedures for operating derails would satisfy the requirements under part 217 only.

Further, operational testing and inspection under part 239 may be conducted as part of a railroad's operational testing and inspection program under § 217.9 or in an entirely separate program. However, as adopted in this final rule, the operational testing and inspection requirements for part 239 have a broader applicability and include several more categories of employees, rather than just those employees covered by § 217.9, as noted above. For example, these requirements also cover such individuals as passenger car attendants (who are considered to be "crewmembers" under § 239.7, as they are "person[s], other than a passenger, who [are] assigned to perform ...2) On-board

functions in a sleeping car or coach assigned to intercity service, other than food, beverage, or security service.”) and ERCC employees, who are not covered under part 217. Therefore, a railroad that would prefer to conduct its operational testing required by part 239 as part of its efficiency testing program under § 217.9 would need to modify its program to ensure that the additional tests are included and conducted for all of the individuals required to be covered under part 239, and that the program includes all six of the basic elements set forth in paragraphs (a)(1)(i) through (a)(1)(vi).

Paragraph (a)(1)(i). The first basic element, described in paragraph (a)(1)(i), is that the program must provide for operational testing and inspection of all covered individuals that addresses the appropriate courses of action in response to various potential emergency situations, as well as the responsibilities of these individuals under the railroad’s e-prep plan. For example, railroads should address how railroad personnel on board a passenger train should respond in the event of a fire. They should also address what each on-board employee’s, contractor’s, or subcontractor’s individual responsibilities are during such an emergency situation, and should also test to see if the crewmember(s) have the emergency equipment (e.g., flash light). FRA believes that these requirements help to reduce confusion during an actual emergency situation and ensure that the railroad’s on-board, control center, and ERCC personnel undergo operational tests and inspections on actions they would be performing during an emergency event.

Regarding the applicability of this section, MTA submitted a comment requesting that FRA modify the language proposed in the NPRM to make clear that the training and efficiency testing requirements would not apply to police officers who are not contractors, subcontractors, or employees of contractors or subcontractors and who also are not employees of a railroad. As justification for this request, MTA notes that MTA Police have more extensive emergency preparedness training than railroad employees, and that it would be appropriate for MTA Police to monitor compliance with their own internal emergency protocols. In response to this comment, FRA makes clear that only railroad employees, railroad contractor and subcontractors, and employees of railroad contractors and subcontractors who are covered by and have responsibilities under the railroad's e-prep plan are subject to operational tests and inspections from the railroad. Further, FRA notes that hired or contracted employees working for the railroad who do not have any responsibilities under the railroad's e-prep plan (e.g., a clerk in the control center that is performing an incidental function, such as receiving a call from a stalled train, but who does not have an assigned role under the plan; see 63 FR 24630, 24651 (May 4, 1998)) are not required to be subject to operational tests and inspections.

Paragraph (a)(1)(ii). Paragraph (a)(1)(ii) requires that railroads describe each type of operational test and inspection required for passenger train emergency preparedness. The description must also specify the means and procedures used to carry out these operational tests and inspections. For example, an operational test intended for an on-board employee may be conducted as a challenge question posed by a supervisor. In this example, the supervisor may ask the employee what his or her responsibilities are

for the evacuation of passengers, including passengers with disabilities, in specific circumstances, such as a passenger car filling with smoke. In another instance, a supervisor may ask an ERCC employee to identify a special circumstance (e.g., a tunnel or bridge) located in his or her territory and demonstrate how the employee would direct emergency responders to the location during an actual emergency. Overall, operational tests and inspections adopted for passenger train emergency preparedness should cover all affected employees and be comprehensive.

Paragraph (a)(1)(iii). Paragraph (a)(1)(iii) requires railroads to state in their e-prep plans the purpose of each type of operational test and inspection conducted. For example, an operational test intended for on-board employees may be conducted to determine if the employees are familiar with passenger evacuation procedures. As another example, such tests intended for ERCC employees may be conducted to determine if the ERCC employees are familiar with special circumstances on their territory and if they know how to direct emergency responders to these locations. In particular, conducting operational tests on ERCC employees to determine their knowledge of the railroad's e-prep plan, special circumstances, and access points is necessary to ensure that they are familiar with emergency procedures and capable of directing emergency responders to a passenger train in the event of an emergency.

Paragraph (a)(1)(iv). New paragraph (a)(1)(iv) clarifies that each railroad must state in its operational testing program the specific intervals at which it will periodically conduct operational tests and inspections of individuals covered by paragraph (a). This information must be listed according to operating division, where applicable. FRA

believes that this additional language is necessary after reviewing various railroads' submitted e-prep plans, some of which simply copied the language directly from § 239.301(a) and placed it into their e-prep plans or stated that the railroad would periodically conduct operational tests and inspections without indicating a specific interval by which these tests or inspections would be administered. By adding a requirement to specify a frequency, FRA is not mandating any specific interval by which the railroad must conduct these tests and inspections, as FRA believes that the regulated community should continue to have the flexibility to decide the appropriate periodic interval based on the individual circumstances of each railroad and its e-prep plan and operational testing program. However, FRA is requiring the railroad to provide more information to the agency so that FRA can better verify that these types of tests and inspections are in fact occurring as planned, and that the railroads are properly carrying out their responsibilities in preparing to deal with various emergency situations.

Paragraph (a)(1)(v). Paragraph (a)(1)(v) requires the railroad to identify in its e-prep plan each officer by name, job title, and division or system, who is responsible for ensuring that the program of operational tests and inspections is properly implemented. For railroads that have multiple divisions or systems, the regulation requires that each railroad identify at least one officer at the railroad's system headquarters who is responsible for overseeing the entire railroad's program and the e-prep plan implementation. This individual should be knowledgeable about the current state of the railroad's operational test and inspection requirements as well as the current state of the railroad's e-prep program system-wide. If more than one individual is responsible for

ensuring that the program is properly implemented on a railroad that has multiple divisions or systems, the e-prep plan should make clear which individual is responsible for overseeing the program and implementation on which division(s) or system(s), and require that such individuals coordinate results and jointly prepare the annual summary required by paragraph (f) of this section.

Paragraph (a)(1)(vi). The final basic element of the program, in paragraph (a)(1)(vi), is that the program must require that railroad officers conducting operational tests and inspections be trained on the elements of the railroad's e-prep plan that are relevant to the tests and inspections that the officers will be conducting. In addition, the railroad officers conducting the operational tests and inspections must be qualified on the procedures for administering such tests and inspections in accordance with the railroad's program.

Paragraphs (b) and (c). FRA is also adding headings to both paragraphs (b) and (c) of this section. FRA believes that adding the heading "Maintaining records of operational test and inspection records" to paragraph (b) will help clarify that paragraph (b) addresses what types of records need to be created for each operational test or inspection performed. Similarly, the heading "Retaining operational test and inspection records" is being added to paragraph (c). This heading clarifies that paragraph (c) addresses the requirements for how long records of operational tests and inspections need to be retained by the railroad. Note that these headings differ slightly from those proposed in the NPRM. For the header in paragraph (b), FRA changed the word "Keeping" to "Maintaining" to be consistent with the use of the word "maintain" within

the body of that paragraph. For paragraph (c), FRA changed the words “Retention of” to “Retaining” in order to be more consistent stylistically with the language used in the heading of paragraph (b). In addition, FRA is modifying the cross-reference to paragraph (a) in the first sentence to reflect that the requirement in paragraph (c) to retain each record “required by paragraph (a)” is actually required by paragraph (b), not paragraph (a). Paragraph (a) requires railroads to conduct the tests and inspections that are the subject of the records required to be kept by paragraph (b) and retained by paragraph (c). FRA believes that these headings and clarifying amendments will be useful guides for the regulated community, especially those who are unfamiliar with part 239 and its requirements.

Paragraphs (c) and (d). Regarding the record-retention requirements in revised paragraph (c) and new paragraph (d) (see also, new paragraphs (e) and (f)), MTA and Metra commented that requiring railroads to retain copies of the operational test and inspection records, program and summaries at both the railroad’s headquarters and divisional headquarters is unnecessary. Metra suggests that FRA modify paragraphs (c) and (d) of this section to eliminate the proposed requirement to retain a copy at the divisional headquarters. MTA suggests that requiring a copy of each record at the headquarters only, coupled with a provision that electronic copies be available at divisional headquarters, would be sufficient to ensure compliance, while reducing redundancy and paperwork. In response to these comments, FRA is modifying the language proposed in the NPRM for existing paragraph (c) and new paragraph (d) (and using conforming language in other similarly-worded or related paragraphs, as further

discussed below) to clarify that records required by paragraphs (a)(1) and (b) and required to be retained by paragraphs (c) and (d) of this section may be retained either in hard copy or electronically, provided that the electronic records are retained pursuant to the conditions set forth in § 239.303.

Paragraph (d) contains a new requirement that each railroad retain one copy of its current operational testing and inspection program required by paragraph (a) of this section and each subsequent amendment to the program. Railroads are required to retain such records at the railroad's system headquarters and, as applicable, at each division headquarters for three calendar years after the end of the calendar year to which the program relates. As noted above, the records may be retained electronically, subject to the conditions set forth in § 239.303, and must also be made available for inspection and copying during normal business hours by representatives of FRA and States participating under 49 CFR part 212 (part 212).

Paragraph (e). In the NPRM, FRA requested comment as to whether the periodic review and analysis requirements of § 217.9(e) should be adopted in this final rule amending part 239 to more appropriately fulfill the intended purpose of providing FRA with a clear understanding of how operational tests and inspections are being applied and how successful these programs are being implemented from a systems perspective. FRA noted that, under § 217.9(e), railroads should already be reviewing and analyzing operational test and inspection data conducted for passenger train emergency preparedness on individuals subject to part 217. Further, FRA indicated that the requirements of the paragraph might be broadened to cover individuals subject to part

239, and indicated that a railroad would be permitted to consolidate such a review and analysis required by part 239 with one required under § 217.9(e). If such requirements were adopted and a consolidation of reviews was made, then a railroad would be required to retain the consolidated reviews for a period of one year after the end of the calendar year to which the reviews relate (assuming that FRA did not adopt in part 239 a more stringent record- retention requirement for such reviews than what is required by § 217.9(e)(3)) and make the reviews available to representatives of FRA and States participating under part 212.

FRA received comments from Metra and MTA. Both railroads suggest that the timing of periodic review and analysis be left to the discretion of the railroad. Metra notes that integrating part 239 analysis with that of part 217 may be problematic in that the railroad may designate separate administrators for the requirements of each respective part, and that integration would require incorporating “non-operating” employees into the part 217 program.

After carefully considering the comments, FRA has decided to adopt a new paragraph (e) in § 239.301 requiring railroads to conduct a six-month review and analysis that is modeled after the similar review in § 217.9(e). Railroads have the option of combining the part 239 program with their part 217 program; however, if that option is not convenient given a particular railroad’s designation of administrators for the respective programs, this alone should not be an impediment to FRA’s adopting such a provision. In fact, the railroads are not objecting to the requirement to perform such a review and analysis, but have simply stated a preference, without further explanation as

to the potential impacts or burdens, that FRA not mandate a specific timeframe by which such periodic reviews and analyses must be performed. FRA notes that the purpose of the six-month review and analysis is to make certain that officers are conducting the minimum number of each type of test or inspection required, and that any necessary adjustments have been made to the distribution of tests and inspections. FRA believes that, without a six-month periodic review and analysis, railroads may not realize that they are not compliant regarding operational testing until the end of the year. The six-month review is critical to assist the railroad regarding compliance with part 239 operational testing requirements.

In furtherance of this purpose, paragraph (e) requires the individuals designated pursuant to paragraph (a)(1)(v) of this section to conduct periodic reviews and analyses not less than once every six months, prepare records of the reviews, and retain one copy of these records at the system headquarters, and, as applicable, at each division headquarters. The review records must be completed no later than 30 days after the time period being reviewed and retained for one year. Such review records may be retained in hard copy or electronically, if pursuant to § 239.303, and must be made available to representatives of FRA for inspection and copying during normal business hours. In particular, the designated officer(s) must prepare a record of the review of three aspects of the program of operational tests and inspections. The first aspect of the program to be reviewed and analyzed (see paragraph (e)(1)) is the operational testing and inspection data to determine compliance by the railroad testing officers with its program, and the review record must include the name of each railroad testing officer, the number of tests

and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or inspection required by the railroad's program. The second aspect required to be reviewed and analyzed (see paragraph (e)(2)) is the accident/incident data, the results of prior operational tests and inspections under this section, and other pertinent safety data to identify the relevant operating rules related to those accidents/incidents that occurred during the period. Note that paragraph (e)(2) requires railroads to make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s), based upon the results of the review of the data, and that if the railroad has divisions, the review must analyze each division's data separately. The third aspect to be reviewed and analyzed (see paragraph (e)(3)) is the implementation of the program from a system perspective, to ensure that the program is being utilized as intended, that the other reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their efforts.

Paragraph (f). Finally, FRA is adding a new paragraph (f) to this section (which was proposed as paragraph (e) in the NPRM). As recommended by RSAC and adopted by FRA with one minor revision, this paragraph requires each railroad subject to this part to prepare and retain an annual summary of the number, type, and result of each operational test and inspection that was conducted in the previous year as required by paragraph (a) of this section. Note that FRA added the words "prepare and" in front of "retain," for clarity. For railroads with operating divisions, the summaries must be

organized by operating division. The requirement to organize the summaries by operating division, where applicable, is intended to provide FRA with a clearer understanding of how each railroad is applying its program of operational tests and inspections and whether the railroad is successfully applying its program over different railroad divisions.

Each railroad is required by this paragraph to complete its annual summary and make it available (to FRA and States participating under part 212 for inspection and copying during normal business hours) at the railroad's system headquarters by March 1 of the year following the year covered by the summary. For a railroad with operating divisions, copies of the annual summaries must also be retained and made available at each of its division headquarters. In each case, the railroad must retain the annual summary (in hard copy or electronically, if pursuant to § 239.303) for three calendar years after the end of the calendar year covered by the summary. For example, a railroad's annual summary of the operational tests and inspections conducted in calendar year 2013 must be retained through calendar year 2016. FRA specifically invited comment on the appropriateness of proposed paragraph (e) (now paragraph (f)). No comments were received, other than regarding the retention of records in hard copy, as noted in the discussion of paragraph (c), above. As also noted above, railroads may retain such records either in hard copy or electronically, subject to the conditions set forth in § 239.303.

Appendix A to Part 239—Schedule of Civil Penalties

Finally, FRA is revising the schedule of civil penalties in Appendix A to part 239 in three ways. The first is by adding new entries under §§ 239.101, 239.105, 239.201, 239.301 (as more specifically noted in the amendatory language of the penalty schedule), some of which are new requirements set forth in this final rule, and others that are existing requirements that lacked an entry in the penalty schedule. The second way is by revising the existing entries, mostly to reflect the addition or deletion of terms, such as by adding the term ERCC and deleting the term “(efficiency).” The third way is by revising footnote no. 1 to reflect the new maximum civil penalty (\$105,000) that FRA is permitted to assess per violation and to delete language that will be added as a part of a new footnote no. 2, which uses a more up-to-date explanation for noting that FRA may use penalty codes to facilitate assessment of civil penalties, which may or may not correspond to any subsection designation(s). As the penalty schedule is a statement of agency policy, it is not required to be subject to notice and comment, and was therefore not proposed in the NPRM.

IV. Regulatory Impact and Notices

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

This final rule has been evaluated in accordance with existing policies and procedures 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 (FRA-2011-0062, Notice No. 2) a regulatory impact analysis addressing the economic impact of this final rule.

As part of the regulatory impact analysis, FRA has assessed quantitative measurements of the cost streams expected to result from the implementation of this final rule. For the 10-year period analyzed, the estimated quantified cost that will be imposed on industry totals \$1,492,792 with a present value (PV, 7 percent) of \$1,073,775. The largest cost burdens are from the new requirements related to the operational tests in § 239.301 of the final rule. The table below presents the estimated discounted costs associated with the final rule, broken down by section of the rule:

10-Year Estimated Cost of Final Rule*	
Emergency Preparedness Plan (§ 239.101)	\$ 495,530
Debriefing and Critique (§ 239.105)	\$ 200,273
Emergency Preparedness Plan; Filing and Approval (§ 239.201)	\$ 16,911
Operational Tests and Inspections (§ 239.301)	\$ 361,060
Total	\$ 1,073,775

*Dollars are discounted at a present value rate of 7 percent.

As part of the regulatory impact analysis, FRA has explained what the likely benefits for this final rule will be, and provided assessments of the potential value of such benefits. This final rule will generate safety benefits by preventing injuries in passenger rail accidents from becoming more severe. FRA uses the Abbreviated Injury Scale (AIS) as a measure of the severity for injuries with an AIS 1 injury being defined as minor and

an AIS 5 as the most severe, i.e., critical.⁴ Benefits will accrue from the expedited arrival of emergency responders to accident scenes, and from the ability of the ERCC personnel to minimize health and safety risks through improved internal and external communications. This final rule will ensure that passenger railroads' emergency preparedness planning and implementation is more flexible and provides the required emergency preparedness training.

Additionally, this final rule will allow passenger railroads to adjust to future personnel reorganizations and to incorporate technological innovations by affording the railroad's management flexibility in determining which part of the organization to designate as the ERCC.

Given the nature of the final rule amendments, FRA believes that the most appropriate methodology to estimate the safety benefits is a break-even analysis. A break-even analysis quantifies the minimum safety benefits necessary for the final rule to be cost-beneficial, considering the estimated quantified costs. For this final rule, the analysis estimates that the break-even point is met when 5.47 injuries are prevented from increasing in severity from AIS 1 (minor) to AIS 2 (moderate).

The table below presents the estimated benefits necessary for this final rule to break-even with the estimated costs. For the 10-year period analyzed, the safety benefits would total \$1,492,792 (undiscounted) with a present value (PV, 7 percent) of \$1,073,775 at the break-even point.

⁴ Association for the Advancement of Automotive Medicine. <http://www.aaam1.org/ais/#>

10-Year Estimated Benefits of Final Rule		
No. of Injuries Prevented from Increasing in Severity from AIS 1 to AIS 2	Undiscounted	Discounted (PV, 7 Percent)
5.47 (Break-Even Point)	\$1,492,792	\$1,073,775
6 (Break-Even Point Rounded Up)	\$1,636,800	\$1,149,620

The benefits for this final rule would exceed the estimated costs when six injuries are prevented from increasing in severity from an AIS 1 to an AIS 2. FRA believes the amendments in this final rule will more than exceed the break-even estimate.

B. Regulatory Flexibility Act and Executive Order 13272; Certification of No Significant Economic Impact on a Substantial Number of Small Entities

FRA developed this final rule in accordance with Executive Order 13272, “Proper Consideration of Small Entities in Agency Rulemaking” (67 FR 53461 (August 16, 2002)), 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 conduct a regulatory flexibility analysis unless it determines and certifies that a rule does not have a significant economic impact on a substantial number of small entities.

FRA initiated this rulemaking through RSAC in part upon learning that in the regulated community there was some confusion regarding existing requirements on

passenger train emergency preparedness (49 CFR part 239). As a result, the General Passenger Safety Task Force (Task Force), a subgroup of the RSAC, was tasked to resolve these issues. The Task Force found that, as currently written, part 239 expressly requires only the railroad's control center employees (along with on-board personnel) to be subject to training and operational tests. However, in many instances, control center employees were not found to be the primary points of contact for outside emergency responders during a passenger train emergency. Instead, control center employees were carrying out other important duties related to ordinary train operations and the emergency at hand, such as providing block protection and diverting trains to other parts of the railroad's network. This regulation is adding a definition for the new term "emergency response communications center" (ERCC) to § 239.7 and providing for the incorporation of the term ERCC in relevant sections of part 239 (see e.g., §§ 239.101, 239.105, 239.201, and 239.301). The amendments in the regulation will help to ensure that all personnel involved in emergency preparedness under part 239 are subject to appropriate training as well as operational tests and inspections. While, the regulation differs slightly from the consensus language, the need for this rulemaking is backed by the RSAC and is improving passenger train emergency preparedness by clarifying training and testing requirements.

In addition, as a result of FRA's experience in the periodic review and approval of passenger railroads' e-prep plans, FRA realized that a number of the changes submitted were purely administrative in nature. While part 239 currently subjects all changes to an e-prep plan to a formal review and approval process, FRA believes that certain purely

administrative changes should be excluded from the formal approval process so that the agency can focus its resources on more substantive matters. Accordingly, this final rule is streamlining the approval of such minor modifications to e-prep plans.

Further, Executive Order 13347 (“Individuals with Disabilities in Emergency Preparedness”) requires the Federal government to appropriately support safety and security for individuals with disabilities in all types of emergency situations. See 69 FR 44573 (July 26, 2004). Currently, each railroad subject to part 239 is required to address the safety of each of its passengers in its emergency preparedness planning. Nonetheless, FRA is clarifying that these railroads must include procedures in their e-prep plans addressing the safe evacuation of persons with disabilities during emergency situations (and full-scale simulations of them).

1. Description of Regulated Entities

The “universe” of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. This final rule will directly affect commuter and intercity passenger railroads, and freight railroads hosting passenger rail operations.

“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 U.S. Small

Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is “for profit” may be and still be classified as a “small entity” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.” Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891 (May 9, 2003), codified at appendix C to 49 CFR part 209. The \$20-million limit is based on the Surface Transportation Board’s revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for this rulemaking.

2. Railroads Impacted

There are only two intercity passenger railroads, Amtrak and the Alaska Railroad. Neither is a small entity. Amtrak is a Class I railroad and the Alaska Railroad is a Class II railroad. Additionally, both railroads are owned by public entities that exceed the

population threshold of 50,000.

There are 28 commuter or other short-haul passenger railroad operations in the U.S. Most of these railroads are part of larger transit organizations that receive Federal funds and serve major metropolitan areas with populations greater than 50,000. However, two of these railroads do not fall in this category and are considered small entities that do not conduct exclusively tourist, scenic, historic, or excursion railroad service within the meaning of the exception to part 239 at § 239.3(b)(3).

The Hawkeye Express is owned and operated by the Iowa Northern Railway Company (IANR). In 2012, Hawkeye Express transported approximately 5,000 passengers per game over a seven-mile round-trip distance to and from the University of Iowa (University) football games. IANR has approximately 110 employees and is primarily a freight operation totaling 184,385 freight train miles in 2010. The service is on a contractual arrangement with the University, a State of Iowa institution. (The population of Iowa City, Iowa is approximately 69,000.) IANR, which is a Class III railroad, owns and operates the six bi-level passenger cars used for this passenger operation which runs an average seven days over a calendar year. FRA expects that any costs imposed on the railroad by this regulation will likely be passed on to the University as part of the transportation cost.

The SNC began operation in the summer of 2011 and currently provides daily rail service over a 57-mile line between Saratoga Springs and North Creek, New York. The SNC, a Class III railroad, is a limited liability company, wholly owned by San Luis & Rio Grande Railroad (SLRG). SLRG is a Class III rail carrier and a subsidiary of

Permian Basin Railways, Inc. (Permian), which in turn is owned by Iowa Pacific Holdings, LLC (IPH). The SNC primarily transports visitors to Saratoga Springs, tourists seeking to sightsee along the Hudson River, and travelers connecting to and from Amtrak service. The railroad operates year round, with standard coach passenger trains. Additional service activity includes seasonal ski trains, and specials such as the “Snow Train” and those featuring “Thomas the Tank Engine™.” This railroad operates under a five-year contract with the local government, and has expressed interest to provide freight service as well. The railroad has about 25 employees.

FRA believes that these two entities will not be impacted significantly. While each of these entities will most likely have to file a new e-prep plan, FRA does not expect they will have to change how each railroad reacts to an emergency situation due to including ERCCs under part 239’s requirements. Their operating structure is small, and it is probable that employees with e-prep duties will continue to have the same emergency responsibilities. FRA expects that both railroads will see additional burden from inclusion of other provisions in this final rule related to recordkeeping and other training and testing requirements. This final rule will not be a significant financial impact on these railroad and their operations. They can expect the total regulatory costs for this final rule as adopted, to be less than \$7,500 for each of the railroads over the next 10 years. Regulatory burden is mostly expected to be related to personnel additions to emergency response training and operational tests and inspections, and to new requirements related to debriefing and critique sessions. The Hawkeye Express and the SNC currently have e-prep plans that have been reviewed and approved by FRA.

Although, this final rule changes several requirements in part 239, the professional skills necessary for compliance with existing and new requirements are the same. FRA believes that both entities have the professional knowledge to fulfill the requirements in this final rule.

In conclusion, FRA believes that there are two small entities and that both will be impacted. However, FRA has found that entities directly burdened by the regulation will not be impacted significantly. FRA believes that the costs associated with the final rule are reasonable and will not cause any significant financial impact on their operations.

3. Certification

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

C. Paperwork Reduction Act

The information collection requirements in this final rule are being submitted for approval to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). The sections that contain the current and new or revised 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
239.13 – Waiver petitions (<u>current requirement</u>)	45 railroads	1 petition	20 hours	20 hours
239.101/201/203 – Emergency preparedness plans (<u>revised requirements</u>)				
-- 1 st year – amended plans	45 railroads	45 plans	31.33 hours	1,410 hours
-- Subsequent years – amended plans – substantive changes	45 railroads	9 plans	31.33 hours	282 hours
-- Subsequent years – amended plans – non-substantive changes	45 railroads	4 plans	60 minutes	4 hours
-- New RRs – e-prep plans	2 railroads	2 plans	80 hours	160 hours
-- Current employee initial training for crewmembers, control center & emergency response communications center personnel	45 railroads	540 trained employees	8 hours	4,320 hours
-- Employee periodic training	45 railroads	54 trained employees	4 hours	216 hours
-- Initial training of new employees	45 railroads	135 trained employees	8 hours	1,080 hours
239.101(a)(1)(ii) – Notifications by control center (<u>current requirements</u>)				
-- Designation of RR employee to maintain current emergency telephone numbers to notify outside responders, etc.	45 railroads	45 designations	5 minutes	4 hours
-- Railroads’ lists/records of emergency telephone numbers to notify outside responders, etc.	45 railroads	2 updated lists	1 hour	2 hours
239.101(a)(3) – Emergency preparedness plan – joint operations (<u>current requirement</u>)	45 railroads	1 plan	16 hours	16 hours
239.101(a)(5) – RR training program for on-line emergency responders (<u>current requirement</u>)	45 railroads	45 updated plans	40 hours	1,800 hours
239.101(a)(7) – Passenger safety information – posting emergency instructions inside all passenger cars (<u>current requirement</u>)	2 new railroads	1,300 cards/ 2 programs/ 2 safety messages/ 2 programs/ + 2 safety messages	5 minutes/ 16 hours/ 48 hours/ 8 hours/ + 24 hours	300 hours
239.105(a)(3) – Debriefing and critique – sessions conducted after passenger emergency situation or full-scale simulation (<u>current requirement</u>)	45 railroads	79 sessions	27 hours	2,133 hours

239.301(a) – Operational efficiency tests (<u>revised requirements</u>) – RR tests/inspections of on-board, control center, and emergency response communications center employees	45 railroads	25,000 tests/inspections	15 minutes	6,250 hours
(b)(c) – Records of operational tests/inspections	45 railroads	25,000 records 90 records	2 minutes	833 hours
(d) – Records of program of operational tests (<u>new requirement</u>)	45 railroads		3 minutes	5 hours
(e) – Periodic reviews and adjustments (not less than every 6 months) to program of operational tests and inspections (<u>new requirement</u>)	45 railroads	90 periodic reviews	2 hours	180 hours
(f) – Annual summary of operational tests/inspections and copy of summary at system and division headquarters (<u>new requirement</u>)	45 railroads	45 annual summaries + 30 hardcopies	5 minutes + 1 minute	5 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, please contact Mr. Robert Brogan, Information Clearance Officer, Federal Railroad Administration, at 202-493-6292 (Robert.Brogan@dot.gov), or Ms. Kimberly Toone, Records Management Officer, Federal Railroad Administration, at 202-493-6132 (Kimberly.Toone@dot.gov).

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

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this

document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

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

D. Federalism Implications

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

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

This final rule has been analyzed in accordance with the principles and criteria contained in Executive Order 13132. This final rule will not have a substantial effect on the States or their political subdivisions, and it will not affect the relationships between the Federal government and the States or their political subdivisions, or the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this regulatory action will not impose substantial direct compliance costs on the States or their political subdivisions. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

However, this final rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 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 “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a

federalism summary impact statement for this final rule is not required.

E. Trade Impact

The Trade Agreements Act of 1979 (Public Law 96-39, 19 U.S.C. 2501 et seq.) prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards.

FRA has assessed the potential effect of this rulemaking on foreign commerce and believes that its requirements are consistent with the Trade Agreements Act. The requirements are safety standards, which, as noted, are not considered unnecessary obstacles to trade. Moreover, FRA has sought, to the extent practicable, to state the requirements in terms of the performance desired, rather than in more narrow terms restricted to a particular design or system.

F. Environmental Impact

FRA has evaluated this 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 proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s

Procedures. See 64 FR 28545, 28547 (May 26, 1999). Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions or air or water pollutants or noise or increased traffic congestion in any mode of transportation are excluded.

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

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency "shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law)." Section 202 of the Act (2 U.S.C. 1532) further requires that "before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general

notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$100,000,000 or more (as adjusted annually for inflation) 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 (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action.

FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a “significant energy action” within the meaning of the Executive Order.

I. Privacy Act

FRA wishes to inform all potential commenters that anyone is able to search the electronic form of any comment or petition received into any of FRA's dockets by the name of the individual submitting the comment (or signing the comment if submitted on behalf of an association, business, labor union, etc.). Please see the privacy notice at <http://www.regulations.gov/#!privacyNotice>. You may also review DOT's complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477-19478), or you may visit <http://www.dot.gov/privacy.html>.

List of Subjects in 49 CFR Part 239

Passenger train emergency preparedness, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons discussed in the preamble, FRA amends part 239 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

PART 239—[AMENDED]

1. The authority citation for part 239 continues to read as follows:

Authority: 49 U.S.C. 20102-20103, 20105-20114, 20133, 21301, 21304, and 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

Subpart A—General

§ 239.5 [Removed and Reserved]

2. Section 239.5 is removed and reserved.

3. Section 239.7 is amended by—
 - a. Revising paragraph (1) of the definition of “Crewmember”;
 - b. Adding “, on-line emergency responder, or outside emergency responder” to the term “Emergency responder”; and
 - c. Adding the definition of “Emergency response communications center” in alphabetical order.

The revisions and additions read as follows:

§ 239.7 Definitions.

* * * * *

Crewmember * * *

(1) On-board functions connected with the movement of the train (i.e., an employee of the railroad, or of a contractor to the railroad, who is assigned to perform service subject to the Federal hours of service requirements during a tour of duty) or

* * * * *

Emergency responder, on-line emergency responder, or outside emergency responder * * *

Emergency response communications center means a central location, or a group of individuals, designated by a railroad with responsibility for establishing, coordinating, or maintaining communication with outside emergency responders, representatives of adjacent rail modes of transportation, or appropriate railroad officials during a passenger train emergency. The emergency response communications center may be part of the control center.

* * * * *

Subpart B—Specific Requirements

3. Section 239.101 is amended by revising paragraphs (a)(1)(ii), (a)(2)(ii), (a)(2)(iii) introductory text, (a)(2)(iv), (a)(2)(v) introductory text, (a)(2)(v)(A), and adding paragraph (a)(8) to read as follows:

§ 239.101 Emergency preparedness plan.

(a) * * *

(1) * * *

(i) * * *

(ii) Notification by control center or emergency response communications center. The control center or the emergency response communications center, as applicable under the plan, shall promptly notify outside emergency responders, adjacent rail modes of transportation, and appropriate railroad officials that a passenger train emergency has occurred. Each railroad shall designate an employee responsible for maintaining current emergency telephone numbers for use in making such notifications.

(2) * * *

(ii) Control center and emergency response communications center personnel. The railroad’s emergency preparedness plan shall require initial training of responsible control center personnel and any emergency response communications center personnel employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad, as well as periodic training at least once every two calendar years thereafter, on appropriate courses of action for each potential

emergency situation under the plan. At a minimum, the initial and periodic training shall include the following:

(A) Territory familiarization (e.g., access points for emergency responders along the railroad's right-of-way; special circumstances (e.g., tunnels); parallel operations; and other operating conditions (e.g., elevated structures, bridges, and electrified territory) including areas along the railroad's right-of-way that are remote and that would likely present challenges for individuals responding to a passenger train emergency);

(B) Procedures to retrieve and communicate information to aid emergency personnel in responding to an emergency situation;

(C) Protocols governing internal communications between appropriate control center and emergency response communications center personnel whenever an imminent potential or actual emergency situation exists, as applicable under the plan; and

(D) Protocols for establishing and maintaining external communications between the railroad's control center or emergency response communications center, or both, and emergency responders and adjacent modes of transportation, as applicable under the plan.

(iii) Initial training schedule for current personnel. The railroad's emergency preparedness plan shall provide for the completion of initial training of all on-board and responsible control center personnel, as well as any emergency response communications center personnel, who are employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad on the date that

the plan is conditionally approved under § 239.201(b)(1), in accordance with the following schedule:

* * * * *

(iv) Initial training schedule for new personnel. The railroad's emergency preparedness plan shall provide for the completion of initial training of all on-board and responsible control center personnel, as well as any emergency response communications center personnel, who are hired by the railroad, contracted or subcontracted by the railroad, or hired by the contractor or subcontractor to the railroad after the date on which the plan is conditionally approved under § 239.201(b)(1). Each of these individuals shall receive initial training within 90 days after the individual's initial date of service.

(v) Testing of on-board, control center, and emergency response communications center personnel. The railroad shall have procedures for testing an individual being evaluated for qualification under the emergency preparedness plan who is employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad. The types of testing selected by the railroad shall be—

(A) Designed to accurately measure the individual's knowledge of his or her responsibilities under the plan;

* * * * *

(8) Procedures regarding passengers with disabilities. The railroad's emergency preparedness plan shall include procedures to promote the safety of passengers with disabilities under all conditions identified in its emergency preparedness plan, such as during a train evacuation. These procedures shall include, but not be

limited to, a process for notifying emergency responders in an emergency situation about the presence and general location of each such passenger when the railroad has knowledge that the passenger is on board the train. The railroad does not have knowledge that such passenger has a disability unless a crewmember has actual knowledge of the disability, such as where a passenger (or his or her companion or fellow passenger) has expressly informed a crewmember on the train of the disability or where the disability is readily apparent. Nothing in this part requires the railroad to maintain any list of train passengers.

* * * * *

5. Section 239.105 is amended by revising paragraphs (c)(3) and (c)(5) to read as follows:

§ 239.105 Debriefing and critique.

* * * * *

(c) * * *

(3) Whether the control center or the emergency response communications center promptly initiated the required notifications, as applicable under the plan;

* * * * *

(5) How efficiently the passengers exited from the car through the emergency exits, including any passengers with a disability or injury (when the railroad has knowledge of any such passengers).

* * * * *

Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans

6. Section 239.201 is amended by revising paragraphs (a) and (b)(3)(i) to

read as follows:

§ 239.201 Emergency preparedness plan; filing and approval.

(a) Filing of plan and amendments—(1) Filing of plan. Each passenger railroad to which this part applies and all railroads hosting its passenger train service (if applicable) shall jointly adopt a single emergency preparedness plan for that service, and the passenger railroad shall file one copy of that plan with the Associate Administrator for Railroad Safety and Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue, SE., Mail Stop 25, Washington, DC 20590, not less than 60 days prior to commencing passenger operations. Any passenger railroad that has an emergency preparedness plan approved by FRA as of July 29, 2014, is considered to have timely filed its plan. The emergency preparedness plan shall include the name, title, address (street address and, if available, email address), and telephone number of the primary person on each affected railroad to be contacted with regard to review of the plan, and shall include a summary of each railroad's analysis supporting each plan element and describing how every condition on the railroad's property that is likely to affect emergency response is addressed in the plan.

(2) Filing of amendments to the plan. (i) Except as provided in paragraph (a)(2)(ii) of this section, each subsequent amendment to a railroad's emergency preparedness plan shall be filed with FRA by the passenger railroad not less than 60 days prior to the proposed effective date of the amendment. When filing an amendment, the railroad must include a written summary of the proposed changes to the previously approved plan and, as applicable, a training plan describing how and when current and

new employees and others within the scope of the training requirement at § 239.101(a)(2) would be trained on any amendment.

(ii) If the proposed amendment is limited to adding or changing the name, title, street address, email address, or telephone number of the primary person to be contacted on each affected railroad with regard to the review of the plan, approval is not required under the process in paragraph (b)(3)(i) of this section. These proposed amendments may be implemented by the railroad upon filing with FRA's Associate Administrator for Railroad Safety and Chief Safety Officer. All other proposed amendments must comply with the formal approval process in paragraph (b)(3)(i) of this section.

(b) * * *

(3) Review of amendments. (i) Except as provided in paragraph (a)(2)(ii) of this section, FRA will normally review each proposed plan amendment within 45 days of receipt. FRA will then notify the primary contact person of each affected railroad of the results of the review, whether the proposed amendment has been approved by FRA, and if not approved, the specific points in which the proposed amendment is deficient.

* * * * *

7. Revise the heading of subpart D to read as follows:

Subpart D—Operational Tests and Inspections; Records, Recordkeeping, and Availability of Records

8. Section 239.301 is revised to read as follows:

§ 239.301 Operational tests and inspections.

(a) Requirement to conduct operational tests and inspections. Each railroad to

which this part applies shall periodically conduct operational tests and inspections of on-board personnel, responsible control center personnel, and, as applicable, emergency response communications center personnel employed by the railroad, under a contract or subcontract with the railroad, or employed by a contractor or subcontractor to the railroad, to determine the extent of compliance with its emergency preparedness plan.

(1) Program of operational tests and inspections. Operational tests and inspections shall be conducted in accordance with the railroad's program. A new railroad shall adopt such a program within 30 days of commencing rail operations. The program shall—

(i) Provide for operational testing and inspection on appropriate courses of action in response to various potential emergency situations and on the responsibilities of an employee of the railroad, of an individual who is a contractor or subcontractor to the railroad, or an employee of a contractor or subcontractor to the railroad, as they relate to the railroad's emergency preparedness plan.

(ii) Describe each type of operational test and inspection required, including the means and procedures used to carry it out.

(iii) State the purpose of each type of operational test and inspection.

(iv) State, according to operating divisions where applicable, the frequency with which each type of operational test and inspection is to be conducted.

(v) Identify the officer(s) by name, job title, and division or system, who shall be responsible for ensuring that the program of operational tests and inspections is properly implemented. A railroad with operating divisions shall identify at least one

officer at the system headquarters who is responsible for overseeing the entire program and the implementation by each division.

(vi) Require that each railroad officer who conducts operational tests and inspections be trained on those aspects of the railroad's emergency preparedness plan that are relevant to the operational tests and inspections that the officer conducts, and that the officer be qualified on the procedures for conducting such operational tests and inspections in accordance with the railroad's program of operational tests and inspections and the requirements of this section.

(2) The program of operational tests and inspections required by paragraph (a)(1) of this section may be combined with the written program of operational tests and inspections required by § 217.9(c) of this chapter.

(b) Maintaining records of operational tests and inspections. Each railroad to which this part applies shall maintain a record of the date, time, place, and result of each operational test and inspection that was performed in accordance with paragraph (a) of this section. Each record shall also specify the name of the railroad officer who administered the test or inspection, the name of each employee tested, and sufficient information to identify the relevant facts relied on for evaluation purposes.

(c) Retaining operational test and inspection records. Each record required by paragraph (b) of this section shall be retained at the system headquarters of the railroad and, as applicable, at the division headquarters for the division where the test or inspection was conducted, for one calendar year after the end of the calendar year to which the test or inspection relates. Each such record shall be retained either in hard

copy or electronically, if pursuant to § 239.303, and shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

(d) Retaining records of program of operational tests and inspections. Each railroad shall retain one copy of its current operational testing and inspection program required by paragraph (a) of this section and one copy of each subsequent amendment to such program. These records shall be retained at the system headquarters, and, as applicable, at each division headquarters where the operational tests and inspections are conducted, for three calendar years after the end of the calendar year to which they relate. These records shall be retained either in hard copy or electronically, if pursuant to § 239.303, and shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

(e) Six-month review of tests and inspections and adjustments to the program of operational tests and inspections. Not less than once every six months, the officer(s) responsible for overseeing the entire program of operational tests and inspections under this section and the implementation of the program by each division, if any, or the system, as designated pursuant to paragraph (a)(1)(v) of this section, shall conduct periodic reviews and analyses as provided in this paragraph, prepare records of reviews as provided in this paragraph, and retain one copy of these records at the system headquarters, and, as applicable, at each division headquarters. Each such review and record shall be completed within 30 days of the close of the period being reviewed. The record of each such review shall be retained (in hard copy or electronically, if pursuant to

§ 239.303) for a period of one year after the end of the calendar year to which the review relates, and be made available to representatives of FRA for inspection and copying during normal business hours. In particular, each designated officer's review and record shall include the following:

(1) The operational testing and inspection data for each division, if any, or the system to determine compliance by the railroad testing officers with its program of operational tests and inspections required by paragraph (a)(1) of this section. At a minimum, this review shall include the name of each railroad testing officer, the number of tests and inspections conducted by each officer, and whether the officer conducted the minimum number of each type of test or inspection required by the railroad's program;

(2) Accident/incident data, the results of prior operational tests and inspections under this section, and other pertinent safety data for each division, if any, or the system to identify the relevant operating rules related to those accidents/incidents that occurred during the period. Based upon the results of that review of the data for each division, if any, or the system, the designated officer(s) shall make any necessary adjustments to the tests and inspections required of railroad officers for the subsequent period(s); and

(3) Implementation of the program of operational tests and inspections under this section from a system perspective, to ensure that the program is being utilized as intended, that the other reviews provided for in this paragraph have been properly completed, that appropriate adjustments have been made to the distribution of tests and inspections required, and that the railroad testing officers are appropriately directing their

efforts.

(f) Annual summary of operational tests and inspections. Before March 1 of each calendar year, each railroad to which this part applies shall prepare and retain at the system headquarters of the railroad and, as applicable, at each of its division headquarters, one copy of a summary of the following with respect to its previous calendar year activities: the number, type, and result of each operational test and inspection, stated according to operating divisions as applicable, that was conducted as required by paragraph (a) of this section. A record of each such summary shall be retained (in hard copy or electronically, if pursuant to § 239.303) for three calendar years after the end of the calendar year to which the record relates and shall be made available to representatives of FRA and States participating under part 212 of this chapter for inspection and copying during normal business hours.

9. Appendix A to part 239 is amended by—
 - a. Revising the entries under subpart B for §§ 239.101(a), 239.101(a)(1)(ii), 239.101(a)(2)(ii), (iii), (iv), and (v),
 - b. Adding entries under subpart B for §§ 239.101(a)(1)(iii), 239.101(a)(8), and 239.105(c) in numerical order,
 - c. Adding an entry under subpart C for § 239.201(a)(iv) in numerical order,
 - d. Revising the heading of subpart D,
 - e. Revising the entries under subpart D for §§ 239.301, 239.301(a), 239.301(c)(1) (by adding additional paragraph designations for (d)(1),

(e)(2), and (f)(1)) and 239.301(c)(2) (by adding additional paragraph designations for (d)(2), (e)(3), and (f)(2)).

- f. Adding entries under subpart D for §§ 239.301(a)(1), 239.301(a)(1)(vi), and 239.301(e)(1) in numerical order,
- g. Revising footnote 1, and
- h. Adding footnote 2.

The revisions and additions read as follows:

APPENDIX A TO PART 239—SCHEDULE OF CIVIL PENALTIES¹

Section ²	Violation	Willful Violation
Subpart B—Specific Requirements		
239.101(a) Failure of a railroad to adopt a written or electronic emergency preparedness plan.....	7,500	11,000
(a)(1) * * *		
(i) * * *		
(ii) Notification of outside emergency responders by control center or ERCC.....	2,500	5,000
(iii) Failure to designate employee responsible for maintaining current emergency telephone numbers for use in notifications.....	2,500	5,000
(a)(2) * * *		
(i) * * *		
(ii) Initial or periodic training of control center and ERCC personnel.....	2,500	5,000
(iii) Completion of initial training of each on-board, control center, and ERCC personnel by the specified date.....	2,500	5,000
(iv) Completion of initial training of each newly- hired on-board, control center, and ERCC personnel by the specified date	2,500	5,000
(v) Adequate procedures to evaluate and test on-board, control center, and ERCC personnel for qualification under the emergency preparedness plan	2,500	5,000
* * * * *		
(a)(8) Failure of the plan to include procedures promoting the safety of passengers with disabilities.....	2,500	5,000
* * * * *		

239.105	*	*	*					
*	*	*	*	*	*	*		
				(c) Failure to design the debrief and critique session to determine the five items specified.....		2,500		5,000
*	*	*	*	*	*	*		
Subpart C—Review, Approval, and Retention of Emergency Preparedness Plans								
239.201	*	*	*					
				(a):				
				(i)	*	*	*	
				(ii)	*	*	*	
				(iii)	*	*	*	
				(iv) Failure of a railroad to file a summary of an amendment to its plan.....		1,000		2,000
*	*	*	*	*	*	*		
Subpart D—Operational Tests and Inspections; Records, Recordkeeping, and Availability of Records								
239.301				Operational tests and inspections				
				(a) Failure to periodically conduct operational tests and inspections of applicable personnel in accordance with program of operational tests and inspections.....		2,500		5,000
				(a)(1) Failure to adopt a program of operational tests and inspections that meets the minimum requirements within 30 days of commencing rail operations.....		5,000		7,500
				(a)(1)(vi) Failure to train or qualify each railroad officer who conducts operational tests and inspections on aspects of the e-prep plan and program procedures relevant to the operational tests and inspections that the officer conducts.....		2,500		5,000
*	*	*	*	*	*	*		
				(c)(1), (d)(1), (e)(2), (f)(1):	*	*	*	
				(c)(2), (d)(2), (e)(3), (f)(2):	*	*	*	
				(e)(1) Failure to conduct six-month review and analysis of required data and make any necessary or appropriate adjustments to the program of operational tests and inspections.....		4,000		7,500
*	*	*	*	*	*	*		

¹ A 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 CFR part 209, appendix A.

² The penalty schedule uses section numbers from 49 CFR part 239. If more than one item is listed as a type of violation of a given section, each item is also designated by a “penalty code,” which is used to facilitate assessment of civil penalties, and which may or may not correspond to any subsection designation(s). For convenience, penalty citations will cite the CFR section and the penalty code, if any. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined CFR and penalty code citation, should they differ.

Issued in Washington, DC, on March 25, 2014.

Melissa L. Porter,
Chief Counsel.

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