



**4910-06-P**

**DEPARTMENT OF TRANSPORTATION**

**Federal Railroad Administration**

**[Docket No. FRA-2009-0041-N-4]**

**49 CFR Part 234**

**RIN 2130-AC50**

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

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

**ACTION:** Final rule.

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**SUMMARY:** The purpose of this document is to update the current schedule of civil penalties for violations of FRA's grade crossing safety regulations by adding recommended civil penalty amounts for violations of specific requirements contained in a recently added subpart. That subpart prescribes requirements that certain railroads establish emergency notification systems (ENS) for receiving toll-free telephone calls reporting various unsafe conditions at highway-rail grade crossings and pathway grade crossings, and for taking certain actions in response to those calls.

**DATES:** Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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**SUPPLEMENTARY INFORMATION:** FRA is revising the penalty schedule at appendix A to 49 CFR part 234 to add recommended civil penalty amounts for violations of specific requirements contained in subpart E, Emergency Notification Systems [ENS] for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings. (See FRA's final rule published on June 12, 2012, 77 FR 35164; March 15, 2013, 78 FR 16414.) The recommended civil penalties are for violations related to the various requirements of an ENS, which includes the: (1) sign(s) placed at the grade crossing that display the information necessary for the public to report an unsafe condition to the appropriate railroad; (2) method the railroad uses to receive and process a telephone call reporting the unsafe condition; (3) remedial action the appropriate railroad or railroads take to address the report of the unsafe conditions; and (4) recordkeeping conducted by the railroad(s).

Under authority delegated from the Secretary of Transportation, FRA adds these recommended penalty amounts to the penalty schedule consistent with the requirements of 49 U.S.C. 21301(a)(2), which provides, in pertinent part, that

[t]he Secretary of Transportation shall include in, or make applicable to, each regulation prescribed . . . under chapter 201 of this title a civil penalty for a violation. \* \* \* The amount of the penalty shall be at least \$500 but not more than \$25,000. However, when a grossly negligent violation or a pattern of repeated violations has caused an imminent hazard of death or injury to individuals, or has caused death or injury, the amount may be not more than \$100,000.

See delegation from the Secretary to the Administrator of FRA at 49 CFR 1.89(a).

Under the separate authority of the Federal Civil Penalties Inflation Adjustment Act of 1990 as amended, FRA has periodically adjusted for inflation the amounts of the minimum, ordinary maximum, and aggravated maximum civil penalties for a violation of this part. Public Law 101-410, 104 Stat. 890, 28 U.S.C. 2461, note, as amended by Section 31001(s)(1) of the Debt Collection Improvement Act of 1996, Public Law 104-134, 110 Stat. 1321-373, April 26, 1996. Currently, the minimum penalty is \$650, the ordinary maximum civil penalty is \$25,000; and the aggravated maximum civil penalty is \$105,000. See, e.g., 73 FR 76704, Dec. 30, 2008; 77 FR 24422, Apr. 24, 2012. As provided for in footnote 1 to appendix A, the Administrator specifically reserves the authority to assess the maximum penalty of \$105,000 for any specific violation if the circumstances of the particular violation warrant.

After FRA issues a civil penalty against an entity, FRA may adjust or compromise the amount of the civil penalty based on a wide variety of mitigating factors, which include: (1) the nature, circumstances, extent, and gravity of the violation; (2) with respect to the entity, the degree of culpability, any history of violations, the ability to pay, and any effect on the ability to continue to do business; and (3) other matters that justice requires. 49 U.S.C. 21301(a)(3).

FRA's revision of appendix A is a general statement of policy under 5 U.S.C. 553(b)(3)(A). Consequently, notice and an opportunity for comment are not required, and this amendment is made effective upon publication.

#### **List of Subjects in 49 CFR Part 234**

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

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

**PART 234—GRADE CROSSING SAFETY**

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

**Authority:** 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311, 22501 note; Pub. L. 110-432, Div. A., Sec. 202; 28 U.S.C. 2461, note; and 49 CFR 1.89.

2. Amend appendix A to part 234 by:

- a. Adding, after the end of the entry for subpart D, an entry for subpart E;
- b. Revising footnote 1; and
- c. Adding footnotes 2, 3, 4, 5, 6, and 7, to read as follows:

APPENDIX A TO PART 234—SCHEDULE OF CIVIL PENALTIES<sup>1</sup>

Section	Violation	Willful Violation
<p style="text-align: center;">* * * * *</p> <p style="text-align: center;"><b>Subpart E—Emergency Notification Systems for Telephonic Reporting of Unsafe Conditions at Highway-Rail and Pathway Grade Crossings</b></p> <p>234.303 Emergency notification systems (ENS) for telephonic reporting of unsafe conditions at highway-rail and pathway grade crossings:</p> <p>(a) Dispatching railroad fails to establish and maintain a toll-free telephone service by which the railroad can directly and promptly receive telephone calls (calls) from the public of reports of unsafe conditions at crossings.....</p> <p>(a)(1) Dispatching railroad fails to have either a live person answer calls directly and promptly, or use an automated</p>	15,000	25,000

Section	Violation	Willful Violation
answering system or third-party telephone service for receiving calls from the public of reports of unsafe conditions at crossings.....	10,000	15,000
(a)(2) Dispatching railroad improperly uses an automated answering system.....	10,000	15,000
(b)(1)-(2) Excepted dispatching railroad improperly uses answering machine to receive calls of unsafe conditions at crossings.....	5,000	7,500
(b)(2) Excepted dispatching railroad fails to use proper method to receive calls of unsafe conditions at crossings during either operational or non-operational hours.....	5,000	7,500
(e) Dispatching railroad improperly uses local telephone number to receive calls of unsafe conditions at crossings.....	5,000	5,000
234.305 Remedial actions in response to reports of unsafe conditions at highway-rail and pathway grade crossings:		
<u>Response to credible report of warning system malfunction at a highway-rail grade crossing.</u>		
(a)(1) Maintaining railroad fails under subpart C to follow subpart C of this part <sup>2</sup> .....	5,000	7,500
(a)(2)(i) Dispatching railroad fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported malfunction.....	5,000	7,500
(ii) Dispatching railroad fails to promptly contact the maintaining railroad and inform it of the reported malfunction.....	5,000	7,500
<u>Response to public report of warning system malfunction at a highway-rail grade crossing.</u>		

Section	Violation	Willful Violation
(b)(1)(i) Railroad with both maintaining and dispatching responsibilities fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported malfunction.....	5,000	7,500
(ii) Railroad with both maintaining and dispatching responsibilities fails to promptly contact the appropriate law enforcement agency and inform it of the reported malfunction.....	5,000	7,500
(iii) Railroad with both maintaining and dispatching responsibilities fails to promptly investigate the report, determine the nature of the malfunction, and take the appropriate remedial action.....	5,000	7,500
(b)(2)(i) Railroad with only dispatching responsibility fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported malfunction.....	5,000	7,500
(ii) Railroad with only dispatching responsibility fails to promptly contact the appropriate law enforcement agency and inform it of the reported malfunction.....	5,000	7,500
(iii) Railroad with only dispatching responsibility fails to promptly contact the maintaining railroad and inform it of the reported malfunction.....	5,000	7,500
(iv) Maintaining railroad fails to promptly investigate the report, determine the nature of the malfunction, and take the appropriate remedial action.....	5,000	7,500
<u>Response to report of warning system failure at a pathway grade crossing.</u>		
(c)(1)(i) Railroad with both maintaining and dispatching responsibilities fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported failure.....	5,000	7,500
(ii) Railroad with both maintaining and dispatching responsibilities fails to promptly contact the appropriate		

Section	Violation	Willful Violation
law enforcement agency and inform it of the reported failure.....	5,000	7,500
(iii) Railroad with both maintaining and dispatching responsibilities fails to promptly investigate the report, determine the nature of the failure, and without undue delay repair the active warning system if necessary.....	5,000	7,500
(c)(2)(i) Railroad with only dispatching responsibility fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported failure.....	5,000	7,500
(ii) Railroad with only dispatching responsibility fails to promptly contact the appropriate law enforcement agency and inform it of the reported failure.....	5,000	7,500
(iii) Railroad with only dispatching responsibility fails to promptly contact the maintaining railroad and inform it of the reported failure.....	5,000	7,500
(iv) Maintaining railroad fails to promptly investigate the report, determine the nature of the failure, and without undue delay repair the active warning system if necessary.....	5,000	7,500
<u>Response to report of a disabled vehicle or other obstruction blocking a railroad track at a highway-rail or pathway grade crossing.</u>		
(d)(1)(i) Railroad with both maintaining and dispatching responsibilities fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported obstruction.....	5,000	7,500
(ii) Railroad with both maintaining and dispatching responsibilities fails to promptly contact the appropriate law enforcement agency and inform it of the reported obstruction.....	5,000	7,500
(iii) Railroad with both maintaining and dispatching responsibilities fails to promptly investigate the report,		

Section	Violation	Willful Violation
determine the nature of the obstruction, and without undue delay take the necessary action to have the obstruction removed.....	5,000	7,500
(d)(2)(i) Railroad with only dispatching responsibility fails to promptly contact all trains authorized to operate through the crossing and inform them of the reported obstruction.....	5,000	7,500
(ii) Railroad with only dispatching responsibility fails to promptly contact the appropriate law enforcement agency and inform it of the reported obstruction.....	5,000	7,500
(iii) Railroad with only dispatching responsibility fails to promptly contact the maintaining railroad and inform it of the reported obstruction.....	5,000	7,500
(iv) Maintaining railroad fails to promptly investigate the report, determine the nature of the obstruction, and without undue delay take the necessary action to have the obstruction removed.....	5,000	7,500
<u>Special rule on contacting a train that is not required to have communication equipment</u>		
(e) Having received a report pursuant to § 234.303(c)(1), (c)(2), (d)(1), or (d)(2), railroad fails to promptly contact the occupied controlling locomotive of the train by the quickest means available consistent with § 220.13(a) of this chapter.....	5,000	7,500
<u>Response to report of an obstruction of view at a highway-rail or pathway grade crossing.</u>		
(f)(1) Railroad with both maintaining and dispatching responsibilities fails to timely investigate the report and remove the obstruction if it is lawful and feasible to do so.....	5,000	7,500
(f)(2)(i) Railroad with only dispatching responsibility fails to promptly contact the maintaining railroad.....	5,000	7,500

Section	Violation	Willful Violation
<p>(ii) Maintaining railroad fails to timely investigate the report and remove the obstruction if it is lawful and feasible to do so.....</p> <p><u>Response to report of other unsafe condition at a highway-rail or pathway grade crossing.</u></p>	5,000	7,500
<p>(g)(1) Railroad with both maintaining and dispatching responsibilities fails to timely investigate the report, and timely correct the unsafe condition if it is lawful and feasible to do so.....</p>	5,000	7,500
<p>(g)(2) Railroad with only dispatching responsibility fails to promptly contact the maintaining railroad.....</p>	5,000	7,500
<p>(g)(3) Maintaining railroad fails to timely investigate the report, and timely correct the unsafe condition if it is lawful and feasible to do so.....</p> <p><u>Maintaining railroad’s responsibilities for receiving reports of unsafe conditions at highway-rail and pathway grade crossings.</u></p>	5,000	7,500
<p>(h)(1)(i) Maintaining railroad fails to provide sufficient contact information to dispatching railroad, by which the dispatching railroad may timely contact the maintaining railroad upon receipt of a report.....</p> <p>(ii) Maintaining railroad fails either to have a live person answer calls directly and promptly, or to use an automated answering system for receiving calls from the dispatching railroad of a report of an unsafe condition.....</p>	5,000	7,500
<p>(iii) Dispatching railroad improperly uses an automated answering system.....</p>	10,000	15,000
<p>(h)(2)(i)-(ii) Excepted maintaining railroad fails to use proper method to receive calls of unsafe conditions at crossings during operational or non-operational hours.....</p>	10,000	15,000
<p>(h)(2)(i)-(ii) Excepted maintaining railroad fails to use proper method to receive calls of unsafe conditions at crossings during operational or non-operational hours.....</p>	5,000	7,500

Section	Violation	Willful Violation
234.306 Multiple dispatching or maintaining railroads with respect to the same highway-rail or pathway grade crossing; appointment of responsible railroad:		
(a)(1) Each of the dispatching railroads for the crossing fails to appoint a primary dispatching railroad for the crossing .....	10,000	15,000
(a)(1)(i)-(iv) The primary dispatching railroad for the crossing fails to carry out one of the prescribed duties.....	5,000	7,500
(a)(2) Another pertinent dispatching railroad for the crossing fails to carry out remedial action as required by § 234.305.....	5,000	7,500
(b)(1) Each of the maintaining railroads for the crossing fails to appoint one maintaining railroad responsible for the placement and maintenance of the ENS sign(s).....	5,000	7,500
(b)(2) The assigned maintaining railroad in § 234.306(b)(1) fails to display on the ENS sign(s) the emergency telephone number of the dispatching railroad or primary dispatching railroad for the crossing.....	5,000	7,500
(c)(1) The dispatching railroad or primary dispatching railroad fails to promptly contact and inform the appropriate maintaining railroad(s) for the crossing of the reported problem.....	5,000	7,500
(c)(2) The maintaining railroad fails to carry out remedial action as required by § 234.305.....	10,000	15,000
234.307 Use of third-party telephone service by dispatching and maintaining railroads <sup>3</sup> :		
(a)(1) Dispatching railroad improperly uses third-party telephone service .....	10,000	15,000
(a)(2) Dispatching railroad fails to ensure third-party telephone service compliance with § 234.307.....	10,000	15,000

Section	Violation	Willful Violation
(b)(1) Maintaining railroad improperly uses third-party telephone service .....	10,000	15,000
(b)(2) Maintaining railroad fails to ensure third-party telephone service compliance with § 234.307.....	10,000	15,000
(d)(1) Railroad fails to provide sufficient contact information to third-party telephone service.....	2,500	5,000
(d)(2)(i) Railroad fails to inform FRA in writing before the implementation of a third-party telephone service.....	2,500	5,000
(ii) Railroad fails to provide FRA with contact information for the third-party telephone service.....	2,500	5,000
(iii) Railroad fails to provide FRA with information identifying the crossings about which the third-party telephone service will receive reports.....	2,500	5,000
(d)(3) Railroad fails to inform FRA in writing within 30 days following any changes in the use of, or the discontinuance of, third-party telephone service.....	2,500	5,000
(d)(4) <sup>4</sup> Dispatching or maintaining railroad fails to take appropriate action required by § 234.305.....	.....	.....
(e) <sup>5</sup> Railroad fails to ensure third-party telephone service compliance with § 234.313 or § 234.315, as applicable.....	.....	.....
234.309 ENS signs in general:		
(a) Dispatching railroad fails to provide ENS telephone number to the maintaining railroad a minimum of 180 days prior to the required implementation date of the ENS.....	2,500	5,000
(b)(1)-(3) <sup>6</sup> Responsible railroad fails to display minimum required information on ENS sign.....	5,000	7,500
(c)(1)-(4) <sup>7</sup> Responsible railroad fails to display ENS sign that meets size and other physical requirements.....	5,000	7,500

Section	Violation	Willful Violation
234.311 ENS sign placement and maintenance:		
(a)(1)-(2) Responsible railroad fails to place and maintain required number of sign(s) at the crossing or entrance(s) to facility.....	5,000	7,500
(b)(1)-(2) Responsible railroad fails to properly locate and maintain the sign(s) at the crossing.....	5,000	7,500
234.313 Recordkeeping:		
(a)(1)-(9) Railroad fails to maintain in its records the minimum information required for each ENS report received..	2,500	5,000
(c)(1)-(2) Responsible railroad(s) fail(s) to record in writing an appointment of a railroad, pursuant to § 234.306, or properly retain a copy of the document.....	2,500	5,000
(d)(1) Railroad fails to properly retain records.....	2,500	5,000
(d)(2) Railroad fails to provide FRA access to records.....	2,500	5,000
234.315 Electronic recordkeeping:		
(a)-(b) Railroad fails to comply with electronic recordkeeping requirements.....	2,500	5,000

<sup>1</sup> 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. To facilitate the assessment of penalty amounts, the specific types of violations of a given section are sometimes designated by the paragraph of the section (e.g., “(a)”) and a code not corresponding to the legal citation for the violation (e.g., “(1)”), so that the complete citation in the penalty schedule is e.g., “(a)(1).” FRA reserves the right to revise the citation of the violation in the Summary of Alleged Violations issued by FRA in the event of litigation.

<sup>2</sup> Either this section or the parallel section of subpart C of this part may be cited, but not both.

<sup>3</sup> FRA does not plan to assess civil penalties against a third-party telephone service, under § 234.307(c) or (e). However, FRA plans to assess violations against the dispatching and maintaining railroads for failing to ensure that the third-party telephone service complies with the requirements of §§ 234.307, 234.313, or 234.315, if applicable. See § 234.307(a), (b), (e).

<sup>4</sup> For a violation of § 234.307(d)(4), a penalty should be assessed for the specific type of violation according to the penalty schedule for a violation of § 234.305.

<sup>5</sup> For a violation of § 234.307(e) pertaining to recordkeeping, a penalty should be assessed for the specific type of violation in the penalty schedule for a violation of §§ 234.313 or 234.315, as applicable.

<sup>6</sup> FRA reserves the right to cite a violation for each item of required information omitted from a sign.

<sup>7</sup> FRA reserves the right to cite a violation for each physical characteristic that is nonconforming.

Issued in Washington, DC, on May 21, 2015.

Sarah Feinberg,

Acting Administrator.

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