



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

#### **49 CFR Part 228**

**[Docket No. FRA-2012-0101, Notice No. 1]**

**RIN 2130-AC41**

#### **Hours of Service Recordkeeping; Automated Recordkeeping**

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

**ACTION:** Notice of proposed rulemaking (NPRM).

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**SUMMARY:** This rulemaking is part of FRA’s broader initiative to reduce the paperwork burden of its regulations. To support compliance with the Federal hours of service laws, Federal regulations have long required railroads to create and retain records regarding the hours of service of their employees who are covered by those laws (covered service employees). In general, the current regulations require covered service employees whose hours are recorded to sign the record by hand (the traditional, manual system) or “certify” the record using a complex computerized system (an electronic system). FRA proposes to amend these regulations to provide a third, simplified method of compliance, for certain entities. FRA proposes to allow railroads with less than 400,000 employee hours per year, and contractors and subcontractors providing covered service employees to such railroads to use an automated system, in which employees apply their electronic signatures to the automated records, which are stored in a railroad

computer system. The proposed rule would not require the use of electronic or automated recordkeeping, would be better tailored to small operations, and is expected, if adopted, to decrease the burden hours spent on hours of service recordkeeping.

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

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

*Public hearing:* FRA anticipates being able to resolve this rulemaking without a public hearing. However, if FRA receives a specific request for a public hearing prior to **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, one will be scheduled, and FRA will publish a supplemental notice in the Federal Register to inform interested parties of the date, time, and specific location of any such hearing.

**ADDRESSES:** Comments, which should be identified by Docket No. FRA-2012-0101, Notice No. 1, may be submitted by any one of the following methods:

- Fax: 1-202-493-2251;
- Mail: U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590;
- Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or

- Electronically through the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.

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

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to the U.S. Department of Transportation, Docket Operations, M-30, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

**FOR FURTHER INFORMATION CONTACT:** Colleen A. Brennan, Trial Attorney, Office of Chief Counsel, FRA, 1200 New Jersey Avenue, SE., RCC-12, Mail Stop 10, Washington, DC 20590 (telephone 202-493-6028 or 202-493-6052); or Zachary Zagata, Operating Practices Specialist, Operating Practices Division, Office of Safety Assurance and Compliance, FRA, 1200 New Jersey Avenue, SE., RRS-11, Mail Stop 25, Washington, DC 20590 (telephone 202-493-6476).

**SUPPLEMENTARY INFORMATION:**

**Commonly Used Abbreviations**

CFR            Code of Federal Regulations

FRA            Federal Railroad Administration

HS hours of service (when the term is used as an adjective, except as part of the name of a specific Act of Congress or the title of a document, and not when the term is used as a noun; for example, “HS records” but not “the HS Act”)

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## **I. Executive Summary**

Federal laws governing railroad employees' hours of service date back to 1907. FRA has long administered both the statutory hours of service (HS) requirements and the agency's HS recordkeeping and reporting regulations (49 CFR part 228, subpart B), which promote compliance with the HS laws. Currently, the HS statutory requirements cover three groups of employees; employees performing the functions of a "train employee," "signal employee," or "dispatching service employee," as defined at 49 U.S.C. 21101. These terms are also defined in the HS recordkeeping and reporting regulations at 49 CFR 228.5 and FRA interpretations.

The HS statutory requirements have been amended several times over the years, most recently in 2008. Section 108(f) of the Rail Safety Improvement Act of 2008 (RSIA) required FRA to amend its then-current HS recordkeeping regulations at 49 CFR part 228 (part 228) to support compliance with the new statutory requirements and to authorize electronic recordkeeping and reporting as a means of compliance with the regulations. 74 FR 25330, May 27, 2009.

In general, the FRA 2009 recordkeeping amendments require that electronic HS records of information required by revised subpart B of part 228 be certified either (1) by the employee whose time was being recorded, or (2) by the reporting crewmember of a train crew or signal gang whose time was being recorded, instead of being signed by hand, and that the records be electronically stamped with the name of the certifying employee and the date and time of certification. See 49 CFR 228.9(b). The 2009

recordkeeping amendments also added new subpart D to part 228, which established comprehensive requirements for electronic recordkeeping systems.

Some smaller railroads have informed FRA that the current requirements of 49 CFR part 228, subpart D for electronic recordkeeping systems make using such systems infeasible for their operations, which are less complex and variable than larger railroads' operations. FRA considered those concerns and proposes in this NPRM to allow smaller railroads (specifically railroads with less than 400,000 employee hours per year), and their contractors and subcontractors who provide covered service employees to those railroads, to use an alternative "automated recordkeeping system" to create and maintain their covered-service employees' required HS records.

FRA is aware that some railroads currently use an automated system, in which covered service employees access a blank HS record on a railroad computer, enter required data on the form, and then print and sign the record, which is still considered a manual or paper record. This proposed rule would allow railroads with less than 400,000 employee hours annually (defined for purposes of this proposed rule as an "eligible smaller railroad"), and contractors and subcontractors that provide covered service employees to the railroads, to have employees electronically sign the automated records of their hours of duty and then store the records in the railroad's computer system. This system would eliminate the requirement to print and sign the record.

The proposed rule would not require an eligible smaller railroad's automated system to conform to some of the existing requirements for electronic recordkeeping systems under 49 CFR part 228, subpart D that may not be relevant to the operations of these smaller railroads. Because of the less complex and less varied nature of the

operations of smaller railroads with less than 400,000 employee hours annually, FRA is comfortable with allowing those railroads to use a system that lacks the programming and analysis that are required of an electronic recordkeeping system under 49 CFR part 228, subpart D. For example, the proposed rule would not require an eligible smaller railroad's automated system to calculate and fill in total time on duty based on the information entered by the employee because it would require programming to enable the system to identify how various periods of time are treated and perform the calculation. As further described below, this proposed rule would significantly reduce costs and paperwork burdens for eligible smaller railroads that develop an automated system, because, like electronic records, automated records require substantially less time to complete than manual records. In addition, the records would be stored in the automated system, which would relieve eligible smaller railroads of the burden of storing and maintaining paper records.

The proposed rule would define "automated recordkeeping system" as one that conforms to the requirements of proposed new §§ 228.201(b) and 228.206. The proposal would define "electronic recordkeeping system" as one that conforms to the requirements of proposed § 228.201(a), and current §§ 228.203-228.205. The proposed rule would provide general requirements for automated records in proposed new § 228.9(c). It would require employees to electronically sign automated records, and would provide requirements for retention of, and FRA access to, automated records in the automated recordkeeping system.

The proposed rule would also provide general requirements for automated recordkeeping systems, in proposed new § 228.201(b). It would require that the

automated recordkeeping system conform to the requirements of proposed new § 228.206, (which provides more detailed requirements for automated recordkeeping systems and automated records), and that the records created and maintained in the automated recordkeeping system conform to the requirements of proposed revised § 228.11. New § 228.201 of the proposed rule would also require eligible smaller railroads, and their contractors and subcontractors using the automated system, to train their employees on the use of the automated system to create their required HS records. The rule also would require sufficient information technology security to ensure the integrity of the system and to prevent unauthorized access to the system or individual records and that FRA may prohibit or revoke the authority to use an automated system that does not meet the requirements.

New § 228.206 of the proposed rule would provide the requirements for automated recordkeeping systems and automated records. The requirements of this proposed section are similar to some of the requirements for electronic recordkeeping systems found in current §§ 228.203 and 228.205. However, the proposed requirements of § 228.206 are tailored to the nature and lesser complexity of the operations of the eligible smaller railroads that would be subject to this proposed rule. Therefore, the proposed rule would not require an automated system to include some of the program components and other features that would not be appropriate or necessary for the operations of eligible smaller railroads, but would require other elements for the automated systems that are not used in an electronic recordkeeping system.

Paragraph (a) of this section would require that automated records be electronically signed and would provide requirements for establishing and using an

electronic signature. Paragraph (b) of this section would provide system security requirements for access to the automated recordkeeping system, data entry on individual records, pre-population of some data on an employee's record subject to certain conditions, procedures for amendment of records and protection against alteration or deletion of a record once the employee who created it has signed the record. Paragraph (c) of this section would require an automated recordkeeping system to be able to identify who entered data on a record and which person entered which data items if more than one person entered data on a single record. Paragraph (d) would establish the required search criteria for an automated recordkeeping system, establishing specific data fields and other criteria which must be searchable. Finally, paragraph (e) of this section would establish requirements for access to the system and its records by FRA and participating State inspectors. Railroads would be required to provide access as soon as possible and not later than 24 hours after a request for access. Each data field that an employee enters would have to be visible, and data fields would have to be searchable as paragraph (d) provides and yield access to all records meeting the specified search criteria.

Finally, the proposed rule would modify the training requirements at § 228.207 to require that railroads using an automated recordkeeping system train their employees and supervisors on the use of that system as part of initial and refresher training (just as would be required for manual or electronic recordkeeping).

As stated above, this amended rule would apply to all railroads subject to the HS recordkeeping regulations with less than 400,000 employee hours annually under FRA accident/incident reporting regulations at 49 CFR 225.21(d), and their contractors and

subcontractors that provide such railroads with covered service employees. Adopting an automated system would be voluntary.

By providing an alternative set of requirements specifically tailored to the circumstances of smaller operations, FRA expects a greater number of railroads to create and maintain HS records using an automated recordkeeping system rather than to continue using manual records. These changes would produce a total reduction of over 194,000 burden hours. The costs of implementing an automated recordkeeping system should be substantially less than an electronic recordkeeping system and are relatively small compared to the benefits gained by eliminating a paper recordkeeping system.

FRA has estimated the cost savings expected from this proposed rule. Our analysis calculates an estimated \$81.8 million in net savings over a 10-year period through the adoption of the proposed automated recordkeeping. The present value of this savings is \$51.5 million (discounted at 7 percent), and \$66.7 million (discounted at 3 percent).

The table below presents the estimated benefits (from cost savings) associated with the proposed rule over a 10-year period.

Table 1.

<b>10-Year Estimated Benefits of Proposed Rule</b>	
Costs to prepare and operate automated recordkeeping (investment required to realize cost savings)	\$3,139,347
Benefits: Reduced recordkeeping labor costs	\$54,638,880
<b>Net Benefits</b>	<b>\$51,499,533</b>

Dollars are discounted at a present value rate of 7%.

FRA estimates that there will be a relatively small investment associated with implementing automated systems necessary to realize the significant benefits (cost

burden reduction). Railroads are already producing hours of service duty records manually on paper records to comply with 49 CFR 228.11 and adopting an automated recordkeeping system is voluntary.

## **II. Statutory and Regulatory History**

Federal laws governing railroad employees' hours of service date back to 1907<sup>1</sup> and are presently codified at 49 U.S.C. 21101-21109,<sup>2</sup> 21303, and 21304.<sup>3</sup> FRA, under 49 U.S.C. 103(g), 49 CFR 1.89, and internal delegations, has long administered the statutory HS requirements and the agency's HS recordkeeping and reporting regulations (49 CFR part 228, subpart B), which promote compliance with the HS laws. Currently, the HS statutory requirements cover three groups of employees; train employees, signal employees, or dispatching service employees, as those terms are defined at Sec. 21101. The HS recordkeeping and reporting regulations at 49 CFR 228.5 include the statutory definitions of these terms and FRA interpretations discuss them. See FRA's "Requirements of the Hours of Service Act; Statement of Agency Policy and Interpretation" at 49 CFR part 228, appendix A, most of which was issued in the 1970s, and subsequent FRA interpretations of the HS laws published in the Federal Register.

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<sup>1</sup> See the Hours of Service Act (Public Law 59-274, 34 Stat. 1415 (1907)). Effective July 5, 1994, Public Law 103-272, 108 Stat. 745 (1994), repealed the Hours of Service Act as amended, then codified at 45 U.S.C. 61-64b, and also revised and reenacted its provisions, without substantive change, as positive law at 49 U.S.C. 21101-21108, 21303, and 21304. The Hours of Service Act was administered by the Interstate Commerce Commission until these duties were transferred to FRA in 1966.

<sup>2</sup> These sections may also be cited as 49 U.S.C. Chapter 211. Hereinafter, references to a "Sec." are to a section of title 49 of the U.S. Code unless otherwise specified.

<sup>3</sup> For a table comparing and contrasting the current Federal HS requirements with respect to freight train employees, passenger train employees, signal employees, and dispatching service employees, please see Appendix A to the Second Interim Interpretations. 78 FR 58830, 58850-58854, Sept. 24, 2013.

Congress has amended the HS statutory requirements several times over the years, most recently in the Rail Safety Improvement Act of 2008 (RSIA).<sup>4</sup> The RSIA substantially amended the requirements of Sec. 21103, applicable to a train employee,”<sup>5</sup> and the requirements of Sec. 21104, applicable to a signal employee.”<sup>6</sup> The RSIA also added new provisions at Secs. 21102(c) and 21109 that together made train employees providing rail passenger transportation subject to HS regulations, not Sec. 21103, if the Secretary timely issued regulations. Subsequently, FRA, as the Secretary’s delegate, timely issued those regulations, codified at 49 CFR part 228, subpart F (Passenger Train Employee HS Regulations), which became effective on October 15, 2011.

Section 108(f) of the RSIA required the Secretary to--

prescribe a regulation revising the requirements for recordkeeping and reporting for Hours of Service of Railroad Employees contained in part 228 of title 49, Code of Federal Regulations . . . to adjust record keeping and reporting requirements to support compliance with chapter 211 of title 49, United States Code, as amended by [the RSIA]; . . . to authorize electronic record keeping, and reporting of excess service, consistent with appropriate considerations for user interface; and . . . to require training of affected employees and supervisors, including training of employees in the entry of hours of service data.

49 U.S.C. 21101 (notes).

FRA, as the Secretary’s delegate, issued those regulations, codified at 49 CFR part 228, including subpart D (Electronic Recordkeeping), which became effective on July 16, 2009. 74 FR 25330, May 27, 2009 (2009 Recordkeeping Amendments).

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<sup>4</sup> Public Law 110-432, Div. A, 122 Stat. 4848.

<sup>5</sup> See Sec. 21101(5).

<sup>6</sup> See Sec. 21101(4). The RSIA also amended the definition of “signal employee” effective October 16, 2008. Before the RSIA, the term meant “an individual employed by a railroad carrier who is engaged in installing, repairing, or maintaining signal systems.” Emphasis added.

FRA issued its first HS recordkeeping regulation, codified at 49 CFR part 228, subparts A and B, in 1972. See 37 FR 12234, Jun. 21, 1972.<sup>7</sup> Because the regulation did not contemplate electronic recordkeeping, that regulation required that HS records be signed manually.<sup>8</sup> Therefore, prior to the effective date of the 2009 Recordkeeping Amendments, railroads that wished to create and maintain their required HS records electronically rather than manually needed FRA's waiver of the requirement for a handwritten signature. See FRA procedural regulations at 49 CFR part 211. At the time that the 2009 recordkeeping amendments went into effect, several Class I railroads were creating and maintaining their required HS records using an electronic recordkeeping system that had been approved by FRA pursuant to a waiver.<sup>9</sup>

In general, the 2009 Recordkeeping Amendments required that either the employee whose time was being recorded, or the reporting crewmember of a train crew or signal gang whose time was being recorded, certify their electronic HS records, instead of signing them by hand, and that the recordkeeping system electronically stamp the records with the name of the certifying employee and the date and time of certification. See 49 CFR 228.9(b). These amendments also established comprehensive requirements for electronic recordkeeping systems. A brief summary of the most significant requirements follows.

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<sup>7</sup> 24 Stat. 383, as amended, 24 Stat. 386, as amended, 80 Stat. 937, 34 Stat. 1415, as amended and 49 CFR 1.89 (d).

<sup>8</sup> In particular, the regulation required the handwritten signature be that of the employee whose time was being recorded.

<sup>9</sup> The preamble of the 2009 Recordkeeping Amendments contains a detailed discussion of the history of electronic recordkeeping and the development of waiver-approved electronic recordkeeping systems. See 74 FR 25330, 25330-25334.

- First, electronic recordkeeping systems must generate records that provide sufficient data fields for an employee to report a wide variety and number of activities that could arise during a duty tour. See 49 CFR 228.201.
- Second, the systems must have security features to control access to HS records and to identify any individual who entered information on a record. See 49 CFR 228.203(a)(1)(i), (a)(2)-(a)(7) and (b).
- Third, systems must include complex program logic that allows the system to identify how periods of time spent in any activity that is entered on a record are treated under the HS laws (and also now under the substantive HS regulations for passenger train employees).
- Fourth, program logic must allow the system to calculate total time on duty from the data the employee entered, flag employee-input errors so the employee can correct them before certifying the record, and require the employee to enter an explanation when the data entered shows a violation of the HS laws or regulations. See 49 CFR 228.203(c).
- Fifth, electronic recordkeeping systems must provide a method known as a “quick tie-up” for employees to enter limited HS information when they have met or exceeded the maximum hours allowed for the duty tour, and railroads must have procedures for employees to do a quick tie-up by telephone or facsimile (fax) if computer access is not available. See 49 CFR 228.5 and 228.203(a)(1)(ii).
- Finally, an electronic recordkeeping system must provide search capability so that records may be searched by date or date range and by employee name or

identification number, train or job assignment, origin or release location, territory, and by records showing excess service. The results of any such search must yield all records matching specified criteria. See 49 CFR 228.203(d).

### **III. Rationale for this Proposed Rule**

In this NPRM, FRA proposes to allow railroads with less than 400,000 employee hours per year, and their contractors and subcontractors who provide those railroads with covered service employees (collectively referred to for the purpose of this proposed rule as “eligible smaller railroads”), to use an “automated recordkeeping system” to create and maintain their covered-service employees’ HS records.<sup>10</sup> (See detailed discussion under section V.A. below, regarding eligible smaller railroads. FRA is aware that some railroads currently use an automated system, in which covered service employees access a blank HS record on a railroad computer, enter required data on the form, and then print and sign the record, which is still considered a manual or paper record. As further described below, this proposed rule would allow employees of eligible smaller railroads to electronically sign the automated record and store it in a railroad computer system, eliminating the requirement to print and sign the record. The proposed rule would not require an automated system to comply with some of the existing requirements for electronic recordkeeping systems under 49 CFR part 228, subpart D that may not be relevant to the operations of these eligible smaller railroads. Electronic or automated

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<sup>10</sup>Given the size and nature of their operations, FRA’s understanding is that it is not common for eligible smaller railroads to have contractors or subcontractors that provide employees to perform covered service for the railroad. However, if an eligible smaller railroad has a contractor or subcontractor whose employees perform covered service for the railroad, the proposed rule would apply to such contractors and subcontractors for the HS records of their employees performing covered service on a railroad subject to this proposed regulation.

records require substantially less time to complete than manual records. However, some eligible smaller railroads have told FRA the existing requirements of 49 CFR part 228, subpart D for electronic recordkeeping systems make using such systems infeasible for their operations, which are less complex and variable than other railroads' operations. By providing an alternative set of requirements specifically tailored to the circumstances of smaller operations, FRA expects a greater number of railroads to create and maintain HS records using an automated recordkeeping system, rather than continuing to use manual records. These changes will produce a total reduction of over 194,000 burden hours. In addition, as discussed in more detail in Section V.A. of this document, FRA expects the cost of implementing an automated recordkeeping system to be substantially less than an electronic recordkeeping system.

FRA also expects that many of the companies that would be subject to this proposed regulation could choose to comply with its requirements using existing equipment and software that many of them already use for other purposes. For example, many eligible smaller railroads will find that their existing equipment and software can be used to generate a form that would allow employees to enter the information relevant to their duty tour that is required by § 228.11 and save the record in a directory structure that would allow either the railroad or FRA to retrieve it using the search criteria provided in this proposed regulation. FRA believes it is appropriate to allow the eligible smaller railroads to use a system that lacks the programming and analysis that are required of an electronic recordkeeping system because of the less complex and less varied nature of the operations of eligible smaller railroads. For example, the proposed rule would not require an automated system to calculate and fill in total time on duty

based on the information the employee entered because that would require costly programming to enable the system to identify how various periods of time are treated and to perform the calculation. Instead, the employee would enter that information just as if it were a paper record. Similarly, the proposed rule would not require an automated system to include costly programming that would prompt the employee to enter an explanation of a duty tour over 12 hours or that would flag possible input errors or missing data (for example, showing an on-duty location that differs from the released location of the previous duty tour).

Currently, the proposed rule would apply to 723 Class III railroads and 15 commuter railroads, and their contractors and subcontractors. FRA considered extending the scope of this proposed regulation to all Class III railroads and all commuter railroads. However, because of the number of employees, volume of HS records, and complexity of operations on some commuter railroads, we believe an electronic recordkeeping system that complies with subpart D of part 228 is the appropriate alternative to the use of manual records for these railroads. Likewise, the definition of “Class III railroad” includes all terminal and switching operations,<sup>11</sup> regardless of their operating revenues. Some of these operations have extensive operations and a number of employees and HS records more appropriately served by an electronic recordkeeping system. A larger and more complex operation would benefit from an electronic recordkeeping system’s program logic capability to help ensure accurate recordkeeping. In addition, the greater search capabilities of an electronic recordkeeping system would enable a railroad with

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<sup>11</sup> See 49 CFR 1201.1-1(d).

larger and more complex operations to better identify relevant records, whether for the railroad's own review, or in response to requests from FRA.

FRA is aware that at least one commuter railroad is currently using an electronic recordkeeping system and that several other commuter railroads are developing electronic recordkeeping systems. FRA understands that these railroads are willing to share some information with other commuter railroads to help them develop their systems. This may provide an opportunity for more commuter railroads to eliminate paper records and adopt electronic recordkeeping systems.

For these reasons, FRA concluded that the proposed rule should only apply to railroads with less than 400,000 employee hours per year. FRA requests comment on this aspect of the proposed rule.

#### **IV. Section-by-Section Analysis**

##### **Subpart A—General**

###### *Section 228.5 Definitions.*

FRA proposes to add definitions of “automated recordkeeping system,” “electronic recordkeeping system” “electronic signature,” “eligible smaller railroad” and “railroad that has less than 400,000 employee hours annually.”

The proposed definitions of the terms “automated recordkeeping system” and “electronic recordkeeping system” would differentiate between the automated systems that are the subject of this rulemaking, which would be required to conform to the requirements of proposed new §§ 228.201(b) and 228.206, from the electronic recordkeeping systems that must meet the requirements of §§ 228.201(a) and 228.203-228.205.

The proposed definition of “electronic signature” is consistent with the Electronic Signatures in Global and National Commerce Act.<sup>12</sup> It would allow railroads to use two different types of electronic signatures for their employees to sign their HS records: either (1) a unique digital signature, created based on the employee’s identification number and password, or other means used to uniquely identify the employee in the automated recordkeeping system; or (2) a unique digitized version of the employee’s handwritten signature that would be applied to the HS record.<sup>13</sup> The definition would also provide that the electronic signature must be created as § 228.19(g) provides (existing regulatory requirements for creating an electronic signature for railroads’ use on their reports of excess service) or proposed § 228.206(a) (proposed new requirements for creating electronic signatures for use on employees’ HS records in an automated recordkeeping system).

For the purpose of this proposed rule, an “eligible smaller railroad” would be, as a general rule, a railroad with less than 400,000 employee hours annually. Such railroads would be eligible to use an automated recordkeeping system under this proposed rule. A “railroad that has less than 400,000 employee hours annually” would be defined as a railroad that has reported to FRA that it had less than 400,000 employee hours during the preceding three consecutive calendar years on Form FRA 6180.56--Annual Railroad Reports of Manhours by State, as required by 49 CFR 225.21(d). The exception to the general rule would be railroads that have not been operating for three prior consecutive

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<sup>12</sup> Public Law 106–229, 114 Stat. 472 (2000). *See, e.g.*, 15 U.S.C. 7006.

<sup>13</sup> If a railroad creates an electronic signature that is a unique digital signature for each of its employees, the employee’s HS record will be signed with the employee’s printed name or other identifying information, when the employee signs the record using his or her electronic signature. If the railroad instead creates a digitized version of the employee’s handwritten signature, the record will be signed with the employee’s handwritten signature when the employee signs the record using his or her electronic signature.

calendar years, but expect to have less than 400,000 employee hours annually during the current year.

*Section 228.9 Records; general.*

Proposed new § 228.9(c) would establish requirements for automated records that parallel the requirements of paragraph (a) for manual records and paragraph (b) for electronic records. Proposed paragraph (c) would require that automated records be electronically signed and stamped with the certifying employee's electronic signature that meets the requirements of § 228.206(a), and the date and time that the employee electronically signed the record. Like paragraphs (a) and (b), paragraph (c) would contain requirements for retaining and accessing the records. However, unlike paragraph (b), paragraph (c) would not require using an employee identification (ID) and password to access automated records. While some railroads subject to this proposed rule might choose to provide an ID and password for the purpose of accessing the system, this process might be more complex than necessary for smaller operations, which may choose, for example, to have a railroad official directly provide access.<sup>14</sup> Finally, paragraph (c) would require that automated records be capable of being reproduced on printers available at the location where records are accessed, meaning that railroads must have printers available at any location where they provide access to records. This requirement also applies to electronic recordkeeping systems in current § 228.9(b)

*Section 228.11 Hours of duty records.*

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<sup>14</sup>It is important to note that access should be available upon request, and railroads and managers risk civil and criminal liability if they control access to the recordkeeping system in a manner that prevents an employee from accurately reporting his or her hours of service.

Currently § 228.11(a) requires each railroad, or a contractor or a subcontractor that provides covered service employees to a railroad, to keep a record, either manually or electronically, concerning the hours of duty of each employee. Because HS records created and maintained using an automated recordkeeping system would also be required to comply with the requirements of § 228.11 (see section-by-section analysis of § 228.201(b) below), FRA proposes to delete the words “manually or electronically” from the requirement.

*Section 228.201 Electronic recordkeeping and automated recordkeeping; general.*

The proposed rule would designate the current requirements of this section for electronic recordkeeping systems as paragraph (a) and proposed new paragraph (b) would add similar requirements for automated recordkeeping systems, in part by cross-referencing those requirements of paragraph (a) that would also be applicable to automated recordkeeping systems. The proposed rule would also make minor non-substantive changes to paragraphs (a)(3), (a)(4), and (a)(5) to correct typographical errors, deleting the “and” after paragraph (a)(3), replacing the periods at the end of paragraphs (a)(4) and (a)(5) with semicolons, and adding “and” after the semicolon at the end of paragraph (a)(5). Proposed new § 228.201(b)(1) would provide that an automated recordkeeping system must comply with the requirements of proposed § 228.206. Proposed new § 228.201(b)(2) would require eligible smaller railroads using automated recordkeeping systems to comply with the requirements of paragraphs (a)(2) and (a)(4)-(a)(6), requirements also applicable to electronic records and recordkeeping systems. Specifically, the proposed rule would require the records created and stored in the automated recordkeeping system to comply with the requirements of § 228.11, as

required by paragraph (a)(2). Further, the rule would require eligible smaller railroads that use an automated system to train employees on how to use the automated system to create their HS records, as required by paragraph (a)(4). The railroads would also have to have sufficient information technology security to ensure the integrity of the system and to prevent unauthorized access to the system or individual records, as required by paragraph (a)(5). Finally, under paragraph (a)(6), the proposed rule would provide that FRA may prohibit or revoke the authority to use an automated system that does not meet the requirements. The main difference between the proposed requirements of § 228.201(b)(2) for automated records and recordkeeping systems and the corresponding existing requirements for electronic records and recordkeeping systems is that automated systems would not be required to have monitoring indicators in the system to help the railroad monitor the accuracy of the records. However, railroads using an automated system would certainly be responsible for the accuracy of their required HS records, regardless of whether the record is manual, automated, or electronic.

Finally, under proposed § 228.201(b)(3), if a railroad, or a contractor or subcontractor to a railroad with an automated recordkeeping system reports to FRA under § 225.21(d) of this chapter on its Annual Railroad Report of Manhours by State that it has more than 400,000 employee hours in three consecutive calendar years, that railroad, or contractor or subcontractor to a railroad may not use an automated recordkeeping system unless FRA grants a waiver under 49 CFR 211.41. As described above, FRA believes larger railroads are better served by the use of an electronic recordkeeping system. In most cases, a railroad with such growth for three consecutive calendar years will have had sufficient time to transition to an electronic recordkeeping system.

*Section 228.206 Requirements for automated records and recordkeeping systems on eligible smaller railroads.*

This proposed new section would establish the requirements for an automated recordkeeping system. These proposed requirements are similar to some of the requirements for electronic recordkeeping systems found in current §§ 228.203 and 228.205. However, as discussed in Section III above, the proposed requirements of § 228.206 are tailored to the nature and lesser complexity of the operations of railroads with less than 400,000 employee hours annually. Therefore, as discussed above, the proposed rule would not require an automated system to include some of the program components and other features that apply to electronic recordkeeping systems that are not appropriate or necessary for the operations of these railroads. However, this proposed new section would require other elements for the automated systems that are not used in an electronic recordkeeping system.

Paragraph (a) would require an employee creating the automated record sign the record to use an electronic signature. This paragraph also would explain the requirements for establishing and using an electronic signature. These requirements are taken from paragraph (g) of § 228.19, which explains the requirements for railroads to establish and use electronic signatures for the purpose of filing reports of excess service. These proposed requirements do not apply to creating HS records using an electronic recordkeeping system and would be unique to automated recordkeeping systems.

Paragraph (b) would provide the standards that automated recordkeeping systems must meet for system security. The paragraph would require railroads to protect access to the automated recordkeeping system by the use of a user name and password or

comparable method. The exact method used may vary depending on the number of employees and other ways that access to a railroad's system may already be protected.

Paragraph (b)(1) would restrict data entry to the employee, train crew, or signal gang whose time is being reported. However, an exception to this requirement would allow a railroad to pre-populate some of the known factual data on its employees' HS record. An employee's name or identification number, or the on-duty time for an employee who works a regular schedule, are examples of the kind of data that could be pre-populated. However, the paragraph would require that the employee be able to make changes to any pre-populated data on his or her record.

Proposed paragraph (b) also would provide that the system may not allow two individuals to have the same electronic signature and that the system must be structured so that a record cannot be deleted or altered once it is electronically signed. The proposed paragraph would also require that any amendment to a record must (1) either be stored electronically apart from the record it amends or electronically attached as information without altering the record and (2) identify the person making the amendment. Finally, proposed paragraph (b) would require the automated recordkeeping system to be capable of maintaining records as submitted without corruption or loss of data, and ensure supervisors and crew management officials can access, but not delete or alter, a record after the employee electronically signs the record. The proposed rule does not establish a specific interval for railroads to back up the data contained in their automated recordkeeping system, but FRA expects there would be sufficient backup to prevent loss of data in compliance with this paragraph. FRA requests comment on the

need for specific requirements related to data backup and what interval and method would be most appropriate.

Paragraph (c) would provide that the automated recordkeeping system be able to identify each individual who entered data on a record and which data items each individual entered if more than one person entered data on a given record.

Paragraph (d) would establish the search capabilities an automated recordkeeping system must have. This includes the specific data fields and other criteria the system must be able to use to search for and retrieve responsive records.

Paragraph (e) would explain the requirements for access to automated recordkeeping systems. Eligible smaller railroads must grant FRA inspectors, and participating State inspectors, access to the system using railroad computer terminals. The railroads would have to provide access as soon as possible, but not later than 24 hours after a request for access. And, each data field an employee entered must be visible. Finally, data fields must be searchable as described in paragraph (d) and yield access to all records matching the specified search criteria.

*Section 228.207 Training.*

This proposed rule would slightly revise the training requirements of part 228. The proposed rule would revise paragraph (b) of this section, which sets forth the components of initial training, to add the requirement for training on how to enter HS data into an automated system. The paragraph currently requires training on electronic recordkeeping systems or the appropriate paper records used by the railroad, contractor, or subcontractor for whom the employee performs covered service. We propose to revise this paragraph by adding a requirement for eligible smaller railroads that develop an

automated recordkeeping system in compliance with the requirements of this proposed rule to give their employees training on how to prepare HS records in that system.

Likewise, the proposed rule would revise paragraph (c) of this section to specifically require eligible smaller railroads with automated systems to provide refresher training emphasizing any changes in HS substantive requirements, HS recordkeeping requirements, or a railroad's HS recordkeeping system since the employee was last provided training. The paragraph currently refers to changes in "the carrier's electronic or other recordkeeping system." FRA expects that any railroad implementing an automated recordkeeping system to replace previous paper records would need to provide training on the use of that system to its employees, even if those employees had previously received training required by this section for paper records.

## **V. Regulatory Impact and Notices**

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

This proposed rule has been evaluated in accordance with existing policies and procedures under Executive Order 12866, Executive Order 13563, and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979. FRA has prepared and placed in the docket a Regulatory Impact Analysis addressing the economic impacts of this proposed rule. In this NPRM, FRA proposes to allow railroads with less than 400,000 employee hours annually, and their contractors and subcontractors, to use an automated recordkeeping system. An automated recordkeeping system would provide a simpler way to create and maintain hours of duty records as 49 CFR part 228, subpart B requires than complying with some of the existing requirements for electronic recordkeeping systems under 49 CFR part 228, subpart D that may not be relevant to the operations of these eligible

smaller railroads. Electronic and automated records require substantially less time to complete than manual records. However, some eligible smaller railroads have told FRA the requirements of 49 CFR part 228, subpart D make using such systems infeasible for their operations, which are less complex and variable than larger railroads. As part of its regulatory evaluation, FRA has explained the benefits of automated records and recordkeeping systems under this proposed rule and provided monetized estimates of the benefits' value. The proposed rule would substantially reduce the costs of current paper recordkeeping systems by allowing eligible smaller railroads to replace it with an automated system to create and maintain hours of duty records. The proposed rule accomplishes this by providing an alternative set of requirements for an automated system specifically tailored to the circumstances of smaller operations. FRA believes the majority of eligible smaller railroads will take advantage of the opportunity for cost savings and incur a small burden to realize what would be a net cost savings.

As discussed below, FRA estimates these changes will produce a total estimated reduction of just over 194,000 burden hours annually. Based on railroads' annual 6180.56 reports to FRA for 2013, this amended rule will apply to a total of approximately 738 railroads with less than 400,000 employee hours annually. These 738 railroads include 723 probable Class III freight railroads, 15 "smaller commuter railroads," and their contractors and subcontractors. FRA estimates that 578 of these entities will adopt an automated recordkeeping system; 80 percent of the 723 Class III railroads will adopt an automated recordkeeping system and all 15 of the smaller commuter railroads, and the 2 small passenger railroads will do so.

The economic analysis<sup>15</sup> provides a quantitative evaluation of the costs and benefits of the proposed rule. The benefits equal the reduced time an employee spends entering hours of duty in an automated system compared to the time they currently spend to manually produce a paper record of hours on duty. FRA calculated a reduction of 8 minutes per record achieved over a 5-year period.

FRA has estimated the cost savings expected from this proposed rule. In particular, over a 10-year period, \$81.9 million in net savings could accrue through the adoption of the proposed automated recordkeeping. The present value of this savings is \$51.5 million (discounted at 7 percent) and \$66.7 million (discounted at 3 percent). FRA concludes that the eligible smaller railroads would benefit significantly from adoption of the proposed rule.

Railroads are already producing HS records manually on paper records to comply with 49 CFR 228.11, and adopting an automated recordkeeping system is voluntary. FRA estimates that there would be a relatively small investment for entities that elect to take advantage of the far larger cost saving benefits that would be achieved. The investment costs associated with this proposed rule are primarily for setting up and transferring the reporting to an automated recordkeeping system. FRA estimates that if each of these railroads were to expend \$5,294 discounted at 7 percent over a 10-year period to set up and operate an automated recordkeeping system for HS records, the railroads would reduce their paperwork burden by \$92,140 discounted at 7 percent over that same period.

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<sup>15</sup> The Regulatory Impact Analysis for Docket No. FRA-2012-101, Notice No. 1, is placed in the regulatory docket for this NPRM.

Therefore, this proposed rule would have a positive effect on these railroads, saving each railroad approximately a net \$86,846 in costs at discounted 7 percent over the 10-year analysis. The table below presents the estimated benefits (from cost savings) associated with the proposed rule, over the 10-year analysis.

Table 1.

<b>10-Year Estimated Benefits of Proposed Rule</b>	
Costs to prepare and operate automated recordkeeping (investment required to realize cost savings)	\$3,139,347
Benefits: Reduced recordkeeping labor costs	\$54,638,880
<b>Net Benefits</b>	<b>\$51,499,533</b>

Dollars are discounted at a present value rate of 7%.

**B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Analysis**

Both the Regulatory Flexibility Act (RFA), Public Law 96-354, as amended, and codified as amended at 5 U.S.C. 601-612, and Executive Order 13272—Proper Consideration of Small Entities in Agency Rulemaking, 67 FR 53461, Aug. 16, 2002, require agency review of proposed and final rules to assess their impact on “small entities” for purposes of the RFA. An agency must prepare a regulatory flexibility analysis unless it determines and certifies that a proposed rule is not expected to have a significant impact on a substantial number of small entities. Pursuant to the RFA, 5 U.S.C. 605(b), the Acting Administrator of FRA certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. Although this proposed rule could affect many small railroads, they may voluntarily adopt the requirements. Moreover, the effect on those railroads that do voluntarily adopt the requirements will be primarily beneficial and not significant because it will reduce their labor burden for hours of service recordkeeping and reporting.

The term “small entity” is defined in 5 U.S.C. 601 (Section 601). Section 601(6) defines “small entity” as having the same meaning as “the terms ‘small business’, ‘small organization’ and ‘small governmental jurisdiction’ defined in paragraphs (3), (4), and (5) of this section.” In turn, Section 601(3) defines a “small business” as generally having the same meaning as “small business concern” under Section 3 of the Small Business Act, and includes any a small business concern that is independently owned and operated, and is not dominant in its field of operation. Next, Sec. 601(4) defines “small organization” as generally meaning any not-for-profit enterprises that is independently owned and operated, and not dominant in its field of operations. Additionally, Sec. 601(5) defines “small governmental jurisdiction” in general to include governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

The U.S. Small Business Administration (SBA) stipulates “size standards” for small entities. It provides that the largest a for-profit railroad business firm may be to be classified as a “small entity” is 1,500 employees for “Line-Haul Operating” railroads and 500 employees for “Short-Line Operating” railroads. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Under exceptions in Section 601, Federal agencies may adopt their own size standards for small entities in consultation with SBA, and in conjunction with public comment. Under that authority, FRA published a “Final Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws” (Policy) which formally establishes that small entities include among others, the following: (1) railroads that Surface Transportation Board (STB) regulations classify as Class III; and (2) commuter railroads

“that serve populations of 50,000 or less.”<sup>16</sup> See 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. Currently, to be a small entity under the Policy, the eligible railroads also must have \$20 million or less in annual operating revenue, adjusted annually for inflation. The \$20 million limit (adjusted annually for inflation) is based on the STB’s threshold for a Class III railroad, which is adjusted by applying the railroad revenue deflator adjustment. For further information on the calculation of the specific dollar limit, see 49 CFR part 1201. FRA is using this definition of “small entity” for this proposed rule.

FRA is proposing to amend its hours of service recordkeeping regulations, to provide simplified recordkeeping requirements to allow railroads with less than 400,000 employee hours annually, and their contractors and subcontractors, to utilize an automated system to create and maintain hours of duty records as required by 49 CFR 228.11. As stated above, FRA has reports that indicate there are 723 Class III railroads with less than 400,000 employee hours annually that would be eligible to use the simplified automated recordkeeping system this proposed rule provides. However, if they are affected, it is voluntary because the proposed rule would not require any railroad to develop and use an automated recordkeeping system. As stated above, there are also 15 smaller commuter railroads, each of which is run by a State, County, or Municipal

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<sup>16</sup> “In the Interim Policy Statement [62 FR 43024, Aug. 11, 1997], FRA defined ‘small entity,’ for the purpose of communication and enforcement policies, the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and the Equal Access for Justice Act 5 U.S.C. 501 *et seq.*, to include only railroads which are classified as Class III. FRA further clarified the definition to include, in addition to Class III railroads, hazardous materials shippers that meet the income level established for Class III railroads (those with annual operating revenues of \$20 million per year or less, as set forth in 49 CFR 1201.1-1); railroad contractors that meet the income level established for Class III railroads; and those commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less.” 68 FR 24892 (May 9, 2003). “The Final Policy Statement issued today is substantially the same as the Interim Policy Statement.” 68 FR 24894.

Agency that could be affected by the proposed rule if they voluntarily decide to develop and use an automated recordkeeping system, but all serve populations of 50,000 or more and are not designated as small businesses.<sup>17</sup> There are also 2 small passenger railroads.

For the purposes of this analysis the 578 railroads FRA estimates to be potentially affected by this proposed rule are assumed to be small railroads. However, as discussed above, the impact on these small railroads would not be significant. This proposed rule would not affect any other small entities other than these small railroads. As stated above in Section V.A., although FRA estimates that if each of these railroads were to expend \$5,294, this proposed rule would have a positive effect on these railroads, saving each railroad approximately \$86,846 in costs at discounted 7 percent over the 10-year analysis. Since this amount is relatively small and beneficial, FRA concludes that this proposed rule would not have a significant impact on these railroads.

### C. Federalism

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 10, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The executive order defines “policies that have federalism implications” 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

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<sup>17</sup> Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), “small governmental jurisdictions” are governments of cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000.

imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA analyzed this NPRM consistent with the principles and criteria contained in Executive Order 13132. FRA has determined the proposed rule would not have substantial direct effects on States, on the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined this proposed rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This proposed rule would amend FRA's regulations on the HS reporting and recordkeeping requirements to allow a railroad with less than 400,000 employee hours annually, and a contractor or subcontractor providing covered service employees to such a railroad to create and maintain HS records for its covered service employees using an automated recordkeeping system. FRA is not aware of any State with regulations similar to this proposed rule. However, FRA notes that this part could have preemptive effect by the operation of law under Section 20106 of the former Federal Railroad Safety Act of 1970, that Congress repealed, reenacted without substantive change, codified at 49 U.S.C. 20106, and later amended (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety

or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters), unless the State law, regulation, or order (1) qualifies under the “essentially local safety or security hazard” exception to Section 20106, (2) is not incompatible with a law, regulation, or order of the U.S. Government, and (3) does not unreasonably burden interstate commerce.

In sum, FRA has analyzed this proposed rule consistent with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications other than possible preemption of State laws under 49 U.S.C. 20106 and 21109 (providing regulatory authority for hours of service). Accordingly, FRA has determined it is not required to prepare a federalism summary impact statement for this proposed rule.

#### D. International Trade Impact Assessment

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

#### E. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork

Reduction Act of 19995, 44 U.S.C. 3501 *et seq.* The sections that contain the new information collection requirements are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR Section - 49 CFR	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
228.11 - Hours of Duty Records	768 railroads/signal contractors	27,511,875 records	2 min./5 min./8 min.	2,733,439 hours
228.17 – Dispatchers Record of Train Movements	150 Dispatch Offices	200,750 records	3 hours	602,250 hours
228.19 - Monthly Reports of Excess Service	300 railroads	2,670 reports	2 hours	5,340 hours
228.103 - Construction of Employee Sleeping Quarters – Petitions to allow construction near work areas	50 railroads	1 petition	16 hours	16 hours
228.201 – Electronic Recordkeeping System and Automated System ( <b>Revised Requirement</b> ) – RR Automated Systems	563 railroads	563 automated systems	24 hours	13,512 hours
228.206 – Requirements for Automated Records and for Automated Recordkeeping Systems on Class III Railroads ( <b>New Requirements</b> ) – Certification of Employee’s Electronic Signature -- Additional Certification/Testimony provided by Employee upon FRA Request -- Class III Procedure for Providing FRA/State inspector with System Access Upon Request	100,500 employees	19,365 signed certifications	5 minutes	1,614 hours
	100,500 employees	75 signed certifications	5 minutes	6 hours
	563 railroads	563 procedures	90 minutes	845 hours
228.207 – Training in Use of Electronic System – Initial Training – Refresher Training ( <b>Revised Requirement</b> )	563 railroads	5,879 trained employees	2 hours	11,758 hours
	768 railroads/contractors	47,000 trained employees	1 hour	47,000 hours
49 U.S.C. 21102 – The Federal Hours of Service Laws - Petitions for Exemption from Laws	10 railroads	1 petition	10 hours	10 hours

228.407 – Analysis of Work Schedules – RR Analysis of one cycle of work schedules of employees engaged in commuter or intercity passenger transportation - RR Report to FRA Administrator of Each Work Schedule that Exceeds Fatigue Threshold -- RR Fatigue Mitigation Plan – Submission and FRA Approval -- Work Schedules, Proposed Mitigation Plans/ Tools, Determinations of Operational Necessity – found Deficient by FRA and Needing Correction -- Follow-up Analyses submitted to FRA for Approval -- Deficiencies found by FRA in Revised Work Schedules and Accompanying Fatigue Mitigation Tools and Determinations of Operational Necessity Needing Correction - Updated Fatigue Mitigation Plans	168 railroads	2 analyses	20 hours	40 hours
	168 railroads	1 report	2 hours	2 hours
	168 railroads	1 plan	4 hours	4 hours
	168 railroads	1 corrected document	2 hours	2 hours
	168 railroads	5 analyses	4 hours	20 hours
	168 railroads	1 corrected document	2 hours	2 hours
	168 railroads	8 plans	4 hours	32 hours
-- RR Consultation with Directly Affected Employees on: (i) RR Work Schedules at Risk for Fatigue Level Possibly Compromising Safety; (ii) Railroad’s Selection of Fatigue Mitigation Tools; and (iii) All RR Submissions Required by this Section Seeking FRA Approval -- Filed Employee Statements with FRA Explaining Any Issues Related to paragraph (f)(1) of this Section Where Consensus was Not Reached	168 railroads	5 consultations	2 hours	10 hours
	RR Employee Organizations	2 filed statements	2 hours	4 hours
228.411 – RR Training Programs on Fatigue and Related Topics (e.g., Rest, Alertness, Changes in Rest Cycles, etc.) -- Refresher Training for New Employees -- RR Every 3-Years Refresher Training for Existing Employees -- RR Record of Employees Trained in Compliance with this Section -- Written Declaration to FRA by Tourist, Scenic, Historic, or Excursion Railroad Seeking Exclusion from this Section’s Requirements because its Employees are Assigned Schedules wholly within the Hours of 4 a.m. to 8 p.m. on the Same Calendar Day that Comply the Provisions of § 228.405	168 railroads	14 training programs	5 hours	70 hours
	168 railroads	150 initially tr. employees	1 hour	150 hours
	168 railroads	3,400 trained employees	1 hour	3,400 hours
	168 railroads	3,550 records	5 minutes	296 hours
	140 railroads	2 written declarations	1 hour	2 hours
Appendix D – Guidance on Fatigue Management Plan – RR Reviewed and Updated Fatigue Management Plans	168 railroads	2 updated plans	10 hours	20 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Under 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: (1) whether these information collection requirements are necessary for the proper performance of the

functions of FRA, including whether the information has practical utility; (2) the accuracy of FRA's estimates of the burden of the information collection requirements; (3) the quality, utility, and clarity of the information to be collected; and (4) whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, SE., 3<sup>rd</sup> Floor, Washington, D.C. 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Toone at the following address: [Robert.Brogan@dot.gov](mailto:Robert.Brogan@dot.gov); [Kim.Toone@dot.gov](mailto:Kim.Toone@dot.gov)

For information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone at 202-493-6132. (These phone numbers are not toll-free).

OMB must make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, to ensure OMB has sufficient time to fully consider a comment to OMB, OMB should receive it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements 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 the final

rule, and will announce the OMB control number, when assigned, by separate notice in the Federal Register.

F. Environmental Assessment

FRA has evaluated this proposed rule consistent 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 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 under section 4(c)(20) of FRA’s Procedures. See 64 FR 28547, May 26, 1999. Section 4(c)(20) states:

[c]ertain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. . . . The following classes of FRA actions are categorically excluded: . . . (20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

FRA has further concluded no extraordinary circumstances exist with respect to this proposed regulation that might trigger the need for a more detailed environmental review under sections 4(c) and (e) of FRA’s Procedures. 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

Under 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 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement . . .

The written statement, if required, would detail the effect on State, local, and tribal governments and the private sector.

For the year 2013, FRA adjusted the monetary amount of \$100,000,000 to \$151,000,000 for inflation. This proposed rule would not result in the expenditure of more than \$151,000,000 by the public sector in any one year, and thus preparation of such a statement is not required.

#### H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, “significant energy action” means 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 a notice of inquiry, advance NPRM, and NPRM) that (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the

Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this NPRM consistent with Executive Order 13211. FRA has determined this NPRM will not have a significant adverse effect on the supply, distribution, or use of energy and, thus, is not a “significant energy action” under the Executive Order 13211.

#### I. Privacy Act Statement

Consistent with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL-14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy). Anyone can search the electronic form of any written communications and comments received into any of FRA’s dockets by the name of the individual submitting the comment (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#!privacyNotice> for the privacy notice of regulations.gov or interested parties may review DOT’s complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

#### **List of Subjects in 49 CFR Part 228**

Administrative practice and procedures, Buildings and facilities, Hazardous materials transportation, Noise control, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

#### **The Proposed Rule**

For the reasons discussed in the preamble, FRA proposes to amend part 228 of chapter II, subtitle B of title 49, Code of Federal Regulations as follows:

**PART 228—PASSENGER TRAIN EMPLOYEE HOURS OF SERVICE;  
RECORDKEEPING AND REPORTING; SLEEPING QUARTERS**

1. The authority for part 228 is revised to read as follows:

Authority: 49 U.S.C. 20103, 20107, 21101-21109; Sec. 108, Div. A, Public Law 110-432, 122 Stat. 4860-4866, 4893-4894; 49 U.S.C. 21301, 21303, 21304, 21311; 28 U.S.C. 2461, note; 49 U.S.C. 103; and 49 CFR 1.89.

2. The heading of part 228 is revised to read as set forth above.

3. In § 228.5, add definitions of “Automated recordkeeping system”, “Electronic recordkeeping system”, “Electronic signature”, “Eligible smaller railroad”, and “Railroad that has less than 400,000 employee hours per year” in alphabetical order to read as follows:

**§ 228.5 Definitions.**

\* \* \* \* \*

Automated recordkeeping system means a recordkeeping system that—

(1) An eligible smaller railroad, or a contractor or subcontractor to such a railroad, may use instead of a manual recordkeeping system or electronic recordkeeping system to create and maintain any records subpart B requires; and

(2) Conforms to the requirements of § 228.206.

\* \* \* \* \*

Electronic recordkeeping system means a recordkeeping system that—

(1) A railroad may use instead of a manual recordkeeping system or automated recordkeeping system to create and maintain any records required by subpart B; and

(2) Conforms to the requirements of §§ 228.201-228.205.

Electronic signature means an electronic sound, symbol, or process that--

(1) Is attached to, or logically associated with, a contract or other record;

(2) Is executed or adopted by a person with the intent to sign the record, to create either an individual's unique digital signature, or unique digitized handwritten signature; and

(3) Complies with the requirements of § 228.19(g) or § 228.206(a).

Eligible smaller railroad means a railroad with less than 400,000 employee hours per year that may create and maintain its hours of service records required by subpart B of this part by using an automated recordkeeping system.

\* \* \* \* \*

Railroad that has less than 400,000 employee hours per year means either: (1) a railroad that reported to FRA that it had less than 400,000 employee hours during the preceding three consecutive calendar years under § 225.21(d) of this chapter on Form FRA 6180.56, Annual Railroad Reports of Manhours by State; or (2) a railroad operating less than 3 consecutive calendar years that reported to FRA that it had less than 400,000 employee hours during the current calendar year under § 225.21(d) of this chapter on Form FRA 6180.56, Annual Railroad Reports of Manhours by State.

\* \* \* \* \*

4. In § 228.9, revise its heading, add headings to paragraphs (a) and (b), and add paragraph (c) to read as follows:

**§ 228.9 Manual, electronic, and automated records; general.**

(a) Manual records. \* \* \*

\* \* \* \* \*

(b) Electronic records. \* \* \*

\* \* \* \* \*

(c) Automated records. Each automated record maintained under this part

shall be--

(1) Signed electronically by the employee whose time on duty is being recorded or, in the case of a member of a train crew or a signal employee gang, digitally signed by the reporting employee who is a member of the train crew or signal gang whose time is being recorded as provided by § 228.206(a);

(2) Stamped electronically with the certifying employee's electronic signature and the date and time the employee electronically signed the record;

(3) Retained for 2 years in a secured file that prevents alteration after electronic signature;

(4) Accessible by the Administrator through a computer terminal of the railroad; and

(5) Reproducible using printers at the location where records are accessed.

5. In § 228.11, revise the first sentence of paragraph (a) to read as follows:

**§ 228.11 Hours of duty records.**

(a) In general. Each railroad, or a contractor or a subcontractor of a railroad, shall keep a record of the hours of duty of each employee. \*\*\*

\*\*\*\*\*

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

**Subpart D—Electronic Recordkeeping System and Automated**

**Recordkeeping System.**

7. In § 228.201, revise the section heading, designate the introductory text as paragraph (a) introductory text, redesignate paragraphs (1) through (6) as paragraphs (a)(1) through (6), revise the paragraphs newly designated as (a)(1), (a)(3), (a)(4), and (a)(5), and add paragraph (b) to read as follows:

**§ 228.201 Electronic recordkeeping system and automated recordkeeping system; general.**

(a) Electronic recordkeeping system. For purposes of compliance with the recordkeeping requirements of subpart B, a railroad, or a contractor or a subcontractor to a railroad, may create and maintain any of the records required by subpart B through electronic transmission, storage, and retrieval, if all of the following conditions are met:

(1) The system used to generate the electronic record meets all requirements of this paragraph (a) and all requirements of §§ 228.203 and 228.205;

\* \* \* \* \*

(3) The railroad, or contractor or subcontractor to the railroad, monitors its electronic database of employee hours of duty records through a sufficient number of monitoring indicators to ensure a high degree of accuracy of these records;

(4) The railroad, or contractor or subcontractor to the railroad, trains its affected employees on the proper use of the electronic recordkeeping system to enter the information necessary to create their hours of service record, as required by § 228.207;

(5) The railroad, or contractor or subcontractor to the railroad, maintains an information technology security program adequate to ensure the integrity of the system,

including the prevention of unauthorized access to the program logic or individual records; and

\* \* \* \* \*

(b) Automated recordkeeping system. For purposes of compliance with the recordkeeping requirements of subpart B, an eligible smaller railroad, or a contractor or a subcontractor that provides covered service employees to such a railroad, may create and maintain any of the records required by subpart B using an automated recordkeeping system if all of the following conditions are met:

(1) The automated recordkeeping system meets all requirements of this paragraph (b) and all requirements of § 228.206; and

(2) The eligible smaller railroad or its contractor or subcontractor complies with all of the requirements of paragraph (a)(2) and paragraphs (a)(4) through (6) of this section for its automated records and automated recordkeeping system.

(3) The railroad, or a contractor or subcontractor to the railroad that has developed an automated recordkeeping system continues to have less than 400,000 employee hours. If a railroad, or a contractor or subcontractor to the railroad, that has developed an automated recordkeeping system reports to FRA that the railroad has 400,000 or more than 400,000 employee hours in three consecutive calendar years under § 225.21(d) of this chapter on its Annual Railroad Report of Manhours by State, then that railroad, or contractor or subcontractor to the railroad, is no longer eligible to use an automated recordkeeping system to record data subpart B of this part requires, unless the entity requests, and FRA grants, a waiver under § 211.41 of this chapter.

8. Add § 228.206 to read as follows:

**§ 228.206 Requirements for automated records and for automated recordkeeping systems on eligible smaller railroads, and their contractors or subcontractors that provide covered service employees to such railroads.**

(a) Use of electronic signature. Each employee creating a record required by subpart B of this part must sign the record using an electronic signature that meets the following requirements:

(1) The record contains the printed name of the signer and the date and actual time the signature was executed, and the meaning (such as authorship, review, or approval) associated with the signature;

(2) Each electronic signature is unique to one individual and shall not be used by, or assigned to, anyone else.

(3) Before an eligible smaller railroad, or a contractor or subcontractor to the railroad, establishes, assigns, certifies, or otherwise sanctions an individual's electronic signature, or any element of such electronic signature, the organization shall verify the identity of the individual.

(4) A person using an electronic signature shall, prior to or at the time of each such use, certify to FRA that the person's electronic signature in the system, used on or after [THE EFFECTIVE DATE OF THE FINAL RULE] is the legally binding equivalent of the person's traditional handwritten signature.

(5) Each employee shall sign the initial certification of his or her electronic signature with a traditional handwritten signature. Each railroad using an automated system must maintain certification of each electronic signature at its headquarters or the headquarters of any contractor or subcontractor providing employees who perform

covered service to such a railroad. Railroads, contractors, and subcontractors must also make the certification available to FRA upon request.

(6) A person using an electronic signature in such a system shall, upon FRA request, provide additional certification or testimony on whether or not a specific electronic signature is the legally binding equivalent of his or her handwritten signature.

(b) System security. Railroads using an automated recordkeeping system must protect the integrity of the system by the use of an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

(1) Data input is restricted to the employee or train crew or signal gang whose time is being recorded, except that an eligible smaller railroad, or a contractor or subcontractor to such a railroad, may pre-populate fields of the hours of service record provided that--

(i) The eligible smaller railroad, or its contractor or subcontractor, pre-populates fields of the hours of service record with information the railroad, or its contractor or subcontractor knows is factually accurate for a specific employee.

(ii) The recordkeeping system may allow employees to copy data from one field of a record into another field, where applicable.

(iii) The eligible smaller railroad, or its contractor or subcontractor does not use estimated, historical, or arbitrary information to pre-populate any field of an hours of service record.

(iv) An eligible smaller railroad, or a contractor or a subcontractor to such a railroad, is not in violation of paragraph (b)(1) of this section if it makes a good faith

judgment as to the factual accuracy of the data for a specific employee but nevertheless errs in pre-populating a data field.

(v) The employee may make any necessary changes to the data by typing into the field without having to access another screen or obtain clearance from railroad, or contractor or subcontractor to the railroad.

(2) No two individuals have the same electronic signature.

(3) No individual can delete or alter a record after the employee who created the record electronically signs the record.

(4) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record.

(5) Each amendment to a record uniquely identifies the individual making the amendment.

(6) The automated system maintains the records as originally submitted without corruption or loss of data.

(7) Supervisors and crew management officials can access, but cannot delete or alter, the records of any employee after the employee electronically signs the record.

(c) Identification of the individual entering data. If a given record contains data entered by more than one individual, the record must identify each individual who entered specific information within the record and the data the individual entered.

(d) Search capabilities. The automated recordkeeping system must store records using the following criteria so all records matching the selected criteria are retrieved from the same location:

- (1) Date (month and year);
- (2) Employee name or identification number; and
- (3) Electronically signed records containing one or more instances of excess service, including duty tours in excess of 12 hours.

(e) Access to records. An eligible smaller railroad, or contractor or subcontractor providing covered service employees to such a railroad, must provide access to its hours of service records under subpart B that are created and maintained in its automated recordkeeping system to FRA inspectors and State inspectors participating under 49 CFR part 212, subject to the following requirements:

(1) Access to records created and maintained in the automated recordkeeping system must be obtained as required by § 228.9(c)(4);

(2) An eligible smaller railroad must establish and comply with procedures for providing an FRA inspector or participating State inspector with access to the system upon request. Railroads must provide access to the system as soon as possible but not later than 24 hours after a request for access;

(3) Each data field entered by an employee on the input screen must be visible to the FRA inspector or participating State inspector;

(4) The data fields must be searchable as described in paragraph (d) of this section and must yield access to all records matching the criteria specified in a search.

9. In § 228.207, revise paragraphs (b)(1)(iii)(B) and (c)(1)(i) to read as follows:

**§ 228.207 Training**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(iii) \* \* \*

(B) The entry of hours of service data, into the electronic system or automated system or on the appropriate paper records used by the railroad or contractor or subcontractor to a railroad for which the employee performs covered service; and

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) Emphasize any relevant changes to the hours of service laws, the recording and reporting requirements in subparts B and D of this part, or the electronic, automated, or manual recordkeeping system of the railroad or contractor or subcontractor to a railroad for which the employee performs covered service since the employee last received training; and

\* \* \* \* \*

Issued in Washington, DC, on August 6, 2015.

**Sarah Feinberg,**  
*Acting Administrator.*

**BILLING CODE 4910-06-P**

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