



This document is scheduled to be published in the Federal Register on 12/14/2016 and available online at <https://federalregister.gov/d/2016-29902>, and on [FDsys.gov](https://FDsys.gov)

FR-4915-01-P

## SURFACE TRANSPORTATION BOARD

49 CFR Part 1122

[Docket No. EP 731]

Rules Relating to Board-Initiated Investigations

AGENCY: Surface Transportation Board.

ACTION: Final rules.

SUMMARY: The Surface Transportation Board (Board or STB) is adopting final rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the Surface Transportation Board Reauthorization Act of 2015.

DATES: These rules are effective on January 13, 2017.

ADDRESSES: Information or questions regarding these final rules should reference Docket No. EP 731 and be in writing addressed to Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Scott M. Zimmerman at (202) 245-0386. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Section 12 of the Surface Transportation Board Reauthorization Act of 2015, Pub. L. No. 114-110, 129 Stat. 2228 (2015) (STB Reauthorization Act or Act) (see 49 U.S.C. 11701) authorizes the Board to investigate, on its own initiative, issues that are "of national or regional significance" and are subject to

the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A. Under Section 12, the Board must issue rules implementing this investigative authority not later than one year after the date of enactment of the STB Reauthorization Act (by December 18, 2016).

By decision served on May 16, 2016, the Board issued a Notice of Proposed Rulemaking (NPRM) in which the Board proposed rules for investigations conducted on the Board's own initiative pursuant to Section 12 of the STB Reauthorization Act. The proposed rules were published in the Federal Register, 81 Fed. Reg. 30,510 (May 17, 2016), and comments were submitted in response to the NPRM.<sup>1</sup>

After consideration of parties' comments, the Board is adopting final rules, to be set forth at 49 C.F.R. part 1122, that establish the procedures for Board investigations conducted pursuant to Section 12 of the STB Reauthorization Act. These final rules do not apply to other types of investigations that the Board may conduct.

#### Introduction

The STB Reauthorization Act provides a basic framework for conducting investigations on the Board's own initiative, as follows:

Within 30 days after initiating an investigation, the Board must provide notice to parties under investigation stating the basis for such investigation. The Board may only

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<sup>1</sup> The Board received comments and replies from the following: Association of American Railroads (AAR); City of Jersey City, Rails to Trails Conservancy (Jersey City) (comments only); National Grain and Feed Association (NGFA); The National Industrial Transportation League (NITL) (comments only); Norfolk Southern Railway Company (NSR); and SMART/Transportation Division, New York State Legislative Board (SMART/TD-NY).

investigate issues that are of national or regional significance. Parties under investigation have a right to file a written statement describing all or any facts and circumstances concerning a matter under investigation. The Board should separate the investigative and decisionmaking functions of Board staff to the extent practicable.

Investigations must be dismissed if they are not concluded with administrative finality within one year after commencement.<sup>2</sup> In any such investigation, Board staff must make available to the parties under investigation and the Board Members any recommendations made as a result of the investigation and a summary of the findings that support such recommendations. Within 90 days of receiving the recommendations and summary of findings, the Board must either dismiss the investigation if no further action is warranted, or initiate a proceeding to determine whether a provision of 49 U.S.C. Subtitle IV, Part A has been violated. Any remedy that the Board may order as a result of such a proceeding may only be applied prospectively.

The STB Reauthorization Act further requires that the rules issued under Section 12 comply with the requirements of 49 U.S.C. 11701(d) (as amended by the STB Reauthorization Act), satisfy due process requirements, and take into account ex parte constraints.

#### Discussion of Issues Raised in Response to the NPRM

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<sup>2</sup> The one-year deadline for investigations conducted on the Board's own initiative does not include any Board proceeding conducted subsequent to the investigation. S. Rep. No. 114-52, at 13 (2015).

In the NPRM, the Board proposed a three-stage process, consisting of (1) Preliminary Fact-Finding, (2) Board-Initiated Investigations, and (3) Formal Board Proceedings. Having considered the comments, the Board will adopt this three-stage process in the final rules, subject to certain modifications from what was proposed in the NPRM. Below we address the comments received in response to the NPRM pertaining to each stage, as well as other related issues, and the Board's responses, including modifications from the NPRM. The final rules are below.

A. Preliminary Fact-Finding

As proposed in the NPRM, Preliminary Fact-Finding refers to the process in which Board staff would conduct, at their discretion, an initial, informal, nonpublic inquiry regarding an issue. The purpose of the Preliminary Fact-Finding would be to determine if there is enough information to warrant a request for authorization to open a Board-Initiated Investigation into whether there may be a potential violation of 49 U.S.C. Subtitle IV, Part A, of national or regional significance. In this section, we address parties' comments on (1) whether the Board should adopt a time limit for Preliminary Fact-Finding, (2) whether Preliminary Fact-Finding should be confidential, (3) how the Board should decide to commence Preliminary Fact-Finding, and (4) fact-gathering.

Time Limit for Preliminary Fact-Finding. In the NPRM, the Board did not impose a time limit on Preliminary Fact-Finding. Because Board staff would be solely determining whether a matter merits seeking authorization to pursue a Board-Initiated Investigation, and would not be able to issue subpoenas to compel testimony or the

production of information or documents, the Board does not consider this stage to be part of the one-year period for an investigation. Some commenters, however, contend that the statutorily-mandated one-year time limit for investigations should include Preliminary Fact-Finding. Other commenters disagree with including Preliminary Fact-Finding in the statutorily-mandated one-year time limit for investigations, arguing that the Board should instead impose a “reasonable time limit” on Preliminary Fact-Finding.

In particular, AAR asserts that the one-year time limit for investigations should apply to Preliminary Fact-Finding because an “open-ended, limitless Preliminary Fact-Finding phase” would undermine the “purpose of the statutory scheme” and would force parties to “endure the burdens and uncertainty of an open-ended inquiry that could last for years.”<sup>3</sup> (AAR Comment 4.)

NSR asserts two arguments in support of including Preliminary Fact-Finding in the one-year time limit. First, NSR states that the plain language of the statute “expressly provides that the Board has one year to conclude any ‘investigation’ with administrative finality.” Therefore, the Board’s proposed “Preliminary Fact-Finding phase is a blatant attempt to buy itself more time to conduct an investigation than afforded” by Section 12 of the STB Reauthorization Act. (NSR Comment 5.) Second, NSR argues that Preliminary Fact-Finding should be included in the statutorily-mandated one-year time

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<sup>3</sup> AAR, however, supports the Board’s proposal to have a Preliminary Fact-Finding phase preceding Board-Initiated Investigations, stating that “providing for a Preliminary Fact-Finding phase makes practical sense and should be maintained in the final rules.” (AAR Comment 5.)

limit so that the Board's proposed investigatory process is subject to "durational restraints" in accordance with other agencies' best practices. According to NSR, "other administrative agencies do not permit indefinite 'pre-investigation' phases" and the Securities Exchange Commission requires that its "pre-investigation" phase, called "Matters Under Inquiry," be completed within 60 days. (NSR Comment 5-6.)

NGFA and NITL disagree with including Preliminary Fact-Finding in the statutorily-mandated one-year time limit for investigations, but argue that the Board should instead impose a reasonable time limit on Preliminary Fact-Finding. NGFA supports the Board imposing a time limit of 60 days. (NGFA Reply 5.) NITL supports a 45-day deadline for Preliminary Fact-Finding. (NITL Comment 2.)

SMART-TD argues that "there is always 'preliminary' work" before an "official" agency action and, therefore, the Board should delete the provision for Preliminary Fact-Finding from the final rules. (SMART-TD Comment 11.)

Although 49 U.S.C. 11701 requires that the Board dismiss any investigation that is not concluded with administrative finality within one year, Preliminary Fact-Finding does not constitute part of an investigation; rather, it is the Board's informal process of determining whether an investigation should be commenced. The Board must have a mechanism to gather information on a preliminary basis to determine whether an investigation is warranted. The Preliminary Fact-Finding period is intended to allow the Board to dismiss unfounded complaints without unnecessarily expending limited Board or party resources. This approach is in the best interest of our stakeholders, as the Board

would be able to more effectively allocate its resources to only investigate potential violations of sufficient gravity to warrant Board action. This approach would also alleviate the burden on parties potentially subject to Board-Initiated Investigations by limiting such investigations only to situations where, in the Board's discretion, investigation into a matter of national or regional significance is warranted. Although SMART-TD argues that the Board should delete the concept of Preliminary Fact-Finding from the rules and merely conduct any such preliminary work without making it an official part of the process, the Board finds that it is in the public interest that our regulations notify stakeholders of the existence of this stage. Accordingly, in the interest of transparency, the Board will not delete this provision from the regulations.

Although there is no limitation in the statute as to how long Preliminary Fact-Finding should occur, the Board understands the concern from the parties that the Board not allow the Preliminary Fact-Finding phase to continue "indefinitely." The final rules, accordingly, require that Preliminary Fact-Finding be concluded within a reasonable period of time. As a matter of policy, we determine "a reasonable period of time" to be approximately 60 days from the date the Board notifies the party subject to Preliminary Fact-Finding that Preliminary-Fact Finding has commenced. See 49 CFR 1122.5(a).

Confidentiality. The NPRM proposed that Preliminary Fact-Finding generally would be nonpublic and confidential, subject to certain exceptions. Several commenters oppose this proposal and request that all of, or certain parts of, Preliminary Fact-Finding be made public.

Jersey City requests that the Board publish notice of commencement of Preliminary Fact-Finding in the Federal Register, make information submitted by parties during Preliminary Fact-Finding publicly available, and publish Board staff's findings from Preliminary Fact-Finding so that third parties may comment on such information. (Jersey City Comment 13.) NITL asks that the Board publish notice of commencement of Preliminary Fact-Finding—which should include a “high level summary” of the issue being investigated—as well as Board staff's conclusions from Preliminary Fact-Finding. (NITL Comment 2.) Similarly, NGFA asks that the Board publish on its website, or in the Federal Register, a description of any issues subject to Preliminary Fact-Finding, and the outcomes of such inquiries, with any sensitive information such as party names redacted. (NGFA Comment 6; NGFA Reply 3.)

AAR opposes making Preliminary Fact-Finding public, stating that to do so would make parties “reluctant to volunteer information” and subject to “unwarranted reputational damage or other harm.” (See AAR Reply 1-2, 4.) Moreover, AAR states that a publicly available description of an issue subject to Preliminary Fact-Finding, even one in which sensitive information is redacted, would be insufficient to protect a railroad's identity given the nature of the industry. (AAR Reply 4-5.) AAR further notes

that shippers' justifications for making Preliminary Fact-Finding public—namely, transparency and public participation—could be satisfied during a Formal Board Proceeding, if one were opened. (AAR Reply 2.)

The Board will adopt the proposal in the NPRM to keep the Preliminary Fact-Finding confidential, subject to certain limited exceptions (discussed below). Having considered the parties' arguments, we are not convinced the potential benefits of making Preliminary Fact-Finding public outweigh the risks. During Preliminary Fact-Finding, Board staff would only be ascertaining whether a matter warrants an investigation by the Board. Preliminary Fact-Finding would not be a formal, evidence-gathering process, and, if the Board were to make Preliminary Fact-Finding public, parties subject to Preliminary Fact-Finding could possibly be subject to unwarranted reputational damage or other harm. NGFA suggests that concerns about confidentiality could be avoided by redacting the parties' names, but even a general description of the issues subject to Preliminary Fact-Finding might effectively disclose the identity of involved parties, regardless of whether the name(s) of the parties were redacted. Therefore, the final rules presume that Preliminary Fact-Finding would be nonpublic and confidential, unless the Board otherwise finds it necessary to make certain information related to, or the fact of, Preliminary Fact-Finding public.

As previously proposed in the NPRM, the final rules would continue to allow the Board to make aspects of Preliminary Fact-Finding public. See section 1122.6(a)(1). In instances where the Board chooses to exercise this discretion, the Board would weigh, on

a case-by-case basis, potential harm to innocent parties, markets, or the integrity of the inquiry and subsequent investigation. However, because of the risks associated with making Preliminary Fact-Finding public, we will not adopt a mechanism through which a party may request that Preliminary Fact-Finding be made public pursuant to section 1122.6(a)(1). The same reasoning applies to confidentiality of Board-Initiated Investigations, as discussed later.

Commencement. The NPRM proposed that Board staff would commence Preliminary Fact-Finding, at its discretion, to determine if an alleged violation could be of national or regional significance and subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, and warrant a Board-Initiated Investigation. AAR proposes three modifications to the Board's regulations. We discuss each in turn.

First, AAR asserts that the Board or the Director of the Office of Proceedings, as opposed to Board staff, should approve commencement of Preliminary Fact-Finding, "given the potentially significant consequences on regulated parties" from Preliminary Fact-Finding, or from a Board-Initiated Investigation or Formal Board Proceeding opened as a result of Preliminary Fact-Finding. (AAR Comment 6.) We decline to incorporate the suggestion that the Board or the Director of the Office of Proceedings should approve commencement of Preliminary Fact-Finding. The Board must gather information concerning potentially qualifying violations to determine whether it should

commence a Board-Initiated Investigation. For the reasons discussed earlier,<sup>4</sup> such activities are informal and preliminary, and, thus, we find that the initiation of Preliminary Fact-Finding does not merit a formal Board action or finding, although the Board would be aware of the commencement of Preliminary Fact-Finding.

Second, AAR suggests that the Board should notify parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. AAR argues that, without such notice, railroads may not be willing to coordinate and share information with the Board's Office of Public Assistance, Governmental Affairs, and Compliance (OPAGAC) out of concern that such information could be used by Board staff in Preliminary Fact-Finding against them. (AAR Comment 7-8.) To address AAR's concerns regarding OPAGAC, we are modifying section 1122.3 to include a requirement that Board staff notify parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. See section 1122.3 (stating that "Board staff shall inform the subject of Preliminary Fact-Finding that Preliminary Fact-Finding has commenced"). The Board finds that it is necessary to maintain railroad confidence in OPAGAC, as OPAGAC's Rail Customer and Public Assistance Program (RCPA) provides a valuable informal venue for the private-sector resolution of shipper-railroad disputes, and, without railroad participation, RCPA would be less effective at facilitating communication among the various segments of the rail-transportation industry and encouraging the resolution of rail-shipper operational or service issues. Thus, the final rules incorporate AAR's request

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<sup>4</sup> See supra Part A: Time Limit for Preliminary Fact-Finding.

that the Board provide notice to parties subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced.

Third, AAR argues that section 1122.3 should use the terminology “warranted” or “not warranted” (instead of “appropriate” or “not appropriate”), as both the NPRM’s preamble and the statute use the word “warranted.” (AAR Comment 9 n.3.) The final rules incorporate this suggestion, adopting the terminology of “warranted” or “not warranted,” instead of “appropriate” or “not appropriate.” See 49 CFR 1122.3.

Fact Gathering. The NPRM proposed that, during Preliminary Fact-Finding, Board staff could request that parties voluntarily provide testimony, information, or documents to assist in Board staff’s informal inquiry, but could not issue subpoenas to compel the submission of evidence. In response to this proposal, AAR, NITL, and NGFA suggest that certain clarifications are needed regarding the collection of information during Preliminary Fact-Finding. We address these comments below.

AAR seeks clarification that (1) the production of documents during Preliminary Fact-Finding is voluntary, (2) the requirement to certify a production of documents applies to Preliminary Fact-Finding, (3) the Board retains its right to demand to inspect and copy any record of a rail carrier pursuant to 49 U.S.C. 11144(b) during Preliminary Fact-Finding, and (4) the information submitted during Preliminary Fact-Finding will be “subject to disclosure in any

subsequent Board-Initiated Investigation on the same terms as other materials gathered during Board-Initiated Investigations.” (AAR Comment 5, 7-8.)

In response to AAR’s comments, the Board provides the following clarifications. First, the production of documents during Preliminary Fact-Finding would be voluntary. See section 1122.9 (granting Investigating Officer(s) the right to compel the submission of evidence only in Board-Initiated Investigations). Second, parties that choose to voluntarily produce documents during Preliminary Fact-Finding would not be required to certify such productions. Whereas the NPRM proposed to require a producing party to submit a statement certifying that such person made a diligent search for responsive documents “[w]hen producing documents *under this part*,” the final rules at section 1122.12(a) now limit that to “[w]hen producing documents *under section 1122.4*,” the regulation governing Board-Initiated Investigations only. Third, as a matter of policy, the Board would not demand to inspect and copy any record—relating to the subject of Preliminary Fact-Finding—of a rail carrier pursuant to 49 U.S.C. 11144(b) during Preliminary Fact-Finding by Board staff. Finally, information submitted during Preliminary Fact-Finding would be subject to disclosure in any subsequent Board-Initiated Investigation on the same terms as materials gathered during Board-Initiated Investigations. This is provided for in the final rules at section 1122.6, which states that all information and documents obtained under section 1122.3 (referring to Preliminary Fact-Finding) or section 1122.4 (referring to Board-Initiated Investigations) whether or not obtained pursuant to a Board request or subpoena, shall be

treated as nonpublic by the Board and its staff, subject to the exceptions described in section 1122.6(a)-(c).

NITL and NGFA state that the Board should provide staff the “appropriate tools” to obtain information needed during Preliminary Fact-Finding. (NITL Comment 2; NGFA Reply 5-6.) NGFA also suggests that the Board should adopt deadlines for a party subject to Preliminary Fact-Finding to submit evidence to the Board. (NGFA Reply 6.)

The Board declines to give Board staff additional authority to obtain information during Preliminary Fact-Finding. As previously noted, Preliminary Fact-Finding is an initial, informal inquiry to determine whether a Board-Initiated Investigation is warranted. The Board, thus, has intentionally limited Board staff’s authority to collect evidence in order to prevent undue burden on anyone. However, during Preliminary Fact-Finding, Board staff would be able to request that parties produce information and documents on a voluntary basis and request that any evidence submitted be provided by a certain deadline. Although Board staff would not be able to issue subpoenas to compel the production of evidence during Preliminary Fact-Finding, parties would have an incentive to provide information or documents to show that a Board-Initiated Investigation is not warranted. For these reasons, the Board declines to grant Board staff any further authority to obtain information during Preliminary Fact-Finding.

B. Board-Initiated Investigation

As proposed in the NPRM, Board-Initiated Investigation refers to an investigation, conducted in accordance with Section 12 of the STB Reauthorization Act, to decide whether to recommend to the Board that it open a proceeding to determine if a violation of 49 U.S.C. Subtitle IV, Part A occurred. The NPRM stated that a Board-Initiated Investigation would begin with the Board issuing an Order of Investigation and providing a copy of the order to the parties under investigation within 30 days of issuance. The NPRM also provided that Board-Initiated Investigations would be nonpublic and confidential, subject to certain exceptions, to protect both the integrity of the process and the parties under investigation from any unwarranted reputational damage or other harm. Finally, the NPRM stated that parties who are not the subject of the investigation would not be able to intervene or participate as a matter of right in Board-Initiated Investigations.

In this section, we address parties' comments on (1) the standard for opening a Board-Initiated Investigation, (2) the definition of "national or regional significance," (3) timing of providing the Order of Investigation to parties under investigation, (4) confidentiality of Board-Initiated Investigations, (5) parties' requests for the right to intervene in Board-Initiated Investigations, (6) railroads' request for access to exculpatory evidence, (7) parties' comments relating to the collection of information and

documentation, and (8) the process for providing Board staff's recommendations and summary of findings to a party under investigation.<sup>5</sup>

Standard for Opening a Board-Initiated Investigation. The NPRM stated that the Board could commence a Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A when it appears that the statute may have been violated. The NPRM further stated that, in instances where Preliminary Fact-Finding had been conducted,<sup>6</sup> in order to seek authorization to commence a Board-Initiated Investigation, Board staff would have to determine that (1) a violation of 49 U.S.C. Subtitle IV, Part A subject to the Board's jurisdiction may have occurred and (2) that the potential violation may be of national or regional significance warranting the opening of an investigation.

In comments, AAR asks the Board to clarify the standard for commencing a Board-Initiated Investigation and require that (1) "the issue [be] of national or regional significance" and (2) "there [be] reasonable cause to believe that there may be a violation of 49 U.S.C. Subtitle IV, Part A." (AAR Comment 9-11.) (emphasis added.) Under

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<sup>5</sup> Jersey City requests the Board also address the "institutional structure, staffing, and resources" it has related to investigations conducted pursuant to Section 12 of the STB Reauthorization Act. As this issue is not pertinent to the regulations, we decline to comment on internal Board staffing issues. (Jersey City Comment 7.)

<sup>6</sup> NGFA asks the Board to change § 1122.4 to clarify that Preliminary Fact-Finding is not required in order to commence a Board-Initiated Investigation. (NGFA Comment 7.) However, there was no requirement in the regulations that Preliminary Fact-Finding must precede a Board-Initiated Investigation, and the NPRM's preamble was clear that Preliminary Fact-Finding was not required in order to commence a Board-Initiated Investigation. We, therefore, decline to make this change to the final rules.

49 U.S.C. 11701, however, the Board may begin an investigation of alleged violations of 49 U.S.C. Subtitle IV, Part A as long as the issue is of national or regional significance. As a result, AAR's proposal would require a higher standard for commencing a Board-Initiated Investigation than imposed by the statute—i.e., by requiring “reasonable cause to believe” that a violation under 49 U.S.C. Subtitle IV, Part A occurred. Accordingly, we decline to adopt AAR's proposed standard and will maintain in the final rules the statutory standard, which provides that the Board may, in its discretion, commence a Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A. See section 1122.4.

AAR further asks that the Board require that any Order of Investigation issued state that “the matter at issue ‘is’ of national or regional significance” (instead of “may be” of national or regional significance). (AAR Comment 9.) Relatedly, NSR asks that the Board clarify that any issue subject to a Board-Initiated Investigation must “remain of national or regional significance throughout the Board-Initiated Investigation and related Formal Board Proceeding.” (NSR Comment 3.)

The final rules will continue to require that an alleged violation subject to a Board-Initiated Investigation be of national or regional significance. See section 1122.4. Section 12 of the STB Reauthorization Act permits the Board to investigate issues that “are of national or regional significance.” We interpret this language to mean that an alleged violation of 49 U.S.C. Subtitle IV, Part A that is of national or regional

significance upon commencement of the investigation may continue to be subject to Board-Initiated Investigation even if the conduct that created the alleged violation ceases. Similarly, conduct underlying an alleged violation does not have to be of ongoing national or regional significance so long as the Board determines that the alleged violation created an issue of national or regional significance at the time the investigation was initiated. Otherwise, conduct that is capable of repetition could create future crises without redress. The final rules thus will adopt the language proposed in the NPRM. See section 1122.4.

Definition of “National or Regional Significance.” In the NPRM, the Board did not define the phrase “of national or regional significance.” As a result, some commenters request that the Board define this phrase or provide examples of issues that would be considered of national or regional significance.

In particular, AAR states that the Board should define “national or regional significance” as “widespread and significant effects on transportation service or markets in a region or across the nation.” AAR also asks that the Board clarify that issues of national or regional significance do not include individual rate disputes or disputes involving a single shipper. (AAR Comment 10.) Similarly, Jersey City states that the Board should define “national or regional significance” in order to avoid litigation on jurisdictional issues stemming from this phrase. (Jersey City Comment 11-12.)

We decline to adopt a definition of “national or regional significance.” The Board finds that AAR’s proposed definition does not provide significantly more insight than the

phrase itself as to what constitutes a matter “of national or regional significance.” In addition, there is no need to expressly exclude rate disputes in these rules—such disputes are not subject to Board-Initiated Investigation under the statute (whether or not they are of national or regional significance). Section 11701(a) of Title 49 of the United States Code states that the Board may begin an investigation on its own initiative, “[e]xcept as otherwise provided in this part.” Rate disputes are governed by 49 U.S.C. 10704, which specifically states that rate disputes may only be commenced “on complaint.” 49 U.S.C. 10704(b). Therefore, rate disputes fall outside the purview of the investigatory authority conferred to the Board under Section 12 of the STB Reauthorization Act.

As to disputes involving a single shipper, the Board declines to adopt a blanket approach as to whether such issues are of national or regional significance. Such a determination would be fact-dependent and require the Board to make a determination based on the specific situation and various factors (such as the dispute’s impact on national or regional rail traffic), which are discussed further below.

NSR and NGFA also ask that the Board provide clarification related to the definition of “national or regional significance.” Specifically, NSR asks the Board to explain how it “intends to apply the jurisdictional standard of ‘national or regional significance.’” (NSR Comment 3.) NGFA requests that the Board “provide a discussion of the types of rail practices or issues the Board would consider to be of national or regional significance.” (NGFA Comment 3-4; NGFA Reply 6.)

Under the final rules, the Board would apply the jurisdictional standard of national or regional significance on a case-by-case basis, considering, for instance, the extent of the impacts of the potential violation on national or regional rail traffic, customers, or third parties, or the geographic scope of the alleged violation. Examples of recent matters that the Board might consider to be of national or regional significance include (but are not limited to): fertilizer shipment delays; rail car supply issues that impact grain shipments; or extensive congestion at strategic interchange points such as Chicago, Ill.

Confidentiality. As with Preliminary Fact-Finding, the NPRM proposed that Board-Initiated Investigations generally would be nonpublic and confidential, subject to certain exceptions,<sup>7</sup> in order to protect the integrity of the process and to protect parties under investigation from possibly unwarranted reputational damage or other harm.

In comments, NGFA asks that the Board publish Orders of Investigation in the Federal Register or on the Board's website, so that third parties may request access to documents produced during a Board-Initiated Investigation, and NGFA and Jersey City ask the Board to inform the public as to the outcome of a Board-Initiated Investigation.<sup>8</sup>

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<sup>7</sup> See § 1122.6(a)-(c). See also infra note 10.

<sup>8</sup> NGFA and Jersey City make the same request with respect to Preliminary Fact-Finding. (NGFA Comment 6-7; Jersey City Comment 14.) NGFA further asks that the Order of Investigation identify a point of contact for Preliminary Fact-Finding and the Board-Initiated Investigation and request from third parties information related to the issue being investigated. (NGFA Comment 6; NGFA Reply 3.) NGFA states that Board could redact information identifying the party subject to the investigation. For the reasons provided above, the final rules maintain that Preliminary Fact-Finding and

(NGFA Comment 6-7.) Similarly, NITL asks that the Board make the Order of Investigation available to the public, and SMART-TD asks the Board to delete the “automatic ‘nonpublic’ process.” (NITL Comment 3; SMART-TD Comment 11.) On reply, AAR opposes making Board-Initiated Investigations public for the same reasons it opposes making Preliminary Fact-Finding public.<sup>9</sup> (AAR Reply 4-5.) For instance, AAR states that public disclosure of the subject of a Board-Initiated Investigation could cause “unwarranted reputational damage or other harm” and that “the threat of public disclosure w[ould] create the incentive to be less cooperative in the discovery process.” (AAR Reply 4.)

We find that the risks of making Board-Initiated Investigations public outweigh the potential benefits, absent extraordinary circumstances.<sup>10</sup> If, after conducting a Board-Initiated Investigation, the Board believes that a Formal Board Proceeding should be commenced to determine if a qualifying violation occurred, the Board would open such a proceeding. At that time, any Formal Board Proceeding would be public, subject to the Board’s existing rules protecting confidential information. See 49 CFR 1104.14. However, if the Board determines that no further action is warranted and therefore dismisses the Board-Initiated Investigation with no further action, the Board generally

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Board-Initiated Investigations generally would be nonpublic and confidential, subject to the exceptions described in § 1122.6(a)-(c).

<sup>9</sup> See supra Part A: Confidentiality.

<sup>10</sup> The Board recognizes that there may be instances where it is necessary to make a Board-Initiated Investigation, or aspects of a Board-Initiated Investigation, public, in which case the Board would rely on § 1122.6(a)(1) to release such information.

would seek to maintain the confidentiality of the party subject to the Board-Initiated Investigation, in order to prevent the party from being subject to any stigma that may be associated with having been investigated. For these reasons, the final rules maintain that Board-Initiated Investigations are presumptively nonpublic and confidential.

With respect to confidentiality, AAR asks that the Board clarify that it is “not claiming unbounded discretion to make confidential information and documents public” and that it revise the NPRM’s confidentiality provision to include the protections provided by 49 CFR 1001.4, which governs predisclosure notification procedures for confidential commercial information. (AAR Comment 17-18.) NSR also asks that the Board “create a reasonable opportunity for the person claiming confidentiality to respond to the Board’s denial of a request for confidential treatment prior to any public disclosure of the purportedly confidential information.” (NSR Comment 4, 28-29.)

The Board will grant these requests to clarify that parties will be given notice and the ability to respond to the potential disclosure of confidential commercial information prior to its release. Specifically, the final rules at section 1122.6(a)(1) now expressly incorporate 49 CFR 1001.4(c), (d) and (e), which require that the Board notify the person claiming confidential treatment prior to publicly disclosing any purportedly confidential commercial information and provide such persons an opportunity to object to the disclosure. The Board’s final rules at section 1122.7 also continue to require that, if a Freedom of Information Act (FOIA) request seeks information that a party has claimed constitutes trade secrets and commercial or financial information within the exception in

5 U.S.C. 552(b)(4), the Board shall give the party an opportunity to respond pursuant to 49 CFR 1001.4.

Order of Investigation. As proposed in the NPRM, the Board would issue an Order of Investigation in order to commence a Board-Initiated Investigation. The Board then would provide a copy of the Order of Investigation to the party under investigation within 30 days of issuance.

In its comments, AAR asks that the Board instead provide a copy of the Order of Investigation to the parties under investigation within 10 days of its issuance. (AAR Comment 12.) Similarly, NGFA asks that the Board provide a copy of the Order of Investigation to the public within 10 or 15 days of its issuance. (NGFA Reply 7.)

Under 49 U.S.C. 11701(d)(1), the Board is required to provide written notice to the parties under investigation by not later than 30 days after initiating the investigation. Although in practice the Board intends to provide copies of the Order of Investigation to parties within a shorter timeframe as requested by AAR and NGFA, the Board declines to adopt regulations that are stricter than the requirements of Section 12 of the STB Reauthorization Act. The final rules therefore maintain the statutory requirement of providing notice to parties under investigation within 30 days.

Intervention. The NPRM provided that third parties, who are not the subject of a Board-Initiated Investigation, may not intervene or participate as a matter of right in any Board-Initiated Investigation. Commenters, mostly shippers, ask that the Board either permit third parties to intervene in Board-Initiated Investigations or comment on an

ongoing investigation. These commenters assert, among other arguments, that third parties have a statutory right to intervene and that intervention would promote transparency and assist Board staff in compiling a more complete record. (NITL Comment 3; NGFA Comment 5-7; NGFA Reply 4, 8; Jersey City Comment 15; SMART-TD 11.) AAR opposes allowing third parties to intervene in Board-Initiated Investigations. (AAR Reply 2, 9.)

We decline to permit third parties to intervene or participate as a matter of right in Board-Initiated Investigations. Although NGFA and Jersey City argue that interventions could increase transparency and assist Investigative Officers in developing a more complete record and determining whether a qualifying violation occurred, a final, binding determination in that regard is not made during a Board-Initiated Investigation. (See NGFA Comment 7; Jersey City Comment 15.) Rather, that decision would be made during the Formal Board Proceeding, where, as AAR notes, third parties could move to intervene and participate in a proceeding. Therefore, shippers' objectives in intervening in Board-Initiated Investigations would be satisfied during a Formal Board Proceeding. In addition, there is a statutory one-year time limitation on Board-Initiated Investigations. Allowing third parties to intervene as of right could make it difficult for the Board to complete its investigation in the required time frame.<sup>11</sup>

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<sup>11</sup> Shippers also request that third parties be allowed to intervene in Preliminary Fact-Finding. We reject this request for the same reasons we reject the request that third parties be allowed to intervene in the Board-Initiated Investigations.

Finally, we disagree with Jersey City's argument that 28 U.S.C. 2323 grants interested "[c]ommunities, associations, firms, and individuals" a right to intervene in any Board-Initiated Investigation. As AAR points out, section 2323 applies only to federal court proceedings arising from challenges to Board rulemakings or attempts to enforce Board orders. (AAR Reply 9.) For these reasons, the final rules continue to prohibit intervention or participation by third parties in any Board-Initiated Investigation.

Information and Documentation Collection. Parties raise several concerns with respect to the production of documents and testimony under the proposed rules. In the NPRM, the Board proposed that, if any transcripts were taken of investigative testimony, they would be recorded by an official reporter or other authorized means. In comments, AAR asks that parties under investigation be given full access to transcripts of their testimony, while NSR asks that subpoenaed witnesses be able to obtain copies of their evidence and transcripts of their testimony. (AAR Comment 14; NSR Comment 22.) AAR also asks that the Board revise the proposed regulation governing transcripts to always require a transcript of investigative testimony. (AAR Comment 14.) AAR further requests that Investigating Officers be limited in the amount of information and documents that they can request of parties and also limited to requesting "documents that are likely to be directly relevant to the investigation." (AAR Comment 15.) NSR asks that the Board "ensure that subpoenas are issued only where they are likely to lead to admissible evidence regarding the investigated issue...and are otherwise limited in scope, specific in directive, and in good faith." (NSR Comment 4.)

In response to AAR and NSR’s comments pertaining to transcripts, the Board declines to always require a transcript of investigative testimony, but will require that witnesses be given access to any transcript of their investigative testimony—either by receiving a copy of the transcript or by inspecting the transcript. Specifically, the final rules now provide that “[a] witness who has given testimony pursuant to [part 1122 of the regulations] shall be entitled, upon written request, to procure a transcript of the witness’ own testimony or, upon proper identification, shall have the right to inspect the official transcript of the witness’ own testimony.” See section 1122.10.

As to Investigating Officers’ right to request documents, we will adopt AAR’s suggestion that Investigating Officers be limited to request documents that are likely to be directly relevant to the investigation. (AAR Comment 15.) Thus, we have modified the language of section 1122.9 to state that Investigating Officer(s) may interview or depose witnesses, inspect property and facilities, and request and require the production of any information, documents, books, papers, correspondence, memoranda, agreements, or other records, in any form or media, “that are likely to be directly relevant to the issues of the Board-Initiated Investigation.” This change also sufficiently addresses NSR’s concern that Investigating Officers’ requests for evidence be “limited in scope, specific in directive, and in good faith.” (NSR Comment 4.) The Board declines to otherwise limit the Investigating Officers’ right to request evidence.

AAR and NSR also ask that the Board provide parties under investigation the right to seek discovery.<sup>12</sup> (See AAR Comment 14; NSR Comment 4, 35-37.) On reply, NGFA opposes the railroads' request that parties under investigation be provided the right to seek discovery, stating that the "final rules should not impose complex requirements and associated legal and other costs on rail customers." (NGFA Reply 3.) NGFA adds that, if the Board were to allow railroads to conduct discovery in Board-Initiated Investigations, such discovery "should be limited to entities that elect to become parties by formally intervening in the proceeding." (NGFA Reply 3, 8.) We agree with NGFA that permitting parties under investigation to seek discovery could impose unnecessary legal and other costs on parties that are not subject to investigation, and we find that permitting such discovery, even of materials gathered by the Board, also could unnecessarily obstruct and delay a Board-Initiated Investigation, which must be concluded within a specific timeline. We therefore decline to permit parties under investigation the right to seek discovery. In the event a party under investigation believes that a third party has information likely to be directly relevant to the investigation, the party under investigation should convey that to the Investigating Officer(s), who may then request that information from the relevant third parties.

Finally, AAR and NSR request that the Board eliminate or add certain other provisions related to the Board's collection of information and documentation during a

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<sup>12</sup> AAR also asks for the right to obtain discovery during a Formal Board Proceeding, which we decline to provide for in the final rules, but which may be considered on a case-by-case basis during Formal Board Proceedings.

Board-Initiated Investigation. First, AAR asks that the Board entirely eliminate the proposed regulation (proposed in the NPRM as 49 CFR 1122.11) titled “Certifications and false statements,” including subparagraph (b), which requires a party from whom documents are sought to submit a list of all documents withheld due to privilege, and subparagraph (c), which sets forth the criminal penalty for perjury. (AAR Comment 16-17.) Alternatively, AAR asks the Board to revise the “Certifications and false statements” provision to “require the person [producing documents] to confirm that it produced all responsive, non-privileged documents located after reasonable search and subject to any agreed-upon protocols regarding reduction of duplicative documents.” (AAR Comment 16.) AAR claims its language would allow a party to only have to produce one copy of a document, even if duplicative digital versions exist. Its language would also require a party to perform a “reasonable” search, rather than a “diligent” search, as proposed in the NPRM. Additionally, AAR asks that the Board adopt a “witness rights” provision in accordance with other agencies’ practices. (AAR Comment 17.) NGFA opposes AAR’s request to remove the “Certifications and false statements” provision. (NGFA Reply 8.)

We decline to eliminate the “Certifications and false statements” provision in its entirety, or its subparagraph (b) relating to the privilege log requirements. Subparagraphs (a) and (b) are necessary, as they would be the Investigating Officers’ primary means of ensuring that parties under investigation have conducted their due diligence and provided the Board with the information requested. However, we will grant AAR’s request

regarding agreed-upon protocols for duplicative documents. Accordingly, the final rules now expressly subject the “Certifications and false statements” provision to any search protocols that the Investigating Officer(s) and producing parties may agree upon. See section 1122.12. We also will change the description of the search from “diligent” to “reasonable.” In addition, at AAR’s suggestion (AAR Comment 16-17), we will remove the criminal penalty for perjury provision, as it is redundant in light of already-applicable federal law, see 18 U.S.C. 1001, 1621, and add a witness rights provision, which is included in the final rules at section 1122.11, in order to clarify the rights and responsibilities of witnesses. See also section 1122.10 (addressing the right of a witness to review his or her transcript).

Second, AAR and NSR request that the Board remove the attorney disqualification provision, proposed in the NPRM as section 1122.9(b), in which the Board would have the authority to exclude a particular attorney from further participation in any Board-Initiated Investigation in which the attorney is obstructing the Board-Initiated Investigation. (AAR Comment 18; NSR Comment 26-27.) After considering the comments, we will remove the attorney disqualification provision from the final rules, as the Board’s current rules governing attorney conduct sufficiently protect the integrity of any investigation. See e.g., 49 CFR 1103.12.

Exculpatory Evidence. AAR and NSR ask that the Board adopt in its final rules a mandatory disclosure provision, modeled after Brady v. Maryland, 373 U.S. 83, 88 (1963), to provide a party subject to investigation exculpatory and potentially exculpatory

evidence. (AAR Comment 13; NSR Comment 4, 32-35.) In Brady, the United States Supreme Court, in criminal proceedings, held that the Due Process clause of the Fifth Amendment requires the prosecutor to disclose exculpatory evidence material to guilt or punishment, known to the government but not known to the defendant. Currently, no statute or case law mandates the application of the Brady Rule to administrative agencies,<sup>13</sup> though some agencies such as the Securities and Exchange Commission and the Commodities Futures Trading Commission have adopted varying versions of the Brady Rule.

The Board recognizes the merits of the Brady Rule and expects to employ the practice of disclosing exculpatory evidence if the Board were to open a Formal Board Proceeding following the conclusion of a Board-Initiated Investigation involving any criminal provisions of 49 U.S.C. Subtitle IV, Part A. However, because (1) most Board-Initiated Investigations will not likely involve any such criminal provisions, (2) Board-Initiated Investigations only determine if the Board should open a Formal Board Proceeding, and (3) any remedy that may result from an investigation must be prospective only, the Brady Rule does not appear directly applicable, and the Board will not codify it in the final rules adopted here.

Recommendations and Summary of Findings. As proposed in the NPRM, Investigating Officer(s) would be required to conclude the Board-Initiated Investigation

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<sup>13</sup> Mister Discount Stockbrokers v. SEC, 768 F.2d 875, 878 (7th Cir. 1985); Zandford v. NASD, 30 F. Supp. 2d 1, 22 n.12 (D.C. Cir. 1998), NLRB v. Nueva Eng'g. Inc., 761 F.2d 961, 969 (4th Cir. 1985).

no later than 275 days after issuance of the Order of Investigation and, at that time, submit to the Board and parties under investigation any recommendations made as a result of the Board-Initiated Investigation and a summary of findings that support such recommendations.

The NPRM also provided an optional process whereby Investigating Officer(s), in their discretion and time permitting, could present (orally or in writing) their recommendations and/or summary of findings to parties under investigation *prior to* submitting this information to the Board Members. The NPRM stated that, in such cases, the Investigating Officer(s) would be required to permit the parties under investigation to submit a written response to the recommendations and/or summary of findings. The Investigating Officer(s) would then submit their recommendations and summary of findings, as well as any response from the parties under investigation, to the Board members and parties under investigation.

In response, AAR and NSR request that the Board make this optional process mandatory.<sup>14</sup> (AAR Comment 19; NSR Comment 4, 23-25.) Alternatively, AAR asks that if the Board does not make this process mandatory, the Board require Investigating Officer(s) to provide their recommendations and summary of findings to parties at the same time they are submitted to Board Members.

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<sup>14</sup> NSR cites to 5 U.S.C. 557(c) as requiring this process to be mandatory. However, 5 U.S.C. 557 applies to hearings in rulemakings or adjudications. See 5 U.S.C. 553, 554, 556, & 557(a). Because the recommendations and findings at issue here address only whether to open a proceeding in which the Board would make a decision, 5 U.S.C. 557(c) is not applicable.

The Board intends that Investigating Officer(s), when possible, will utilize the optional process of presenting their recommendations and summary of findings to parties under investigation prior to submitting them to the Board Members. However, given the one-year deadline for concluding Board-Initiated Investigations, the Board will not make this process mandatory, as there may be circumstances in which Investigating Officer(s) cannot complete their recommendations and summary of findings sufficiently in advance of the one-year deadline to allow them to be presented to the party under investigation prior to submission to the Board. In such cases, the Investigating Officer(s) will provide their recommendations and summary of findings to parties at the same time they are submitted to the Board Members. This is provided for in the final rules at section 1122.5(c), which states that the Investigating Officer(s) must submit their recommendations and summary of findings to the Board and parties under investigation within 275 days.

With respect to parties' responses to Investigating Officers' recommendations and summary of findings, AAR also requests that the Board clarify that parties have the right to submit arguments in their response to Board staff's recommendations and summary of findings. AAR also argues that the Board should increase the 15-page limit for parties' responses to Board staff's recommendations and summary of findings, but if not, then clarify that the party's supporting data, evidence, and verified statements would not count towards the 15-page limit. We will grant AAR's requests, as they would provide the Board with more information in determining whether further action is warranted

following a Board-Initiated Investigation. The final rules now provide that: parties have the right to submit arguments in their response to Board staff's recommendations and summary of findings; supporting data, evidence, and verified statements do not count towards the page limit of such responses; and parties may submit written statements responding to the Investigating Officers' recommendations and summary of findings of up to 20 pages. See App. A to Pt. 1122 (stating "parties under investigation may submit a written statement...[that] shall be no more than 20 pages, not including any supporting data, evidence, and verified statements that may be attached...setting forth the views of the parties under investigation of factual or legal matters or other arguments relevant to the commencement of a Formal Board Proceeding").

### C. Formal Board Proceeding

As proposed in the NPRM, the Formal Board Proceeding refers to a public proceeding that may be instituted by the Board pursuant to an Order to Show Cause after a Board-Initiated Investigation has been conducted. With respect to the Formal Board Proceeding phase, commenters express concerns relating to (1) the duration of the Formal Board Proceeding, (2) the standard for commencing a Formal Board Proceeding, and (3) the Order to Show Cause.

Duration of the Formal Board Proceeding. As proposed in the NPRM, there are no time limits for the Formal Board Proceeding. However, NSR argues that the Formal Board Proceeding should be included in the statutorily-mandated one-year time limit on investigations, based on the plain language of Section 12 of the STB Reauthorization Act,

federal court precedent interpreting administrative finality, and other provisions in the Board's governing statute. (NSR Comment 6-8.) We address each of NSR's arguments in turn.

According to NSR, because 49 U.S.C. 11701(d)(6) states that the Board must "dismiss any investigation that is not concluded by the Board with administrative finality within 1 year after the date on which it was commenced," the Board must either dismiss the Board-Initiated Investigation or decide on the merits of the Formal Board Proceeding within one year of opening the Board-Initiated Investigation. (NSR Comment 6-7.) However, such an interpretation directly contradicts the Senate Report for the STB Reauthorization Act, which clearly excludes the Formal Board Proceeding from the statute's one-year deadline on Board-Initiated Investigations, stating:

The requirement to dismiss any investigation that is not concluded within 1 year after the date on which it was commenced would only include the time period needed to generate recommendations and summary of findings. The time period needed to complete a proceeding, after receipt of the recommendations and summary of findings, would not be included in the 1 year timeline for investigations.

S. Rep. No. 114-52, at 13 (2015).

NSR nonetheless states that the Senate Report "is trumped by the unambiguous new section 11701(d)(6)," arguing that "administrative finality" is "a known term of art with a specific definition, thus precluding any need to rely on legislative history." As

support, NSR, among other cases, compares the Board’s proposed investigation process to Newport Galleria Group v. Deland, 618 F. Supp. 1179 (D.C. Cir. 1985), in which the court found that the Environmental Protection Agency’s commencement of an investigation did not constitute final agency action. (NSR Comment 6-7.)<sup>15</sup> In Newport Galleria Group, however, the question was whether judicial review of the initiation of an investigation was proper. Newport Galleria Group, 618 F. Supp. at 1185. Here, under 49 U.S.C. 11701(d)(6), the question is whether the Board’s conclusion of an investigation and opening of a Formal Board Proceeding—as opposed to the initiation of an investigation—constitutes administratively final action for purposes of Section 12 of the STB Reauthorization Act.

Moreover, under 49 U.S.C. 11701(d)(7), which immediately follows the requirement that the Board conclude a Board-Initiated Investigation with administrative finality within one year, the Board’s options for concluding the Board-Initiated

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<sup>15</sup> NSR also cites Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591 (1944) (determining that findings from an investigation are preliminary), Reliable Automatic Sprinkler Co. v. Consumer Prod. Safety Commission, 324 F.3d 726 (D.C. Cir. 2003) (finding that the Consumer Product Safety Commission’s (1) investigation of a manufacturer’s product, (2) statement of “intention to make a preliminary determination that the [product] present[ed] a substantial hazard” and (3) “request for voluntary corrective action” did not constitute final agency action under the Administrative Procedure Act), and Tenneco, Inc. v. FERC, 688 F.2d 1018 (5th Cir. 1982) (finding the Federal Energy Regulatory Commission’s decision terminating an adjudicatory proceeding and instituting an investigation of the matter to be a non-final order for purposes of judicial review). These cases are not controlling as to the definition of “administrative finality” for Board-Initiated Investigations for the same reasons as discussed below with respect to Newport Galleria Group involving 49 U.S.C. 11701(d)(6) & (7).

Investigation, and thus satisfying the requirement in section 11701(d)(6), are to “dismiss the investigation if no further action is warranted” or “initiate a proceeding to determine if a provision under this part has been violated.” We read section 11701(d)(6), in conjunction with section 11701(d)(7), as stating that the Board must dismiss investigations that have not been concluded within a year (i.e., concluded either by dismissal because no further action is warranted, or by the opening of a Formal Board Proceeding). While the meaning of “administrative finality” within section 10701(d)(6) may need to be defined in the future, the language of the statute and the Senate Report support not including the Formal Board Proceeding in the one-year deadline for concluding the Board-Initiated Investigation pursuant to Section 12(b) of the STB Reauthorization Act.

Additionally, NSR states that “other provisions of the Board’s governing statute reinforce that administrative finality occurs only with [a] Board decision.” (NSR Comment 8.) Specifically, NSR cites 49 U.S.C. 11701(e)(7), which “permits judicial review upon conclusion of the Formal Board Proceeding,” and 49 U.S.C. 722(d),<sup>16</sup> which states that “an action of the Board under this section is final on the date on which it is served,” for the proposition that “administrative finality occurs only with the Board decision” issued upon conclusion of the Formal Board Proceeding. (NSR Comment 8.) However, the relevant governing statutory provisions for concluding a Board-Initiated

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<sup>16</sup> The STB Reauthorization Act redesignated 49 U.S.C. 722(d) as 49 U.S.C. 1322(d).

Investigation—which are more specific to the process at issue than those cited by NSR—are 49 U.S.C. 11701(d)(6) & (7), which, as previously explained, provide that the Board conclude an investigation with administrative finality within one year by either “dismiss[ing] the investigation if no further action is warranted” or “initiat[ing] a proceeding to determine if a provision under this part has been violated.” The final rules, therefore, continue to impose no time limit on Formal Board Proceedings. See sections 1122.1(b) & 1122.5(e).

Standard for Opening a Formal Board Proceeding. AAR asks the Board to clarify the standard for commencing a Formal Board Proceeding, specifically requesting that the Board require that there be “reasonable cause” to believe that a violation of 49 U.S.C. Subtitle IV, Part A occurred.<sup>17</sup> (AAR Comment 20-21.) As discussed above,<sup>18</sup> the Board declines to adopt this “reasonable cause” standard for initiating a Board-Initiated Investigations because it would require a higher standard than imposed by the statute. For that same reason, the Board declines to adopt this standard for opening a Formal Board Proceeding. The final rules therefore maintain, in accordance with Section 12 of the STB Reauthorization Act, that the Board shall dismiss a Board-Initiated Investigation

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<sup>17</sup> AAR also requests that the Board include in the standard for opening a Formal Board Proceeding that the Board base its decision on the results of the Board-Initiated Investigation. (AAR Comment 20-21.) The Board declines to expressly include such a requirement in the final rules, as the final rules mirror the statutory standard for opening a Formal Board Proceeding.

<sup>18</sup> See supra Part B: Standard for Opening a Board-Initiated Investigation.

if no further action is warranted, or shall initiate a Formal Board Proceeding to determine whether any provision of 49 U.S.C. Subtitle IV, Part A has been violated.

Order to Show Cause. With respect to the Order to Show Cause, AAR asks that the Board clarify that the burden of proof remains on the agency to prove that a violation of 49 U.S.C. Subtitle IV, Part A occurred. (AAR Comment 20-21.) We affirm that the Order to Show Cause does not change the burden of proof from the requirements of Section 12 of the STB Reauthorization Act for proving that a violation of 49 U.S.C. Subtitle IV, Part A occurred.

Additionally, NSR asks that the Board require that the Order to Show Cause state the issues to be considered in the Formal Board Proceeding. (NSR Comment 4, 30-32.) We find this request to be reasonable, as a party subject to a Formal Board Proceeding should have notice as to the issues that will be publicly considered by the Board. Based on NSR's comment, the final rules include a requirement that the Order to Show Cause state the issues to be considered during the Formal Board Proceeding. See section 1122.5(e) (stating "[t]he Order to Show Cause shall state the basis for, and the issues to be considered during, the Formal Board Proceeding and set forth a procedural schedule").

#### D. Other Related Issues

Separation of Investigative and Decisionmaking Functions. In the NPRM, the Board proposed to separate the investigative and decisionmaking functions of Board staff to the extent practicable, in accordance with the requirements of Section 12 of the STB

Reauthorization Act. Although NGFA supports the Board’s proposal, AAR requests that the “rules expressly state that the Board will separate investigative and decisionmaking functions of staff” and NSR requests that the Board remove from the final rules the phrase “to the extent practicable.” (AAR Comment 11-12; NSR Comments 13, 20.)

The NPRM’s proposed language expressly tracked 49 U.S.C. 11701(d)(5), which states that in any investigation commenced on the Board’s own initiative, the Board must “to the extent practicable, separate the investigative and decisionmaking functions of staff.” Although AAR argues that this is insufficient, as it is merely a “ritualistic incantation of [the] statutory language,” the NPRM also proposed that the Order of Investigation would identify the Investigating Officer(s) and provided that parties subject to investigation could submit written materials to the Board Members at any time. As a result, parties that feel that the investigative and decisionmaking functions of staff are not properly separated may express their concerns in writing directly to the Board during the course of a Board-Initiated Investigation or Formal Board Proceeding. See section 1122.13. Moreover, the Board declines to remove the phrase “to the extent practicable” from the final rules because doing so would not be in full compliance with the statutory language of Section 12 of the STB Reauthorization Act.

AAR further asks that the Board explain “any instances where it may not be practicable to separate these functions.” AAR also requests that the Board include in the final rules provisions ensuring the separation of investigatory and decisionmaking functions, such as requirements that the Board “[i]dentify all staff who work in an

investigation, not just the Investigating Officers” and “[n]otify Board Members, decisional staff within the Board, and parties subject to investigation who has been designated investigation staff for any particular Board-Initiated Investigation.” (AAR Comment 11-12.)

The Board declines to describe instances where it may not be practicable to separate these functions. Based on AAR’s comment, however, we clarify that our intent is that any Board staff substantively working on a Board-Initiated Investigation would be identified as an Investigating Officer. To better reflect this intent, the final rules now require that the Order of Investigation “identify all Board staff who are authorized to conduct the investigation as Investigating Officer(s).” See section 1122.4. Additionally, Board Members would be notified regarding who has been designated as investigative staff for any particular Board-Initiated Investigation because Board Members would have to issue an Order of Investigation, which, according to the final rules at section 1122.4, would include the names of the Investigating Officers.

Ex Parte Communications. Section 12(c)(3) of the STB Reauthorization Act requires the Board, in issuing rules implementing its investigatory authority, to take into account ex parte constraints. Consistent with analogous ex parte constraints in other proceedings at the Board, the NPRM proposed that, as a matter of policy, the Board Members would not engage in off-the-record verbal communications concerning the matters under investigation with parties subject to Board-Initiated Investigations.

However, the NPRM provided that parties under investigation would have the right to submit written statements to the Board at any time.

Jersey City and NSR ask the Board to revise the NPRM's approach to ex parte communications. First, Jersey City asks that the Board remove the NPRM's provision allowing any party subject to a Board-Initiated Investigation to submit to the Board written statements at any time during the Board-Initiated Investigation. (Jersey City Comment 16.) Second, NSR requests that the Board restrict ex parte communications between Investigating Officers and Board staff conducting Preliminary-Fact Finding and other Board staff, as well as Board Members involved in the Formal Board Proceeding. Finally, NSR states that, should such communications occur, Section 5 and Section 12 of the STB Reauthorization Act should apply. (NSR Comment 3, 20-21.)

The Board declines to adopt Jersey City's and NSR's proposals regarding ex parte communications. As explained above, the final rules require the Board to identify in the Order of Investigation (which would be voted on by the Board Members) all Board staff conducting a Board-Initiated Investigation. Therefore, Board Members and their staffs would know with whom to restrict their communications to avoid ex parte issues. Additionally, the final rules continue to provide parties under investigation with the ability to notify the Board in writing of any facts or circumstances relating to the investigation, including potentially prohibited ex parte communications. See 49 CFR 1122.13. As such, the Board would address any ex parte issues that may arise on a case-by-case basis as raised by the parties subject to investigation.

Settlement. The NPRM proposed that, during Board-Initiated Investigations, the Investigating Officer(s) would be able to engage in settlement negotiations with parties under investigation and that, if at any time during the investigation, the Investigating Officer(s) and parties under investigation were to reach a tentative settlement agreement, the Investigating Officer(s) would submit the settlement agreement as part of their proposed recommendations to the Board Members for approval or disapproval, along with the summary of findings supporting the proposed agreement. As proposed in the NPRM, the Board would then decide whether to approve the agreement and/or dismiss the investigation or open a Formal Board Proceeding in accordance with the NPRM's proposed procedural rules. In response to this proposal, NGFA comments that the settlement process is too "nontransparent." However, for the reasons provided above with respect to confidentiality,<sup>19</sup> the Board declines to require that the settlement process be public or to permit third-party involvement in the process. Therefore, as a matter of policy, the Board maintains the settlement process as proposed in the NPRM.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis

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<sup>19</sup> See supra Part B: Confidentiality.

available for public comment. 5 U.S.C. 601-604. Under section 605(b), an agency is not required to perform an initial or final regulatory flexibility analysis if it certifies that the proposed or final rules will not have a “significant impact on a substantial number of small entities.”

Because the goal of the RFA is to reduce the cost to small entities of complying with federal regulations, the RFA requires an agency to perform a regulatory flexibility analysis of small entity impacts only when a rule directly regulates those entities. In other words, the impact must be a direct impact on small entities “whose conduct is circumscribed or mandate” by the proposed rule. White Eagle Coop. Ass’n v. Conner, 553 F.3d 467, 478, 480 (7th Cir. 2009). An agency has no obligation to conduct a small entity impact analysis of effects on entities that it does not regulate. United Distrib. Cos. V. FERC, 88 F.3d 1105, 1170 (D.C. Cir. 1996).

In the NPRM, the Board certified under 5 U.S.C. 605(b) that the proposed rule would not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. The Board explained that the proposed rule would not place any additional burden on small entities, but rather clarify an existing obligation. The Board further explained that, even assuming for the sake of argument that the proposed regulation were to create an impact on small entities, which it would not, the number of small entities so affected would not be substantial. No parties submitted comments on this issue. A copy of the NPRM was served on the U.S. Small Business Administration (SBA).

The final rule adopted here revises the rules proposed in the NPRM. However, the same basis for the Board's certification of the proposed rule applies to the final rules adopted here. The final rules would not create a significant impact on a substantial number of small entities, as the regulations would only specify procedures related to investigations of matters of regional or national significance conducted on the Board's own initiative and do not mandate or circumscribe the conduct of small entities.

Therefore, the Board certifies under 5 U.S.C. 605(b) that the final rules will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

List of Subjects in 49 CFR Part 1122

Investigations.

It is ordered:

1. The final rules set forth below are adopted and will be effective on January 13, 2017.
2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.
3. This decision is effective on January 13, 2017.

Decided: December 7, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Jeffrey Herzig

Clearance Clerk

For the reasons set forth in the preamble, the Surface Transportation Board amends title 49, chapter X, subchapter B, of the Code of Federal Regulations by adding part 1122 to read as follows:

**PART 1122—BOARD-INITIATED INVESTIGATIONS**

Sec.

1122.1 Definitions.

1122.2 Scope and applicability of this part.

1122.3 Preliminary Fact-Finding.

1122.4 Board-Initiated Investigations.

1122.5 Procedural rules.

1122.6 Confidentiality.

1122.7 Request for confidential treatment.

1122.8 Limitation on participation.

1122.9 Power of persons conducting Board-Initiated Investigations.

1122.10 Transcripts.

1122.11 Rights of witnesses.

1122.12 Certifications and false statements.

1122.13 Right to submit statements.

Appendix A to Part 1122 – Informal Procedure Relating to Recommendations and Summary of Findings from the Board-Initiated Investigation

Authority: 49 U.S.C. 1321, 11144, 11701.

**§ 1122.1 Definitions.**

(a) *Board-Initiated Investigation* means an investigation instituted by the Board pursuant to an Order of Investigation and conducted in accordance with Section 12 of the Surface Transportation Board Reauthorization Act of 2015, now incorporated and codified at 49 U.S.C. 11701.

(b) *Formal Board Proceeding* means a public proceeding instituted by the Board pursuant to an Order to Show Cause after a Board-Initiated Investigation has been conducted.

(c) *Investigating officer(s)* means the individual(s) designated by the Board in an Order of Investigation to conduct a Board-Initiated Investigation.

(d) *Preliminary Fact-Finding* means an informal fact-gathering inquiry conducted by Board staff prior to the opening of a Board-Initiated Investigation.

**§ 1122.2 Scope and applicability of this part.**

This part applies only to matters subject to Section 12 of the Surface Transportation Board Reauthorization Act of 2015, 49 U.S.C. 11701.

**§ 1122.3 Preliminary Fact-Finding.**

The Board staff may, in its discretion, conduct nonpublic Preliminary Fact-Finding, subject to the provisions of § 1122.6, to determine if a matter presents an alleged violation that could be of national or regional significance and subject to the Board's jurisdiction under 49 U.S.C. Subtitle IV, Part A, and warrants a Board-Initiated Investigation. Board staff shall inform the subject of Preliminary Fact-Finding that Preliminary Fact-Finding has commenced. Where it appears from Preliminary Fact-Finding that a Board-Initiated Investigation is warranted, staff shall so recommend to the Board. Where it appears from the Preliminary Fact-Finding that a Board-Initiated Investigation is not warranted, staff shall conclude its Preliminary Fact-Finding and notify any parties involved that the process has been terminated.

**§ 1122.4 Board-Initiated Investigations.**

The Board may, in its discretion, commence a nonpublic Board-Initiated Investigation of any matter of national or regional significance that is subject to the jurisdiction of the Board under 49 U.S.C. Subtitle IV, Part A, subject to the provisions of § 1122.6, by issuing an Order of Investigation. Orders of Investigation shall state the basis for the Board-Initiated Investigation and identify all Board staff who are authorized to conduct the investigation as Investigating Officer(s). The Board may add or remove Investigating Officer(s) during the course of a Board-Initiated Investigation. To the extent practicable, an Investigating Officer shall not participate in any decisionmaking

functions in any Formal Board Proceeding(s) opened as a result of any Board-Initiated Investigation(s) that he or she conducted.

**§ 1122.5 Procedural rules.**

(a) After notifying the party subject to Preliminary Fact-Finding that Preliminary Fact-Finding has commenced, the Board staff shall, within a reasonable period of time, either:

(1) Conclude Preliminary Fact-Finding and notify any parties involved that the process has been terminated; or

(2) Recommend to the Board that a Board-Initiated Investigation is warranted.

(b) Not later than 30 days after commencing a Board-Initiated Investigation, the Investigating Officer(s) shall provide the parties under investigation a copy of the Order of Investigation. If the Board adds or removes Investigating Officer(s) during the course of the Board-Initiated Investigation, it shall provide written notification to the parties under investigation.

(c) Not later than 275 days after issuance of the Order of Investigation, the Investigating Officer(s) shall submit to the Board and the parties under investigation:

(1) Any recommendations made as a result of the Board-Initiated Investigation; and

(2) A summary of the findings that support such recommendations.

(d) Not later than 90 days after receiving the recommendations and summary of findings, the Board shall decide whether to dismiss the Board-Initiated Investigation if no further action is warranted or initiate a Formal Board Proceeding to determine whether any provision of 49 U.S.C. Subtitle IV, Part A, has been violated in accordance with section 12 of the Surface Transportation Board Reauthorization Act of 2015. The Board shall dismiss any Board-Initiated Investigation that is not concluded with administrative finality within one year after the date on which it was commenced.

(e) A Formal Board Proceeding commences upon issuance of a public Order to Show Cause. The Order to Show Cause shall state the basis for, and the issues to be considered during, the Formal Board Proceeding and set forth a procedural schedule.

**§ 1122.6 Confidentiality.**

(a) All information and documents obtained under § 1122.3 or § 1122.4, whether or not obtained pursuant to a Board request or subpoena, and all activities conducted by the Board under this part prior to the opening of a Formal Board Proceeding, shall be treated as nonpublic by the Board and its staff except to the extent that:

(1) The Board, in accordance with 49 CFR 1001.4(c), (d), and (e), directs or authorizes the public disclosure of activities conducted under this part prior to the opening of a Formal Board Proceeding. If any of the activities

being publicly disclosed implicate records claimed to be confidential commercial information, the Board shall notify the submitter prior to disclosure in accordance with 49 CFR 1001.4(b) and provide an opportunity to object to disclosure in accordance with 49 CFR 1001.4(d);

(2) The information or documents are made a matter of public record during the course of an administrative proceeding; or

(3) Disclosure is required by the Freedom of Information Act, 5 U.S.C. 552 or other relevant provision of law.

(b) Procedures by which persons submitting information to the Board pursuant to this part of title 49, chapter X, subchapter B, of the Code of Federal Regulations may specifically seek confidential treatment of information for purposes of the Freedom of Information Act disclosure are set forth in § 1122.7. A request for confidential treatment of information for purposes of Freedom of Information Act disclosure shall not, however, prevent disclosure for law enforcement purposes or when disclosure is otherwise found appropriate in the public interest and permitted by law.

**§ 1122.7 Request for confidential treatment.**

Any person that produces documents to the Board pursuant to § 1122.3 or § 1122.4 may claim that some or all of the information contained in a particular document or documents is exempt from the mandatory public disclosure requirements of the Freedom of Information Act (FOIA), 5 U.S.C. 552, is

information referred to in 18 U.S.C. 1905, or is otherwise exempt by law from public disclosure. In such case, the person making such a claim shall, at the time the person produces the document to the Board, indicate on the document that a request for confidential treatment is being made for some or all of the information in the document. In such case, the person making such a claim also shall file a brief statement specifying the specific statutory justification for non-disclosure of the information in the document for which confidential treatment is claimed. If the person states that the information comes within the exception in 5 U.S.C. 552(b)(4) for trade secrets and commercial or financial information, and the information is responsive to a subsequent FOIA request to the Board, 49 CFR 1001.4 shall apply.

**§ 1122.8 Limitation on participation.**

No party who is not the subject of a Board-Initiated Investigation may intervene or participate as a matter of right in any such Board-Initiated Investigation under this part.

**§ 1122.9 Power of persons conducting Board-Initiated Investigations.**

The Investigating Officer(s), in connection with any Board-Initiated Investigation, may interview or depose witnesses, inspect property and facilities, and request and require the production of any information, documents, books, papers, correspondence, memoranda, agreements, or other records, in any form or media, that are likely to be directly relevant to the issues of the Board-Initiated

Investigation. The Investigating Officer(s), in connection with a Board-Initiated Investigation, also may issue subpoenas, in accordance with 49 U.S.C. 1321, to compel the attendance of witnesses, the production of any of the records and other documentary evidence listed above, and access to property and facilities.

**§ 1122.10 Transcripts.**

Transcripts, if any, of investigative testimony shall be recorded solely by the official reporter or other person or by means authorized by the Board or by the Investigating Officer(s). A witness who has given testimony pursuant to this part shall be entitled, upon written request, to procure a transcript of the witness' own testimony or, upon proper identification, shall have the right to inspect the official transcript of the witness' own testimony.

**§ 1122.11 Rights of witnesses.**

(a) Any person who is compelled or requested to furnish documentary evidence or testimony in a Board-Initiated Investigation shall, upon request, be shown the Order of Investigation. Copies of Orders of Investigation shall not be furnished, for their retention, to such persons requesting the same except with the express approval of the Chairman.

(b) Any person compelled to appear, or who appears in person at a Board-Initiated Investigation by request or permission of the Investigating Officer may be accompanied, represented, and advised by counsel, as provided by the Board's regulations.

(c) The right to be accompanied, represented, and advised by counsel shall mean the right of a person testifying to have an attorney present with him during any aspect of a Board-Initiated Investigation and to have this attorney advise his client before, during and after the conclusion of such examination.

**§ 1122.12 Certifications and false statements.**

(a) When producing documents under § 1122.4, the producing party shall submit a statement certifying that such person has made a reasonable search for the responsive documents and is producing all the documents called for by the Investigating Officer(s), subject to any search protocols agreed to by the Investigating Officer(s) and producing parties. If any responsive document(s) are not produced for any reason, the producing party shall state the reason therefor.

(b) If any responsive documents are withheld because of a claim of the attorney-client privilege, work product privilege, or other applicable privilege, the producing party shall submit a list of such documents which shall, for each document, identify the attorney involved, the client involved, the date of the document, the person(s) shown on the document to have prepared and/or sent the document, and the person(s) shown on the document to have received copies of the document.

**§ 1122.13 Right to submit statements.**

Any party subject to a Board-Initiated Investigation may, at any time during the course of a Board-Initiated Investigation, submit to the Board written statements

of facts or circumstances, with any relevant supporting evidence, concerning the subject of that investigation.

**Appendix A to Part 1122 – Informal Procedure Relating to Recommendations and Summary of Findings from the Board-Initiated Investigation**

(a) After conducting sufficient investigation and prior to submitting recommendations and a summary of findings to the Board, the Investigating Officer, in his or her discretion, may inform the parties under investigation (orally or in writing) of the proposed recommendations and summary of findings that may be submitted to the Board. If the Investigating Officer so chooses, he or she shall also advise the parties under investigation that they may submit a written statement, as explained below, to the Investigating Officer prior to the consideration by the Board of the recommendations and summary of findings. This optional process is in addition to, and does not limit in any way, the rights of parties under investigation otherwise provided for in this part.

(b) Unless otherwise provided for by the Investigating Officer, parties under investigation may submit a written statement, as described above, within 14 days after of being informed by the Investigating Officer of the proposed recommendation(s) and summary of findings. Such statements shall be no more than 20 pages, not including any supporting data, evidence, and verified statements that may be attached to the written statement, double spaced on 8 ½ by 11 inch paper, setting forth the views of the parties under investigation of factual

or legal matters or other arguments relevant to the commencement of a Formal Board Proceeding. Any statement of fact included in the submission must be sworn to by a person with personal knowledge of such fact.

(c) Such written statements, if the parties under investigation choose to submit, shall be submitted to the Investigating Officer. The Investigating Officer shall provide any written statement(s) from the parties under investigation to the Board at the same time that he or she submits his or her recommendations and summary of findings to the Board.

[FR Doc. 2016-29902 Filed: 12/13/2016 8:45 am; Publication Date: 12/14/2016]