



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 234

[Docket No. FRA-2018-0096, Notice No. 2]

RIN 2130-AC72

State Highway-Rail Grade Crossing Action Plans

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

ACTION: Final rule.

SUMMARY: FRA is issuing this final rule in response to the Fixing America's Surface Transportation Act mandate that FRA issue a rule requiring 40 States and the District of Columbia to develop and implement highway-rail grade crossing action plans. This final rule also requires ten States that developed highway-rail grade crossing action plans as required by the Rail Safety Improvement Act of 2008 and FRA's implementing regulation to update their plans and submit reports to FRA describing actions they have taken to implement them.

DATES: This final rule is effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: *Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> and follow the online instructions for accessing the docket.

FOR FURTHER INFORMATION CONTACT: James Payne, Staff Director, Highway-Rail Crossing and Trespasser Programs Division (telephone: 202-493-6005); Debra Chappell, Transportation Specialist (telephone: 202-493-6018); or Kathryn Gresham, Attorney Adviser, Office of the Chief Counsel (telephone: 202-493-6063).

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I. Executive Summary

This final rule revises FRA's regulation (49 CFR 234.11) on State highway-rail grade crossing action plans (Action Plans) to require 40 States and the District of Columbia (D.C.) to develop and implement FRA-approved Action Plans. The final rule also requires ten States that were previously required to develop Action Plans by the Rail Safety Improvement Act of 2008¹ (RSIA) and FRA's implementing regulation at 49 CFR 234.11 to update their plans and submit reports describing the actions they have taken to implement their plans.

¹ Pub. L. 110-432.

This final rule is intended to implement the Fixing America's Surface Transportation Act (FAST Act) mandate that the FRA Administrator promulgate a regulation requiring States to develop, implement (and update, if applicable) Action Plans.² In RSIA, Congress directed the Secretary of Transportation (Secretary) to identify the ten States that had the most highway-rail grade crossing (GX) collisions, on average, over the previous three years, and require those States to develop Action Plans for the Secretary's approval.³ RSIA required the Action Plans to "identify specific solutions for improving" grade crossing safety and to "focus on crossings that have experienced multiple accidents or are at high risk" for accidents. Using FRA's database of reported GX accidents/incidents that occurred at public and private grade crossings, FRA determined the following ten States had the most reported GX accidents/incidents at public and private grade crossings during the three-year period from 2006 through 2008: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas. Therefore, on June 28, 2010, FRA issued a final rule (2010 final rule) requiring these ten States to develop Action Plans and submit them to FRA for approval (based on the Secretary's delegation of authority to the Federal Railroad Administrator in 49 CFR 1.89).⁴

Section 11401 of the FAST Act (Section 11401)⁵ tasks the FRA Administrator with promulgating a regulation requiring these ten States to update the Action Plans they previously submitted to FRA under 49 CFR 234.11. This statutory mandate also directs FRA to include a regulatory provision that requires each of these ten States to submit a report to FRA describing: (a) what the State did to implement its previous Action Plan;

² 49 U.S.C. 11401.

³ RSIA, Sec. 202.

⁴ 75 FR 36551 (June 28, 2010) (codified at 49 CFR 234.11).

⁵ 49 U.S.C. 11401.

and (b) how the State will continue to reduce GX safety risks. As for the other 40 States and D.C., Section 11401(b)(1)(B) requires the FRA Administrator to promulgate a regulation requiring them to develop and implement State Action Plans.

The FAST Act mandate contains specific requirements for the contents of the Action Plans. As set forth in Section 11401(b)(2), each Action Plan must identify GXs that: (a) have experienced recent GX accidents or incidents; (b) have experienced multiple GX accidents or incidents; or (c) are at high-risk for accidents or incidents. Section 11401(b)(2) further provides that each Action Plan must identify specific strategies for improving safety at GXs, including GX closures or grade separations, and that each State Action Plan must designate a State official responsible for managing implementation of the plan.

In addition, the FAST Act mandate contains requirements related to FRA's review and approval of State Action Plans, as well as requirements related to the publication of FRA-approved plans. For example, when FRA approves a State's Action Plan, Section 11401(b)(4) requires FRA to make the approved plan publicly available on an "official Internet Web site."

If a State submits an Action Plan FRA deems incomplete or deficient, Section 11401(b)(6) requires FRA to notify the State of the specific areas in which the plan is deficient. In addition, Section 11401(b)(6) requires States to correct any identified deficiencies and resubmit their corrected plans to FRA within 60 days from FRA's notification of the deficiency. If a State fails to meet this 60-day deadline for correcting deficiencies identified by FRA, Section 11401(b)(8) requires FRA to post a notice on an "official Internet Web site" that the State has an incomplete or deficient Action Plan.

FRA personnel, including FRA regional grade crossing managers, inspectors, and specialists and experts from FRA's Highway-Rail Crossing and Trespasser Programs

Division, are available to assist States with developing, implementing, and updating their Action Plans. For example, as further explained in the Section-by-Section Analysis below, FRA will offer webinars as well as provide GX accident/incident data to States upon request. FRA will also assist State agencies that wish to use FRA's Office of Safety Analysis website (<https://railroads.dot.gov/safety-data>) to generate customized reports of GX accident/incident data.

II. Funding

FRA received comments recommending that Federal funding should be available to offset the costs associated with State efforts to develop and update Action Plans, as required by this final rule. Delaware DOT (DeIDOT) commented that dedicated funding should be available for States to develop and implement their Action Plans as required by FRA, while the Vermont Agency of Transportation (VTrans) submitted comments encouraging FRA to include funding to States in carrying out this requirement. Otherwise, DeIDOT asserted that the costs associated with developing and implementing an Action Plan would prohibit or delay the State's implementation of safety improvements.

The statutory mandate for this rulemaking did not contain any provision that would authorize dedicated Federal funding for the Action Plans. However, Section 11401(d) allows for States to use Federal funds allocated through the Federal Highway Administration's (FHWA) Railway-Highway Crossings (Section 130) Program to develop and update their Action Plans as required by this final rule. In addition, the two percent limitation on the use of Section 130 funds apportioned to a State allowed by 23 U.S.C. 130(k) for the compilation and analysis of data in support of the Rail-Highway Crossings Program annual reports does not restrict the use of Section 130 funds to develop or update Action Plans. However, FRA recommends States contact their local

FHWA Division Office for more information, if they have questions about the use of Section 130 funds or any other FHWA-administered funds to develop or update their Action Plans.

Minnesota DOT (MNDOT) submitted comments requesting specific guidance on how States may use Section 130 funds to develop their Action Plans. In particular, MNDOT asked if States may use Section 130 funds to offset the cost of developing Action Plans at 100 percent funding, or whether States will be required to come up with a 10 percent match. In addition, if States will be required to come up with a 10 percent match, MNDOT asked if the State of Minnesota can use funds in its Grade Crossing Safety Account as the 10 percent match. Under 23 U.S.C. 130(f)(3), the Federal share of rail-highway crossing projects using Section 130 set-aside funds is 90 percent. The question regarding State of Minnesota Grade Crossing Safety Account funds falls outside the scope of this rulemaking, as the State of Minnesota administers the distribution of State funding. As such, FRA recommends that MNDOT coordinate with the appropriate agency to obtain guidance on that issue.

III. Section-by-Section Analysis

Section 234.1 Scope

This section discusses the scope of part 234. As proposed in the notice of proposed rulemaking (NPRM),⁶ FRA is revising paragraph (a)(3) to reflect the revised requirements contained in 49 CFR 234.11 as a result of the FAST Act mandate and indicate that these revised requirements are within the scope of this part.

Section 234.5 Definitions

⁶ 84 FR 60032 (Nov. 7, 2019).

Although FRA proposed no new definitions in the NPRM, after reviewing the comments received in response to the NPRM, in this final rule, FRA is adding definitions for three terms used in § 234.11 to the list of definitions in § 234.5.

The first definition FRA is adding is the definition of the term “accident/incident,” which FRA is adopting, in part, from the definition of the term in 49 CFR 225.5. Specifically, this final rule defines “accident/incident” as any impact between railroad on-track equipment and a highway user at a GX or pathway grade crossing (PX). The definition further notes that the term “highway user” includes automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, pedestrians, and all other modes of surface transportation, motorized and un-motorized.

FRA received a number of comments on its proposal to replace the term “collisions” in § 234.11(a) with the term “accidents,” and to use the term “accident or incident” in § 234.11(e) when describing required Action Plan elements. MNDOT and the Oregon Department of Transportation (ODOT) commented that use of the terms “accidents” (used in proposed paragraph (a)) and “accident or incident” (used in proposed paragraph (e)) would be confusing. MNDOT recommended that FRA define these terms in the final rule. ODOT recommended that FRA use a single word or word combination consistently throughout the final rule, instead of switching back and forth between “accident” and the word combination “accident or incident.” A resident of Chicago, Illinois also commented that the phrase “accident or incident” is too vague.

In addition, FRA received comments from one or more unnamed individuals calling themselves the “State Program Managers Section 130/State [GX] Program Office,” and self-described as having a combined 50 years of public service experience and over 25 years of experience managing Section 130 programs. FRA refers to this commenter as the “130 Group” to distinguish them from official comments submitted on

behalf of Section 130 Program Managers for one or more State departments of transportation. In their comments, the 130 Group recommended FRA use the term “collision” or the term “crash” in this final rule for consistency with other highway safety programs that seek to mitigate the frequency and severity of incidents. The 130 Group explained that use of the term “accident” has been discouraged because a train always has the right of way and a vehicle must always stop or approach a grade crossing prepared to stop.

The Alaska Department of Transportation and Public Facilities (Alaska DOT&PF) also prefers the word “crashes.” Alaska DOT&PF asserted in its comments that “crashes” is the terminology more commonly recognized by traffic safety practitioners and interest groups and recommended that FRA at least explain why the term is not used, if not adopted in the final rule.

After considering these comments, in this final rule, FRA is adopting a slightly revised term, “accident/incident.” In making this decision, FRA relied heavily on the plain language of Section 11401(b), which specifically refers to “[GX] accidents or incidents” as one of the primary factors for identifying GXs that must be addressed by States in their Action Plans. FRA notes that the word combination “accidents or incidents” used in Section 11401(b) is essentially the same as the term “accident/incidents,” which has been used for years in FRA’s accident reporting regulations in 49 CFR part 225.

This final rule also moves the existing definition of “pathway grade crossing” from § 234.301 (which applies only to FRA’s Emergency Notification System regulations in subpart C to 49 CFR part 234) to § 234.5. Although FRA did not propose to move this definition in the NPRM, by moving it to § 234.5 in this final rule, the definition will now apply to all of FRA’s grade crossing regulations in 49 CFR part 234.

For purposes of this final rule, including the definition in § 234.5 will make clear the term's meaning as it is used in § 234.11, which as revised, requires States to address safety at PXs, as well as GXs, in their Action Plans. This change is consistent with the mandate of Section 11401(e), which defines "highway-rail grade crossing" to include locations where "a pathway explicitly authorized by a public authority or a railroad carrier . . . crosses one or more railroad tracks either at grade or grade-separated." Specifically, in this final rule, FRA is defining the term "pathway grade crossing" in § 234.5 to mean a pathway that crosses one or more railroad tracks at grade and that is: (1) explicitly authorized by a public authority or a railroad; (2) dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others; and (3) not associated with a public highway, road, or street, or a private roadway.

Pathways that are contiguous with, or separate but adjacent to, GXs are part of the GX and are not separate crossings. However, as explained in FRA's Guide for Preparing U.S. DOT Crossing Inventory Forms, pathways that intersect with one or more railroad tracks more than 25 feet from the location where a highway, road, or street intersects with one or more railroad tracks are generally separate PXs. The comments regarding this term and FRA's responses are further discussed below in the discussion regarding § 234.11.

FRA is also adding a definition of "State highway-rail grade crossing action plan" or "Action Plan." This definition is being added in response to multiple comments from State agencies, including Alaska DOT&PF, Washington Utilities and Transportation Commission staff (Washington UTC staff), the South Dakota Department of Transportation (SDDOT) and the departments of transportation for Idaho, Montana, North Dakota, and Wyoming, recommending that FRA allow States the flexibility to coordinate, integrate, or incorporate their Action Plans with other reports, such as the

Strategic Highway Safety Program (SHSP) or the State Transportation Improvement Program. Specifically, this final rule defines “State highway-rail grade crossing action plan” or “Action Plan” as a document submitted to FRA for review and approval by a State of the United States (or D.C.), which contains the elements required by § 234.11(e) to address safety at highway-rail and pathway grade crossings. Therefore, a State may comply with this final rule by submitting an existing document to FRA that addresses GX and PX safety, provided the existing document contains (or is amended to include) all the required elements in § 234.11(e).

Section 234.11 State Highway-Rail Grade Crossing Action Plans

Currently, paragraph (a) of this section indicates that the purpose of this section is to reduce “collisions” at GXs in the ten States that had the most GX collisions from 2006-2008 (the “initial ten States”). Existing paragraph (a) also makes clear that this section does not restrict any other entity from adopting an Action Plan, nor would it restrict any State or D.C. from adopting an Action Plan with additional or more stringent requirements not inconsistent with this regulation. In the NPRM, FRA proposed to replace the word “collisions” with the word “accidents” for consistency with the language of Section 11401(b). For the reasons discussed above, in this final rule, FRA is revising paragraph (a) to state that the purpose of the section is to reduce “accident/incidents” at GXs and PXs nationwide by requiring States and D.C. to develop or update and implement Action Plans.

As revised, paragraph (a) reiterates the existing language clarifying that this section does not restrict any entity from adopting an Action Plan with additional or more stringent requirements, nor does it restrict any State or D.C. from adopting an Action Plan with additional or more stringent requirements not inconsistent with this regulation. For purposes of this section, unless otherwise stated, the term “State” refers to any one of

the 50 States in the United States of America or D.C.; FRA also separately refers to or identifies D.C. within part 234 for clarity in some instances.

Consistent with the NPRM, paragraph (b) of this section requires 40 States (the States other than the initial ten States) and D.C. to develop individual Action Plans that address each of the required elements listed in paragraph (e) of this section, and to submit their individual plans to FRA for review and approval no later than 14 months after the final rule publication date. For the reasons discussed below, in this final rule, FRA is adding a definition of “State highway-rail grade crossing action plan” to § 234.11 to clarify that a State may prepare and submit a document specifically designed to satisfy the requirements of this section or submit an existing document that contains (or is amended to include) all the required elements in § 234.11(e).

For example, to satisfy the requirements of this final rule, a State may choose to update its SHSP and provide the updated SHSP to FRA for review and approval as its Action Plan. However, States should be mindful that updating an existing document to include all the required elements in § 234.11(e) does not change the underlying nature of the document. Accordingly, if a State chooses to update an existing document to include all the required elements in § 234.11(e), this final rule does not relieve the State from complying with all applicable State or Federal requirements that govern the existing document.

Also, if a State chooses to update an existing document, the State is strongly encouraged to add a separate chapter or appendix to address the required elements in paragraph (e) of this section. In the alternative, the State may add an index to the updated document that clearly identifies the specific pages on which the required elements in paragraph (e) of this section are addressed.

Paragraph (b) also requires 40 States (the States other than the initial ten States) and D.C. to submit their Action Plans electronically through FRA's website in Portable Document Format (PDF). FRA will provide a secure document submission site for States and D.C. to use to upload their Action Plans for FRA review and approval.

DelDOT, MNDOT, the 130 Group, and the departments of transportation for Idaho, North Dakota, South Dakota, and Wyoming submitted comments on the proposed requirement in paragraph (b) to submit individual Action Plans to FRA for review and approval. DelDOT noted that the State of Delaware currently experiences an extremely low number of train-related crashes and asserted that developing an Action Plan would draw resources away from other ongoing efforts to make a positive safety impact on the State and its communities. Accordingly, DelDOT recommended that FRA establish guidelines that, if met, would exempt a State from the requirement to develop an Action Plan.

The 130 Group also recommended that FRA establish a threshold that, if met, would exempt a State from the requirement to develop an Action Plan. Specifically, the 130 Group recommended that FRA establish a national car-train crash ratio threshold that would exempt States with car-train crash ratios lower than the threshold from the requirement to develop and submit an Action Plan to FRA for review and approval.

Another commenter, identified as the Chicagoland Rail Safety Team (CRST), similarly recommended that FRA conduct an "almost perfunctory" review of the Action Plans submitted by States with the lowest number of grade crossing fatalities. In addition, CRST recommended that FRA allow States with the lowest number of grade crossing fatalities simply to complete an FRA-prepared questionnaire.

FRA also received multiple comments from State agencies, including Alaska DOT&PF, Washington UTC staff, SDDOT and the departments of transportation for

Idaho, Montana, North Dakota, and Wyoming, recommending that FRA include a provision in this final rule allowing States the flexibility to coordinate, integrate, or incorporate their Action Plans with other reports, such as the SHSP or the State Transportation Improvement Program. The departments of transportation for Idaho, Montana, North Dakota, South Dakota, and Wyoming asserted that integrating the Action Plans required by this rulemaking with other plans may improve implementation, facilitate and simplify coordination, and promote synergy with other plans.

Section 11401(b) specifically directed FRA to issue implementing regulations requiring each State (except for the initial ten States) to develop and implement an Action Plan. Therefore, this final rule does not exempt any State from the requirement to develop a written plan to improve safety at GXs and PXs. However, recognizing that a number of States may have already developed written plans or other documents addressing GX and PX safety, as noted above, FRA has added a definition of “Action Plan” to this final rule that allows States to submit existing documents that address GX and PX safety, if the documents contain (or are amended to include) all the required elements listed in paragraph (e) of this section. As explained above, if a State chooses to update an existing document, the document must address all the required elements listed in paragraph (e) in a separate chapter or appendix so that it is clear how it complies with the requirements for an Action Plan. If a State decides to submit an existing document as its Action Plan to FRA for review and approval, without adding a separate chapter or appendix, the State should include an index that shows where the document addresses each required element listed in paragraph (e).

MNDOT commented that the 14-month period within which States are required to develop Action Plans is extremely aggressive. However, FRA does not have the flexibility to extend the 14-month period for States to develop and update Action Plans

because FRA is required by Section 11401 to review and approve the Action Plans and then report to Congress information about the Action Plans and their implementation within three years of the date of this final rule. Therefore, FRA will work closely with States that seek FRA's assistance in preparing their Action Plans, and allow flexibility to submit existing documents that contain (or are amended to include) all the required elements listed in paragraph (e) of this section.

DelDOT urged FRA to clarify that the requirement in paragraph (b) to develop Action Plans does not contain a duty to update Action Plans after they have been approved by FRA. Except for the initial ten States, the statutory mandate in Section 11401(b) does not direct FRA to require States to update their Action Plans. Therefore, except for the initial ten States that are required to submit updated Action Plans this one time, this final rule does not require States to update their Action Plans after they are approved by FRA.

FRA recommends that States update their Action Plans even though they are not required to do so. The actions States must take to develop Action Plans and, more specifically, to develop specific strategies for improving grade crossing safety can, if done properly, significantly improve safety and complement other efforts by States to improve transportation safety generally, by focusing attention on the State's GX and PX safety needs. In this regard, Action Plans can supplement existing State efforts to increase the effectiveness of grade crossing improvements by adding a planning component to identify GXs and PXs that have experienced recent (or multiple) accident/incidents or are considered "high-risk" for having one or more accident/incidents in the future.

Currently, paragraph (c) of this section outlines requirements for the Action Plans that the initial ten States were required to submit to FRA by August 27, 2011. As

proposed in the NPRM and in response to the statutory mandate in Section 11401(b), this final rule revises paragraph (c) to require each of the initial ten States to update their existing Action Plans and to provide individual reports on their efforts to implement their existing plans and on the continuation of their strategies to reduce GX and PX safety risks.

As also proposed in the NPRM, paragraph (c)(1) of this section requires each of the initial ten States to update their existing Action Plans to address each of the required elements listed in paragraph (e) of this section within 14 months of the final rule publication date. (Action Plans developed by the other 40 States and D.C. will be required to address these elements as well.) Paragraph (c)(1) also requires each of the initial ten States to submit their updated Action Plans to FRA for review and approval.

The list of required elements in paragraph (e) incorporates many of the elements that the initial ten States were required to address in their existing plans. However, as discussed below, there are new requirements that the initial ten States will need to address in their updated plans. For example, for consistency with Section 11401(b), States will need to address PX safety and States will need to identify the data sources used to classify PXs and GXs in one of the categories set forth in paragraph (e)(1). Below is a more detailed discussion of paragraph (e) requirements.

As proposed in the NPRM, paragraph (c)(2) requires each of the initial ten States to submit a report to FRA describing how the State implemented the Action Plan that it previously submitted to FRA under 49 CFR 234.11. Each of these initial ten States is also required by paragraph (c)(2) to describe in its report how the State will continue to reduce GX and PX safety risks. These requirements are derived from Section 11401(b).

This report, which must address each proposed initiative or solution contained in the State's Action Plan originally submitted to FRA under 49 CFR 234.11, can be

submitted as an appendix to the State's updated Action Plan. As CRST recommends in its comments, FRA intends to use these implementation reports to identify States that have effective Action Plans in place, as well as States with Action Plans that need to be improved, so FRA can provide additional assistance that may be needed through focused outreach efforts.

Paragraph (c)(3) has been added to the final rule, in order to move the list of the initial ten States from paragraph (d), as proposed, into paragraph (c) for ease of reference. This change is not substantive.

Paragraph (d) of this section requires the initial ten States to submit their updated Action Plans and individual implementation reports electronically in PDF form. FRA will provide a secure document submission site for these States to use to upload their updated Action Plans and implementation reports for FRA review.

As proposed in the NPRM, paragraph (e) of this section contains a list of required elements for new and updated State Action Plans. These elements are derived from Section 11401(b)(2), which mandates that each State Action Plan "identify [GXs] that have experienced recent [GX] accidents or incidents or multiple [GX] accidents or incidents, or are at high-risk for accidents or incidents."

As noted in the section-by-section discussion of § 234.5 above, States are required to address both GXs and PXs in their Action Plans. Congress specifically included PXs in Section 11401(b). Therefore, although not proposed in the NPRM, in deference to Congressional intent to require States to address both GXs and PXs, FRA is requiring States to address PXs in their Action Plans.

FRA received comments from the 130 Group expressing concern that this final rule might require States to address private grade crossings in their Action Plans. The 130 Group asserted that State efforts to regulate private crossings (especially when

combined with the complications of access to private property) would require significantly more staff and would open “a myriad of legal issues regarding government oversight of private infrastructure and operations.” Therefore, the 130 Group recommended that paragraph (e)(1) be limited to public GXs.

Section 11401(b) specifically includes private GXs in its definition of the term “GX.” Therefore, FRA has not revised this final rule to limit its scope to public GXs. However, FRA recognizes that not all States exercise jurisdiction over private grade crossings. Accordingly, while this final rule requires States to assess risk levels at private grade crossings, and to address private grade crossings that present significant levels of risk, FRA recognizes that the ability of States to address risks at private grade crossings will depend on the level of the authority individual States exercise over those crossings (and, in some cases, the public/private nature of the roadway leading to the crossing).

In addition, FRA received comments from a resident of Chicago, Illinois and the CRST, urging FRA to encourage States to use an expanded definition of the term “GX” that would include 1,000 feet on either side of the actual intersection of the roadway with railroad tracks. CRST also recommended, in the alternative, that FRA send a letter to members of Congress seeking additional information about the Congressional intent underlying Section 11401. Specifically, CRST recommended that FRA confirm whether Congress intended States to focus their Action Plans on GXs as currently defined in 49 CFR 234.5, or whether Congress intends States to utilize a more expansive definition, such as CRST’s proposed definition, which would include more trespassing casualties. In support of its recommendation, CRST pointed to data included in FRA’s National Strategy to Prevent Trespassing on Railroad Property, which indicates that 74 percent of trespasser deaths and injuries occurred within 1,000 feet of a grade crossing. Similarly, the resident of Chicago, Illinois asserted that trespassing injuries and fatalities should not

be excluded simply because they do not occur where pavement and rails intersect. This commenter urged FRA to require States to differentiate uniformly between trespasser and vehicle incidents in their Action Plans, so that States will collect and categorize this information separately as incidents occur.

FRA encourages States in their Action Plans to evaluate potential risks posed by trespassing within 1,000 feet of the actual intersection of the roadway with the railroad tracks.

Similarly, FRA encourages States to differentiate between motor vehicle crashes and pedestrian fatalities and injuries that occur at GXs and PXs in their Action Plans and to assess whether they need to take specific actions to address pedestrian safety at GXs and PXs. Nonetheless, FRA received multiple comments from States, including the Washington Utilities and Transportation Commission staff, SDDOT, and the State departments of transportation for Idaho, Montana, North Dakota, and Wyoming, expressing concern that this rulemaking should support State efforts to develop simple, straightforward and low-cost Action Plans and should not impose additional regulatory requirements that were not specifically included in the language of the FAST Act. Therefore, FRA strongly recommends that States with GXs and PXs located near locations identified as trespasser “hot spots” include strategies in their Action Plans to address trespassing, as some GXs and PXs may be used by individuals to gain access to the railroad right-of-way. However, in recognition of the fact that not all States have significant pedestrian safety concerns at their highway-rail and pathway crossings, FRA is not revising the definition of “GX” in § 234.5 to include the railroad right-of-way within 1,000 feet of the intersection of the roadway with the railroad tracks, nor is FRA requiring States to assume the additional burden of collecting and categorizing information about motor vehicle crashes and pedestrian fatalities and injuries separately.

FRA is addressing the trespassing issue through implementation of its *National Strategy to Prevent Trespassing on Railroad Property* (available online at <https://railroads.dot.gov/national-strategy-prevent-trespassing>).

As proposed in the NPRM, paragraph (e)(1) would require States to identify in their Action Plans GXs that: (1) have experienced at least one accident or incident within the previous three years; (2) have experienced more than one accident or incident within the previous five years; or (3) are at “high-risk” for accidents or incidents as defined by the relevant State or D.C.

FRA received comments on the proposed three-year period in paragraph (e)(1)(i) from ODOT, which recommended that the time period be made consistent with the proposed five-year time period in proposed paragraph (e)(1)(ii). Asserting three years of accident or incident data may not be enough to make a determination, ODOT recommended that a consistent five-year period would be most appropriate.

However, as noted in the NPRM, FRA intended to use different time periods in paragraphs (e)(1)(i) and (e)(1)(ii) to differentiate between grade crossings that have experienced “recent” accident/incidents and grade crossings that have experienced “multiple” accident/incidents as Section 11401(b) requires. As explained in the NPRM, the three-year time period in paragraph (e)(1)(i) is intended to enable States to identify which individual GXs and PXs have experienced “recent” accident/incidents. The five-year time period in paragraph (e)(1)(ii) is intended to enable States to identify which individual GXs and PXs have experienced “multiple” GX accidents/incidents. This five-year timeframe is consistent with the five-year timeframe used by the initial ten States when they prepared their Action Plans pursuant to existing § 234.11.

FRA received comments on this 5-year period in paragraph (e)(1)(ii) from MNDOT, in which MNDOT noted the State of Minnesota has a very low number of GXs

that have experienced more than one accident or incident in the previous five years.

Therefore, MNDOT asked whether it would be permissible for a State to look back over a longer period to improve its analysis.

Thankfully, as MNDOT points out, some States have a very low number of GXs which have experienced more than one accident/incident in the previous five years. FRA suggests that States with very low grade crossing accident/incident numbers should consider defining what constitutes a GX or PX with a “high-risk for accidents or incidents” in accordance with paragraph (e)(1)(iii) and addressing those crossings in their Action Plans. As proposed in the NPRM, paragraph (e)(1)(iii) allows a State to define what constitutes grade crossings with a “high-risk for accidents or incidents” and focus its Action Plan on those crossings. By choosing this option, as opposed to trying to identify GXs and PXs that have experienced previous accidents/incidents in accordance with paragraph (e)(1)(i) or (ii), States with low grade crossing accident/incident numbers can, within the constraints of paragraph (e)(1)(iii), use a different set of criteria to identify GXs and PXs to address in their Action Plans.

MNDOT also submitted comments on the proposed paragraph (e)(1)(iii), noting that the State of Minnesota has done significant work developing a risk ranking system for project selection. Therefore, MNDOT expressed optimism that, given FRA’s proposal in the proposed rule to allow States the flexibility to define “high risk” GXs, MNDOT may be able to use their existing risk ranking system to define “high risk” GXs within the State of Minnesota and thereby reduce plan development costs.

However, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the Association of American Railroads (AAR), and an individual commenter submitted comments expressing concern with the proposed language in paragraph (e)(1)(iii) that would allow States to define what constitutes a

“high risk” GX. AFL-CIO asserted that the proposed language in paragraph (e)(1)(iii) would allow States to limit their efforts to grade crossings where an accident has already taken place, which it asserted would be inconsistent with the spirit of the underlying statutory mandate. Similarly, while noting that some level of risk standardization would likely benefit the nation as a whole, Mr. Gregory James submitted comments recommending that FRA disseminate minimum guidelines for identifying potentially problematic grade crossings.

AAR expressed concern that if FRA does not define what constitutes “high risk” of an incident occurring at a GX, the result would be 51 different definitions of what constitutes “high risk.” Therefore, AAR recommended that, at a minimum, FRA should include factors that States should consider when designating a grade crossing as “high risk.” For example, AAR recommended States consider factors such as profile deficiencies, skew, inadequate sight distances due to fixed obstructions, and the density of neighborhood development along the corridor near a crossing.

After considering all the comments received and evaluating the potential benefits and consequences of allowing States to define “high risk” grade crossings for themselves, FRA determined that the comments provided by AFL-CIO, Mr. James, and AAR have merit. Accordingly, in this final rule, FRA has revised proposed paragraph (e)(1)(iii) of this section to include a list of key factors that States are required to consider in their Action Plans when identifying “high-risk” crossings under paragraph (e)(1)(iii) of this section. These key factors in paragraph (e)(1)(iii) include the average annual daily traffic, the total number of trains per day that travel through the crossing, the total number of motor vehicle collisions that have occurred at the crossing during the previous 5-year period, the number of main railroad tracks at the crossing, the number of roadway

lanes at the crossing, sight distance and roadway geometry at the crossing, and maximum timetable speed at the crossing.

FRA notes that the key factors listed in paragraph (e)(1)(iii) are minimum factors a State must consider if defining high-risk crossings under paragraph (e)(1)(iii). Therefore, FRA encourages States to consider any other factors that may be present at a particular crossing that may increase the risk of an accident/incident. Examples of potential additional factors a State may find useful to consider include: the volume and nature of any hazardous materials transported through the crossing, the frequency of any passenger trains traveling through the crossing, and the proximity of a school or emergency service provider, which could cause a high number of school buses or emergency service vehicles to travel through the grade crossing. AFL-CIO asserted in its comments that increased pedestrian volume may increase opportunities for an accident, while AAR identified the density of neighborhood development along the corridor near the crossing as a factor that can contribute to high risk levels at a GX.

When evaluating these risk factors and the overall risk levels at individual GXs and PXs under paragraph (e)(1)(iii), FRA recommends States consider the definition of “risk” provided in 49 CFR 270.5 and 271.5, in which the term “risk” is defined as “the combination of the probability (or frequency of occurrence) and the consequence (or severity) of a hazard.” FRA also recommends that States describe the process or formula used to assess risk at each crossing in their Action Plans. However, to obtain information about all the factors considered by States when identifying GXs and PXs in their Action Plans as “high risk,” paragraph (e)(1)(iii) requires States that identify “high risk” crossings under paragraph (e)(1)(iii) to include in their Action Plans the complete list of factors considered in making this determination.

As proposed in the NPRM, paragraph (e)(2) requires States to identify the data sources used to categorize the GXs and PXs in their Action Plans. To help States identify GXs and PXs that have experienced recent accident/incidents, multiple accident/incidents, or are at high-risk for accident/incidents, FRA will provide GX and PX accident/incident data to States upon request. FRA will also assist State agencies electing to use FRA's Office of Safety Analysis website to generate customized reports of GX accident/incident data.

In the NPRM, paragraph (e)(3) would require States to discuss specific strategies to improve safety at the identified crossings over a period of at least five years. FRA received a number of comments on this proposed minimum five-year time period, and for the reasons discussed below, FRA is revising proposed paragraph (e)(3) to provide for a minimum time period of four years.

The departments of transportation for Idaho, Montana, North Dakota, South Dakota, and Wyoming submitted comments noting that Congress established planning requirements in the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), the Transportation Equity Act for the 21st Century (TEA-21), and the Safe Accountable Flexible Efficient Transportation Equity: A Legacy for Users Act (SAFETEA-LU) directing the State Transportation Improvement Program (STIP) to span four years. Accordingly, these State DOTs recommended that FRA allow States to align the time frame covered by their Action Plans with the four-year STIP time frame, but not require them to do so. The Alaska DOT&PF, on the other hand, submitted comments supporting the proposed five-year minimum time period. Alaska DOT&PF noted that some States are not able to insert grade separations or rail realignment projects into fiscally constrained STIPs.

After consideration of these comments, FRA has concluded that providing the flexibility for State Action Plans to cover a minimum four-year time period for consistency with other surface transportation planning requirements is justified. Accordingly, FRA is revising proposed paragraph (e)(3) to provide that State Action Plans must discuss specific strategies to improve safety at the identified crossings over a period of “at least four years.” FRA intends this change to facilitate integration of the Action Plans required by this final rule with existing State planning mechanisms and documents (e.g., STIPs, SHSPs, and State Rail Plans). However, nothing in this final rule restricts States from including specific strategies to improve crossing safety in their Action Plans for a period longer than four years.

AAR also submitted comments on paragraph (e)(3), recommending FRA clarify that, prior to making any changes to address blocked crossing concerns that could impact train operations, States must consult with the railroad primarily responsible for dispatching trains through the crossing as indicated by the name of the railroad on the Emergency Notification System (ENS) sign. FRA expects that States seeking to make changes to address blocked crossing concerns will, at a minimum, coordinate with the railroad primarily responsible for dispatching trains through the highway-rail or pathway grade crossing prior to making any changes that could impact train operations. Depending on the type of change envisioned, the State should contact the railroad primarily responsible for maintaining the highway-rail or pathway grade crossing (if different from the railroad primarily responsible for dispatching trains through the crossing) as well. However, a requirement that States must consult with railroads prior to implementing certain types of strategies in their Action Plans to address blocked crossing concerns falls beyond the scope of this rulemaking.

FRA also received comments on paragraph (e)(3) from Washington UTC staff, SDDOT, as well as the departments of transportation for Idaho, Montana, North Dakota, and Wyoming. In their comments, these State agencies recommended that the final rule include language allowing States to discuss the types of grade crossing improvement projects they will address and emphasize, as opposed to requiring States to identify specific projects to be undertaken. The departments of transportation for Idaho, Montana, North Dakota, South Dakota, and Wyoming asserted that this approach would allow States to set forth policy priorities in their Action Plans. FRA agrees that States should not be required to identify specific projects to be undertaken. Therefore, while FRA encourages States to identify specific projects that they may wish to highlight in their Action Plans, FRA would like to clarify that this final rule does not require project identification.

Given Section 11401's mandate that FRA prepare and submit a report to Congress within three years of issuing this final rule, FRA notes that it intends to evaluate each Action Plan to assess whether it provides sufficient information to inform Congress of specific strategies that will be implemented (or continue to be implemented) by individual States to improve GX safety. To this end, FRA agrees with CRST's comments that FRA should anticipate its reporting obligations to Congress, and during FRA's review of Action Plans, disapprove any plans that are not objective, observable, and measurable.

FRA received comments from multiple State agencies, including Washington UTC staff, SDDOT, and departments of transportation for Idaho, Montana, North Dakota, and Wyoming, recommending that the final rule include language providing for Action Plans to be considered deficient only if they are inconsistent with statutory requirements, so that modest deficiencies in regulatory planning or paperwork will not

prohibit safety investments. While *de minimis* deficiencies in paperwork should not lead to an Action Plan being rejected, FRA disagrees with the recommendation to consider Action Plans deficient only if they are inconsistent with statutory requirements. Section 11401 specifically mandates that FRA issue a rule requiring States to develop and implement Action Plans that meet certain requirements. The regulatory requirements in this final rule respond to that mandate and enable the effective and consistent implementation of the statutory requirements in Section 11401. For example, paragraph (e)(4) of this section requires States to provide an implementation timeline for the strategies identified in their Action Plans. Although not specifically required by Section 11401, this requirement is designed to help ensure States implement the strategies identified in their Action Plans effectively.

As for the requirement in paragraph (e)(3) of this section, which requires States discuss specific strategies for improving GX and PX safety, CRST submitted comments recommending that FRA insist that States incorporate the safety of pedestrians (at crossings and along the railroad right-of-way) into their Action Plans. In support of this recommendation, CRST asserted that over the long term, pedestrian fatalities at grade crossings have not demonstrated a decreasing trend like vehicle occupant fatalities at GXs. Similarly, with respect to proposed crossing closure projects, CRST stated that care must be taken to ensure that closure of the grade crossing will not result in increased trespassing along the railroad right-of-way.

FRA agrees that States should incorporate the safety of pedestrians at GXs and PXs into their Action Plans. For example, the FAST Act requires States to consider crossing closures and grade separation projects. Therefore, to avoid introducing new or increased risk, FRA expects any State contemplating crossing-closure and/or grade-separation projects will evaluate not only the potential reduction in risk to motor vehicle

occupants from the closure or separation project, but also the potential impact on trespassing at the location of any crossing slated for closure.

CRST also urged FRA to consider making additional changes in this final rule to address suicides that occur at crossings and along railroad rights-of-way. For example, CRST recommended that FRA insist that State Action Plans include efforts to reduce suicides at grade crossings, as well as along the railroad right-of-way, in areas in which suicides appear to be a significant problem. If a State has experienced a high number of suicides at one or more GXs or PXs, this final rule provides the flexibility for that State to develop and include in its Action Plan specific strategies to address the issue. FRA encourages any State that has experienced a high number of suicides at particular grade crossings to include specific strategies in its Action Plan to address suicides at those crossings.

CRST asserted that FRA's decision not to include suicide data in FRA's periodic summaries of rail-related injuries and illnesses associated with railroad operations may dissuade States from addressing suicides that occur at crossings and along the railroad right-of-way. Therefore, CRST recommended that FRA amend 49 CFR 225.41 (Suicide data) to allow (or require) FRA to report all deaths in FRA's summaries of "total fatalities." In addition, a resident of Chicago, Illinois urged FRA to develop a mechanism in the final rule that would require railroads to release video obtained from their outward-facing locomotive cameras to State coroners and law enforcement officials upon request, to facilitate State efforts to determine accurately the cause of death. Although FRA appreciates these comments and suggestions, both are outside the scope of the statutory authority for this rulemaking. FRA does, however, maintain several online resources that provide access to FRA's railroad trespassing data, including certain data related to suicides. One such resource, FRA's Trespass and Suicide Dashboard, allows

users to interact visually with trespass and suicide data collected by FRA. Therefore, FRA encourages entities seeking to view FRA data on fatalities that occur at GXs (as defined in 49 CFR 234.5), as well as fatalities that occur along railroad rights-of-way, to visit our Trespass and Suicide Dashboard, which is accessible online through FRA’s Web site. In addition, FRA notes that it has an ongoing rulemaking on Locomotive Image and Audio Recording Devices for Passenger Trains to implement a Congressional mandate.⁷

In adopting paragraph (e)(4), FRA has corrected a typographical error in the proposed rule. Paragraph (e)(4) requires States to provide an implementation timeline for the specific strategies they develop to improve safety at the GXs identified in their Action Plans. In the proposed rule, FRA erroneously indicated that the proposed requirement to discuss these specific strategies in the State Action Plans was contained in paragraph (d)(2) of this section. To correct this error, paragraph (e)(4) in the final rule requires States to provide an implementation timeline for “the strategies discussed in paragraph (e)(3) of this section.”

As proposed in the NPRM, paragraph (e)(5) requires each State and D.C. to designate an official responsible for managing implementation of the Action Plan. As noted earlier, FRA will create a secure document submission site that States can use to upload Action Plans. The official designated under this paragraph will be given primary user access to the secure document submission site, as well as the authority to grant access to secondary users. Accordingly, the designated State official will need to register with FRA to gain primary user access to the secure document submission site.

Paragraph (f) of this section requires States and D.C. to provide contact information for their designated officials, so they can be invited to set up primary user accounts.

⁷ 84 FR 35712 (July 24, 2019); 49 U.S.C. 20168.

Paragraph (f)(2) also requires each State and D.C. to notify FRA if a new official is subsequently designated to manage implementation of its Action Plan and to provide contact information for the new designated official. FRA has modified paragraph (f)(2) from that proposed in the NPRM in response to comments submitted by the Alaska DOT&PF recommending that FRA not adopt the proposed requirement for States to maintain updated contact information. Alaska DOT&PF asserted that the proposed requirement was too onerous, especially for a one-time plan with no ongoing reporting requirement.

FRA agrees that an ongoing requirement to maintain current contact information for State Action Plans for many years seems unnecessary, given the absence of any requirement to update the plan. Therefore, FRA has modified paragraph (f)(2) from that proposed in the NPRM to limit the period of time States are required to maintain current contact information for their Action Plans to a four-year period after publication of this final rule. This requirement will help ensure FRA has current contact information while States implement their Action Plan strategies in accordance with their implementation timelines. This requirement will also help ensure FRA has current contact information available when FRA prepares the required report to Congress, while limiting the burden on States.

Paragraph (g) of this section sets forth FRA's review and approval process for Action Plans. As provided in paragraph (g)(1), FRA will update its website to reflect receipt of each new, updated, or corrected Action Plan. FRA encourages States to work with FRA staff as they develop their Action Plans. FRA will also offer webinars to assist States in developing and updating their Plans. As indicated in comments submitted by CRST, FRA's ability to provide technical assistance to States will help ensure States develop Action Plans that can be effectively evaluated and implemented.

To avoid delaying implementation of needed grade crossing safety improvements, paragraph (g)(2)(i) states that FRA will conduct a preliminary review of each new, updated, and corrected Action Plan within sixty (60) days of receipt. During this 60-day review period, FRA will determine whether a submitted plan has adequately addressed the elements prescribed in paragraph (e) of this section.

FRA acknowledges comments received on ways to improve the proposed review process for Action Plans. Washington UTC staff, and the departments of transportation for Idaho, Montana, North Dakota, South Dakota, and Wyoming recommended that FRA establish a staggered timeline for States to submit their Action Plans, in which States with the highest number of grade crossing accidents would be required to submit their plans first. Similarly, VTrans submitted comments recommending that the final rule allow States to submit their Action Plans at the same time that they submit their SHSPs (which are generally submitted in staggered, 5-year cycles).

FRA does not have the flexibility to allow for a staggered timeline or cycle for submitting Action Plans to FRA for review and approval because Section 11401 requires FRA to report to Congress information about the Action Plans and their implementation within three years. However, as noted above, FRA will offer webinars and work closely with any State that desires the Agency's assistance in developing its Action Plan. This involvement from FRA should help ensure the efficiency of the plan review process. FRA anticipates that States with a high number of grade crossing accident/incidents will submit Action Plans that are more detailed than those of States with a low number of grade crossing accident/incidents. In this regard, FRA agrees with comments submitted by CRST and all Action Plans submitted under this regulation will be carefully reviewed.

DelDOT commented that FRA's proposed review process would create confusion among State officials who may not feel confident implementing their Action Plans until

more than 120 days have passed from the date of FRA's receipt of their plans. Alaska DOT&PF recommended that FRA include FHWA in the review and approval process for Action Plans, given the potential need for Federal aid highway funding to implement the strategies identified by States in their Action Plans.

Accordingly, in adopting paragraph (g)(2)(ii), FRA is clarifying that Action Plans will be considered conditionally approved sixty (60) days after receipt by FRA unless FRA notifies the State's designated point of contact that the Action Plan is incomplete or deficient. Therefore, if a State has not been notified that its Action Plan is incomplete or deficient, a State may proceed with implementation of its Action Plan after 60 days have elapsed from the date of FRA's receipt of its plan. In addition, States may verify the review status of their Action Plans by checking FRA's website or contacting FRA.

Paragraph (g)(2)(iii) states that FRA reserves the right to conduct a more comprehensive review of each "new, updated, or corrected" Action Plan, which may take up to 120 days to complete. In addition, FRA will continue to consult and coordinate with FHWA during FRA's review of Action Plans.

Paragraph (g)(3) specifically addresses Action Plans that FRA determines to be incomplete or deficient. As reflected in paragraph (g)(3)(i), if FRA finds a submitted Action Plan is incomplete or deficient, it will notify the appropriate designated official via email of the specific areas in which the plan is deficient or incomplete.

Paragraph (g)(3)(ii) requires States and D.C. to complete, correct, and resubmit within 60 days any Action Plan that FRA deems incomplete or deficient. This 60-day timeframe is derived from Section 11401(b)(7), which directs States to complete their Action Plans and correct deficiencies identified within 60 days of the date of FRA notification.

FRA received a number of comments from State agencies on the 60-day correction period contained in paragraph (g)(3)(ii), including comments from SDDOT, Washington UTC staff, and the departments of transportation for Idaho, Montana, North Dakota, and Wyoming, recommending that FRA include a provision in the final rule to allow States to request an extension of time to correct any deficiencies identified during FRA's review of their Action Plans, if additional time is needed to rectify them. Similarly, Alaska DOT&PF submitted comments recommending that the final rule allow at least 120 days for States to correct any deficiencies identified during FRA's review of their Action Plans.

FRA has not, however, established a separate process in this final rule that would allow a State to request additional time to correct deficiencies identified during FRA's review of its Action Plan. While FRA is sympathetic to the concerns expressed by these State agencies, Section 11401(b) directs States to correct deficiencies identified and resubmit their Action Plans within 60 days from the date on which FRA notifies them of the deficiencies. In addition, this 60-day correction period is twice as long as the 30-day period within which the initial ten States were required to correct any deficiencies identified in their Action Plans. Therefore, FRA has not expanded the 60-day correction period mandated by Section 11401(b). Nonetheless, as previously discussed, FRA intends to provide webinars and technical assistance to State agencies during the 14-month period between the publication date of this final rule and the submission deadline for State Action Plans to help ensure efficiency in their development and review.

As provided in paragraph (g)(4)(i), after FRA has completed its review and approves a new, updated, or corrected Action Plan, FRA will notify the State's designated official described in paragraph (e)(5) by email that the Action Plan has been fully approved.

Paragraph (g)(4)(ii) states that FRA will make each fully-approved Action Plan publicly available for online viewing. This provision is intended to comply with Section 11401(b)(4)'s requirement that the FRA Administrator make each approved Action Plan publicly available on "an official internet website." In addition, to avoid confusion, FHWA will remove the original Action Plans submitted by the initial ten States from its website.

As provided in paragraph (g)(4)(iii), each State and D.C. are required to implement their Action Plans.

Paragraph (h) of this section provides that the Secretary may condition the awarding of a rail improvement grant to a State or D.C. on the submission of an FRA-approved Action Plan under this section. This language reflects the authority specifically granted to the Secretary in Section 11401(b)(5).

FRA received comments on the language in this paragraph from multiple State agencies. Washington UTC staff, SDDOT, and the departments of transportation for Idaho, Montana, North Dakota, and Wyoming submitted joint comments expressing concern that conditioning the awarding of highway-rail crossing funding or grants on having an approved plan is a risky approach that may impede important safety improvements that can save lives and reduce collisions. The departments of transportation for Idaho, Montana, North Dakota, South Dakota, and Wyoming also noted that State highway-rail crossing project selection should not be restricted solely by a State's FRA-approved Action Plan because safety, feasibility, engineering judgment, and other factors must also be considered.

FRA agrees that a State's selection of highway-rail crossing improvement projects should not be exclusively limited to the highway-rail crossing improvement projects that are specifically identified in the State's FRA-approved Action Plan. However, FRA

believes a properly prepared Action Plan identifying GXs and PXs where recent accidents have occurred, or that a State characterizes as “high-risk,” can inform project selection. During FRA’s review of applications for grant funding, FRA often looks for evidence of advance planning and identification of crossing safety needs through data-based risk analysis. Therefore, by discussing specific projects in their Action Plans, as well as the data sources used to identify safety needs that will be addressed by these projects, States can use their Action Plans as a vehicle for providing evidence of advance planning and data-based crossing risk analysis.

Section 234.301 Definitions

As noted in the discussion of § 234.5 above, in this final rule, FRA is removing the definition of “pathway grade crossing” from the list of definitions in § 234.301 (which applies only to FRA’s Emergency Notification System regulations in subpart C to 49 CFR part 234). As previously discussed, by removing the definition of “pathway grade crossing” from § 234.301 and moving it to § 234.5, the definition of “pathway grade crossing” will now apply to all of FRA’s grade crossing regulations in 49 CFR part 234.

IV. Regulatory Impact and Notices

A. Executive Order 12866, Congressional Review Act, and DOT Regulatory Policies and Procedures

This final rule is not a significant regulatory action within the meaning of Executive Order 12866, “Regulatory Planning and Review,” and DOT’s Administrative Rulemaking, Guidance, and Enforcement Procedures in 49 CFR part 5. Pursuant to the Congressional Review Act,⁸ the Office of Information and Regulatory Affairs designated this rule as not a “major rule,” as defined by 5 U.S.C. 804(2). Details on the estimated

⁸ 5 U.S.C. 801 *et seq.*

cost of this rule can be found in the Regulatory Evaluation, which FRA has prepared and placed in the docket (docket number FRA-2018-0096).

The purpose of the final rule is to reduce accident/incidents at GXs and PXs nationwide. The final rule requires each State and D.C. to submit or re-submit to FRA an Action Plan. The final rule also requires each of the 10 States that previously created an FRA-approved Action Plan to submit a report to FRA that describes how the State implemented its existing Plan and how the State will continue to reduce GX and PX safety risks.

Costs

The final rule specifically lists the required elements for Plans. To minimize the compliance costs, the final rule affords each State the flexibility to develop or update an Action Plan based upon the individual State's hazard assessment.

Section 11401(a) required FRA to develop and distribute a model State Action Plan. In conjunction with FHWA, FRA developed a "Highway-Railway Grade Crossing Action Plan and Project Prioritization Noteworthy Practices Guide." FRA shared this guide with States via letters that included the data requirements as discussed in Section 11401. The guide is currently available on DOT's website. In addition, previous Action Plans from the 2010 final rule have also been made available to the public on DOT's website. After issuing this final rule, FRA will provide States with assistance in developing their Action Plans.

Table 1 shows the costs associated with the final rule. The largest costs for the 10 States that have already developed an FRA-approved Action Plan are: updating and submitting an Action Plan to FRA; submitting a report to FRA that describes how the previously approved Action Plan was implemented; and resubmitting (if necessary) an Action Plan if FRA determines the State's updated Action Plan submission to be

incomplete. Collectively, the largest costs for the other 40 States and D.C. are: developing and submitting an Action Plan to FRA; and resubmitting (if necessary) an Action Plan if FRA determines the State’s previous Action Plan submission to be incomplete.

As shown in Table 1, the final rule will result in a total cost of \$1.0 million (PV, 7%), and \$1.1 million (PV, 3%).

Table 1: Cost Summary, discounted at 7% and 3% (2017 dollars)⁹

Costs	States Updating Existing Plan		States Creating New Plan		All States	
	7%	3%	7%	3%	7%	3%
Develop or Update Action Plan	\$350,000	\$364,000	\$580,000	\$602,000	\$930,000	\$966,000
Submitting Report to FRA	\$ 57,000	\$ 59,000	--	--	\$57,000	\$59,000
Resubmit Action Plan	\$ 17,000	\$ 18,000	\$24,000	\$25,000	\$41,000	\$43,000
Government Admin. Costs					\$20,000	\$21,000
Total Cost	\$424,000	\$441,000	\$604,000	\$627,000	\$1,048,000	\$1,089,000

FRA assumes that all costs will be incurred in the first year of analysis. The costs that are derived from the analysis do not include the costs of voluntary changes in investments or operations that States will make when implementing their Action Plans.

Benefits

This analysis discusses the non-quantifiable benefits associated with this final rule. FRA expects that States developing and implementing Action Plans may improve the way they allocate resources for GX and PX mitigation efforts. The final rule’s primary benefit will come from a reduction in the number of GX and PX accident/incidents and the associated decrease in fatalities, injuries, and property damage, as well as diminished environmental impacts. Last, FRA anticipates that Action Plans may also reduce accident severity, as some States may develop and implement Action

⁹ Numbers rounded to the nearest 1,000.

Plans that focus efforts on mitigating accident/incidents that are more likely to result in fatalities.

B. Regulatory Flexibility Determination

The Regulatory Flexibility Act of 1980¹⁰ (RFA) and Executive Order 13272¹¹ require agency review of proposed and final rules to assess their impacts on small entities. When an agency issues a rulemaking proposal, the RFA requires the agency to “prepare and make available for public comment an initial regulatory flexibility analysis” that will “describe the impact of the proposed rule on small entities.”¹² Section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the proposed rulemaking is not expected to have a significant economic impact on a substantial number of small entities.

In the proposed rule, FRA identified 51 entities (the 50 States and D.C.) that will be affected by the rule. Each of the 50 States and D.C. have a population greater than 50,000. Therefore, FRA certified that the rule would not have a significant economic impact on a substantial number of small entities. FRA received no comments regarding the certification.

The Administrator of FRA hereby certifies that this final rule will not have a significant economic impact on a substantial number of small entities.

C. Federalism

Executive Order 13132, “Federalism,”¹³ requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that

¹⁰ 5 U.S.C. 601 *et seq.*

¹¹ 67 FR 53461, Aug. 16, 2002.

¹² 5 U.S.C. 603(a).

¹³ 64 FR 43255, Aug. 10, 1999.

have federalism implications” are defined in the Executive order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the Agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal Government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the Agency consults with State and local governments early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the Agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that the final rule will not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that this final rule, which complies with a statutory mandate, will not have federalism implications that impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for this final rule is not required.

D. Paperwork Reduction Act

The information collection requirements in this rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork

Reduction Act of 1995.¹⁴ The sections that contain the information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section ¹⁵	Respondent universe	Total Annual responses	Average time per responses ¹⁶	Total annual burden hours	Total cost equivalent ¹⁷
234.11(b)—State Action Plans – Development and submission of new Action Plans (40 States + D.C.)	40 States + D.C.	1.3 plans + 2.3 plans + 4 plans + 6 plans	700 hours + 550 hours + 200 hours + 60 hours	3,377 hours	\$206,672
—(c)(1) Updated Action Plans (10 listed States in § 234.11(e))	10 States	1 plan + 1 plan + 1.3 plans	1,100 hours + 640 hours + 225 hours	2,040 hours	\$124,848
—(c)(2) Implementation reports (10 listed States in § 234.11(e))	10 States	1 report + 1 report + 1.3 reports	160 hours + 120 hours + 40 hours	333 hours	\$20,380
—(f)(2) Notification to FRA by State or D.C. of another official to assume responsibilities described under § 234.11(e)(6)	50 States + D.C.	2.7 notifications	5 minutes	.3 hours	\$20
—(g) FRA review and approval of State Action Plans: Disapproved plans needing revision (40 States + D.C.)	40 States + D.C.	.7 plans + .7 plans + 1.3 plans	105 hours + 60 hours + 24 hours	142 hours	\$8,690
—(g) FRA review and approval of State Action Plans: Disapproved plans needing revision (10 listed States in § 234.11(e))	10 States	.3 plans + .3 plans + .3 plans	165 hours + 96 hours + 34 hours	98 hours	\$6,016

¹⁴ 44 U.S.C. 3501 *et seq.*

¹⁵ The proposed burdens for §§ 234.11(d), (e), and (f)(1) are covered under §§ 234.11(b) and (c)(1) and (2).

¹⁶ Based on input from FRA subject matter experts and feedback from States, the 40 States and D.C. that currently do not have an FRA-approved Action Plan are grouped into four burden levels: high, medium, and low, and minimal burden. For the 10 States, they are grouped into three burden levels: high, medium, and low.

¹⁷ An hourly compensation rate of \$61.20 was used to calculate the total cost equivalent.

Total	N/A	27 plans, reports, and notifications	N/A	5,991 hours	\$366,627
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All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, at 202-493-0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via e-mail to Ms. Wells at Hodan.Wells@dot.gov.

OMB is required to make a decision concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the *Federal Register*. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. The current OMB control number for 49 CFR 234.11 is 2130-0589.

E. Environmental Impact

FRA has evaluated this final rule consistent with the National Environmental Policy Act (NEPA),¹⁸ the Council of Environmental Quality's NEPA implementing regulations,¹⁹ and FRA's NEPA implementing regulations²⁰ and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement

¹⁸ 42 U.S.C. 4321 *et seq.*

¹⁹ 40 CFR parts 1500 through 1508.

²⁰ 23 CFR part 771.

(EIS). Categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.²¹ Specifically, FRA has determined that this final rule is categorically excluded from detailed environmental review pursuant to 23 CFR 771.116(c)(15), “[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise.”

The purpose of this rulemaking is to revise FRA’s State Action Plan requirements as mandated by the FAST Act. This rule does not directly or indirectly impact any environmental resources and will not result in significantly increased emissions of air or water pollutants or noise. Instead, the final rule is likely to result in safety benefits. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.²² FRA has concluded that no such unusual circumstances exist with respect to this final regulation and it meets the requirements for categorical exclusion under 23 CFR 771.116(c)(15).

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.²³ FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).²⁴

F. Executive Order 12898 (Environmental Justice)

²¹ 40 CFR 1508.4.

²² 23 CFR 771.116(b).

²³ 16 U.S.C. 470.

²⁴ Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and DOT Order 5610.2(a)²⁵ require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate. FRA has evaluated this final rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority populations or low-income populations.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995,²⁶ 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 such regulations incorporate requirements specifically set forth in law.) Section 202 of the Act²⁷ further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement detailing the effect on State, local, and tribal governments and

²⁵ 91 FR 27534 (May 10, 2012).

²⁶ Pub. L. 104-4, 2 U.S.C. 1531 *et seq.*

²⁷ 2 U.S.C. 1532.

the private sector. This final rule will not result in the expenditure, in the aggregate, of \$100,000,000 or more in any one year and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”²⁸ FRA evaluated this final rule in accordance with Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of the Executive order.

Executive Order 13783, “Promoting Energy Independence and Economic Growth,” requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources.²⁹ FRA determined this final rule will not burden the development or use of domestically produced energy resources.

List of Subjects in 49 CFR Part 234

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

The Final Rule

For the reasons discussed in the preamble, FRA is amending part 234 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 234—GRADE CROSSING SAFETY

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

²⁸ 66 FR 28355 (May 22, 2001).

²⁹ 82 FR 16093 (Mar. 31, 2017).

Authority: 49 U.S.C. 20103, 20107, 20152, 20160, 21301, 21304, 21311; Sec. 11401, Div. A, Pub. L. 114-94, 129 Stat. 1679 (49 U.S.C. 22501 note); and 49 CFR 1.89.

2. In § 234.1, revise and republish paragraph (a) to read as follows:

§ 234.1 Scope.

(a) This part prescribes minimum -

(1) Maintenance, inspection, and testing standards for highway-rail grade crossing warning systems;

(2) Standards for the reporting of failures of highway-rail grade crossing warning systems and for the actions that railroads must take when such systems malfunction;

(3) Requirements for certain identified States to update their existing State highway-rail grade crossing action plans and submit reports about the implementation of their existing plans and for the remaining States and the District of Columbia to develop State highway-rail grade crossing action plans;

(4) Requirements that certain railroads establish systems for receiving toll-free telephone calls reporting various unsafe conditions at highway-rail grade crossings and pathway grade crossings, and for taking certain actions in response to those calls; and

(5) Requirements for reporting to, and periodically updating information contained in, the U.S. DOT National Highway-Rail Crossing Inventory for highway-rail and pathway crossings.

* * * * *

3. Revise § 234.5 by adding in alphabetical order definitions of “Accident/incident,” “Pathway grade crossing,” and “State highway-rail grade crossing action plan or Action Plan” to read as follows:

§ 234.5 Definitions.

As used in this part:

Accident/incident means any impact between railroad on-track equipment and a highway user at a highway-rail grade crossing or pathway grade crossing. The term “highway user” includes automobiles, buses, trucks, motorcycles, bicycles, farm vehicles, pedestrians, and all other modes of surface transportation motorized and un-motorized.

* * * * *

Pathway grade crossing means a pathway that crosses one or more railroad tracks at grade and that is—

- (1) Explicitly authorized by a public authority or a railroad;
- (2) Dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others; and
- (3) Not associated with a public highway, road, or street, or a private roadway.

* * * * *

State highway-rail grade crossing action plan or Action Plan means a document submitted to FRA for review and approval by a State of the United States (or the District of Columbia), which contains the elements required by § 234.11(e) to address safety at highway-rail and pathway grade crossings.

* * * * *

4. Revise § 234.11 to read as follows:

§ 234.11 State highway-rail grade crossing action plans.

(a) *Purpose.* The purpose of this section is to reduce accident/incidents at highway-rail and pathway grade crossings nationwide by requiring States and the District of Columbia to develop or update highway-rail grade crossing action plans and implement them. This section does not restrict any other entity from adopting a highway-

rail grade crossing action plan. This section also does not restrict any State or the District of Columbia from adopting a highway-rail grade crossing action plan with additional or more stringent requirements not inconsistent with this section.

(b) *New Action Plans.* (1) Except for the 10 States identified in paragraph (c)(3) of this section, each State and the District of Columbia shall develop a State highway-rail grade crossing action plan that addresses each of the required elements listed in paragraph (e) of this section and submit such plan to FRA for review and approval not later than **[INSERT DATE 425 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

(2) Each State and the District of Columbia shall submit its highway-rail grade crossing action plan electronically through FRA's website in Portable Document Format (PDF).

(c) *Updated Action Plan and implementation report.* (1) Each of the 10 States listed in paragraph (c)(3) of this section shall develop and submit to FRA for review and approval an updated State highway-rail grade crossing action plan that addresses each of the required elements listed in paragraph (e) of this section, not later than **[INSERT DATE 425 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

(2) Each of the 10 States listed in paragraph (c)(3) of this section shall also develop and submit to FRA, not later than **[INSERT DATE 425 DAYS AFTER DATE OF PUBLICATION OF IN THE FEDERAL REGISTER]**, a report describing:

- (i) How the State implemented the State highway-rail grade crossing action plan that it previously submitted to FRA for review and approval; and
- (ii) How the State will continue to reduce highway-rail and pathway grade crossing safety risks.

(3) The requirements of this paragraph (c) apply to the following States: Alabama, California, Florida, Georgia, Illinois, Indiana, Iowa, Louisiana, Ohio, and Texas.

(d) *Electronic submission of updated Action Plan and implementation report.* Each of the 10 States listed in paragraph (d)(2) of this section shall submit its updated highway-rail grade crossing action plan and implementation report electronically through FRA's website in PDF form.

(e) *Required elements for State highway-rail grade crossing action plans.* Each State highway-rail grade crossing action plan described in paragraphs (b) and (c) of this section shall:

- (1) Identify highway-rail and pathway grade crossings that:
 - (i) Have experienced at least one accident/incident within the previous 3 years;
 - (ii) Have experienced more than one accident/incident within the previous 5 years; or
 - (iii) Are at high-risk for accidents/incidents as defined in the Action Plan.

Each State or the District of Columbia that identifies highway-rail and pathway grade crossings that are at high-risk for accidents/incidents in its Action Plan shall provide a list of the factors that were considered when making this determination. At a minimum, these factors shall include:

- (A) Average annual daily traffic;
- (B) Total number of trains per day that travel through each crossing;
- (C) Total number of motor vehicle collisions at each crossing during the previous 5-year period;
- (D) Number of main tracks at each crossing;

- (E) Number of roadway lanes at each crossing;
- (F) Sight distance (stopping, corner and clearing) at each crossing;
- (G) Roadway geometry (vertical and horizontal) at each crossing; and
- (H) Maximum timetable speed;

(2) Identify data sources used to categorize the highway-rail and pathway grade crossings in paragraph (e)(1) of this section;

(3) Discuss specific strategies, including highway-rail grade crossing closures or grade separations, to improve safety at those crossings over a period of at least four years;

(4) Provide an implementation timeline for the strategies discussed in paragraph (e)(3) of this section; and

(5) Designate an official responsible for managing implementation of the State highway-rail grade crossing action plan.

(f) *Point of contact for State highway-rail grade crossing action plans.* (1)

When the State or the District of Columbia submits its highway-rail grade crossing action plan or updated Action Plan and implementation report electronically through FRA's website, the following information shall be provided to FRA for the designated official described in paragraph (e)(5) of this section:

- (i) The name and title of the designated official;
- (ii) The business mailing address for the designated official;
- (iii) The e-mail address for the designated official; and
- (iv) The daytime business telephone number for the designated official.

(2) If the State or the District of Columbia designates another official to assume the responsibilities described in paragraph (e)(5) of this section before [INSERT

DATE 1461 DAYS AFTER DATE OF PUBLICATION OF IN THE FEDERAL

REGISTER], the State or the District of Columbia shall contact FRA and provide the information listed in paragraph (f)(1) of this section for the new designated official.

(g) *Review and approval.* (1) FRA will update its website to reflect receipt of each new, updated, or corrected highway-rail grade crossing action plan submitted pursuant to this section.

(2)(i) Within 60 days of receipt of each new, updated, or corrected highway-rail grade crossing action plan, FRA will conduct a preliminary review of the Action Plan to ascertain whether the elements prescribed in paragraph (e) of this section are adequately addressed in the plan.

(ii) Each new, updated, or corrected State highway-rail grade crossing action plan shall be considered conditionally approved for purposes of this section sixty (60) days after receipt by FRA unless FRA notifies the designated official described in paragraph (e)(5) of this section that the highway-rail grade crossing action plan is incomplete or deficient.

(iii) FRA reserves the right to conduct a more comprehensive review of each new, updated, or corrected State highway-rail grade crossing action plan within 120 days of receipt.

(3) If FRA determines that the new, updated, or corrected highway-rail grade crossing action plan is incomplete or deficient:

(i) FRA will provide email notification to the designated official described in paragraph (e)(5) of this section of the specific areas in which the Action Plan is deficient or incomplete and allow the State or the District of Columbia to complete the plan and correct the deficiencies identified.

(ii) Within 60 days of the date of FRA's email notification identifying the specific areas in which the highway-rail grade crossing action plan is incomplete or

deficient, the State or District of Columbia shall correct all deficiencies and submit the corrected State highway-rail grade crossing action plan to FRA for approval. The corrected highway-rail grade crossing action plan shall be submitted electronically through FRA's website in PDF format.

(4)(i) When a new, updated, or corrected State highway-rail grade crossing action plan is fully approved, FRA will provide email notification to the designated official described in paragraph (e)(5) of this section.

(ii) FRA will make each fully-approved State highway-rail grade crossing action plan publicly available for online viewing.

(iii) Each State and the District of Columbia shall implement its fully-approved highway-rail grade crossing action plan.

(h) *Condition for grants.* The Secretary of Transportation may condition the awarding of any grants under 49 U.S.C. ch. 244 on the State's or District of Columbia's submission of an FRA-approved State highway-rail grade crossing action plan under this section.

§ 234.301 [Amended]

5. Amend § 234.301 by removing the definition of "Pathway grade crossing."

Issued in Washington, D.C.

Quintin C. Kendall,

Deputy Administrator,

Federal Railroad Administration.

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