



DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 215

[Docket No. FRA-2023-0021, Notice No. 1]

RIN 2130-AC94

Freight Car Safety Standards Implementing the Infrastructure Investment and Jobs Act

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to amend the Freight Car Safety Standards (FCSS) to implement section 22425 of the Infrastructure Investment and Jobs Act (Act). The Act places certain restrictions on newly built freight cars placed into service in the United States (U.S.) including limiting content that originates from a country of concern (COC) or is sourced from a state-owned enterprise (SOE) and prohibiting the use of sensitive technology that originates from a COC or SOE. The Act mandates that FRA issue a regulation to monitor and enforce industry's compliance with the standards of the Act.

DATES: Comments on the proposed rule must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

Comments received after that date will be considered to the extent practicable.

ADDRESSES: *Comments:* Comments related to Docket No. FRA-2023-21 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Note that all comments

received will be posted without change to <https://www.regulation.gov>; this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

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

FOR FURTHER INFORMATION CONTACT: Check Kam, Mechanical Engineer, Office of Railroad Safety at (202) 366-2139, email: check.kam@dot.gov; or Michael Masci, Senior Attorney, Office of the Chief Counsel, telephone: (202) 302-7117, email: michael.masci@dot.gov.

SUPPLEMENTARY INFORMATION:

Abbreviations and Terms Used in This Document

CBP – Customs and Border Protection

CE – Categorical Exclusion

CFR – Code of Federal Regulations

COC – Country of Concern

DOT – Department of Transportation

EA – Environmental Assessment

EIS – Environmental Impact Statement

FCSS – Freight Car Safety Standards

FR – *Federal Register*

FRA – Federal Railroad Administration

FTA – Federal Transit Administration

GS – General Schedule

IJA – Infrastructure Investment and Jobs Act

IP – Intellectual Property

IRFA – Initial Regulatory Flexibility Analysis

NAFTA – North American Free Trade Agreement

NEPA – National Environmental Policy Act

NPRM – Notice of Proposed Rulemaking

OMB – Office of Management and Budget

PRA – The Paperwork Reduction Act

RSA – Rail Security Alliance

SOE – State-owned enterprise

Umler – Universal Machine Language Equipment Register

U.S. – United States

U.S. DOC – United States Department of Commerce

U.S.C. – United States Code

USITC – U.S. International Trade Commission

USMCA – United States-Mexico-Canada Agreement

USTR – U.S. Trade Representative

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I. Executive Summary

Purpose of the Regulatory Action

FRA is issuing this rulemaking as required by the Act.¹ The Act provides that a railroad freight car, wholly manufactured on or after the date that is 1 year after the date of issuance of regulations, may only operate on the U.S. general railroad system if: (1) the railroad freight car is manufactured, assembled, and substantially transformed, as applicable, by a qualified manufacturer in a qualified facility; (2) none of the sensitive technology located on the railroad freight car, including components necessary to the functionality of the sensitive technology, originates from a COC or is sourced from a SOE; and (3) none of the content of the railroad freight car, excluding sensitive technology, originates from a COC or is sourced from a SOE that has been determined by a recognized court or administrative agency of competent jurisdiction and legal authority to have violated or infringed valid United States intellectual property rights of another including such a finding by a Federal district court under title 35 or the U.S. International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).²

The Act further provides percentage limitations on freight car contents so that not later than one year after the date of issuance of regulations, a railroad freight car, even if complying with the requirements in the preceding paragraph, may not operate on the U.S. general railroad system if more than 20 percent of the content of the railroad freight car,

¹ The Infrastructure Investment and Jobs Act (IIJA), Sec. 22425, Public Law 117-58, 135 Stat. 752 (Nov. 15, 2021) (codified at 49 U.S.C. 20171) and generally referred to in this proposed rule as the Act, or section 20171).

² 49 U.S.C. 20171(b)(1).

calculated by the net cost of all components of the car and excluding the cost of sensitive technology, originates from a COC or is sourced from a SOE. After three years from the date of issuance of regulations, the percentage may not be more than 15 percent.³

Summary of the Regulatory Action

The Act requires regulations to be issued to implement its mandate and for freight car manufacturers to certify that freight cars covered by the Act are in compliance.⁴ This regulation would codify a process for FRA to monitor and enforce compliance with the Act. To carry out the Act's certification requirement, FRA is proposing to require railroad freight car manufacturers to electronically certify to FRA that each freight car complies with the Act before it operates on the U.S. general railroad system of transportation. The certification would be required to identify each car being offered for operation, and include the manufacturer's name and the name of the individual responsible for certifying compliance with the Act. In addition, the manufacturers would be required to maintain all records showing information to support certification, including content calculations, and such records would be made available to FRA upon request.

Costs and Benefits of the Proposed Regulatory Action

This proposed rule would fulfill FRA's obligation to issue a rulemaking that would implement the Act. In section "VI. A. Executive Order 12866 as Amended by Executive Order 14094" of this proposed rule, FRA describes the benefits and costs that would come from issuing this regulation.

Over a 10-year period of analysis, FRA quantifies the following costs to the freight car manufacturing industry and FRA that would come from issuing this proposed rule: (1) limiting content sourced from COCs or SOEs; (2) prohibiting the use of sensitive technology from these sources; (3) industry compliance costs; and (4) government

³ *Id.* at (b)(2).

⁴ The Act requires certification to the "Secretary of Transportation." Pursuant to 49 CFR 1.89(a), the Secretary has delegated that authority to FRA.

administrative monitoring and enforcement costs. As shown in table 1, the cost from issuing the proposed rule is approximately \$143,300 (undiscounted), \$123,600 (present value (PV), 3%), and \$89,500 (PV, 7%). The annualized net costs are approximately \$14,500 (PV, 3%) and \$12,800 (PV, 7%).⁵

Table 1: Industry and FRA burden from issuing the proposed rule, total cost, rounded (\$100)

Entity	Total Cost (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Industry costs	40,100	34,000	23,800	4,000	3,400
FRA costs	103,200	89,600	65,700	10,500	9,400
Total cost	143,300	123,600	89,500	14,500	12,800

In the economic analysis section, FRA qualitatively explains the potential benefits that may result from implementing the proposed rule. Issuing the proposed rule would protect the U.S. rail system from risks that come from manufacturing freight cars with sensitive technology and technological components, necessary to the functionality of the sensitive technology, from a COC or SOE such as potential vulnerabilities in information security. As such, this proposed rule would mitigate potential issues related to compromised national security and corporate espionage. Issuing the proposed rule would also fulfill FRA’s duties as required by the Act. As mentioned in the economic analysis section, FRA welcomes public comment to assess the potential costs and benefits associated with implementing this proposed rule.

II. Infrastructure Investment and Jobs Act Background

On November 15, 2021, President Biden signed the Act,⁶ which includes a mandate that FRA issue regulations to implement it.⁷ In general, the Act allows freight

⁵ All cost and benefits estimates are in 2022 dollars.

⁶ 49 U.S.C. 20171. See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-implementation-of-the-infrastructure-investment-and-jobs-act/>.

⁷ *Id.* at (c)(1).

cars, wholly manufactured after a certain date, to operate in the U.S. only if the cars are manufactured by a “qualified manufacturer” in a “qualified facility.”⁸ The Act defines “qualified manufacturer” as a “freight car manufacturer that is not owned or under the control of a state-owned enterprise.”⁹ Similarly, the Act defines “qualified facility” as “a facility that is not owned or under the control of a state-owned enterprise.”¹⁰ The Act defines “state-owned enterprise” as an entity that is owned by, or under the control of, a government or agency of a COC or an individual acting under the direction or influence of a government or agency of a COC.¹¹

The Act provides a three-pronged definition of a COC. First, to be a COC under the Act, a country must have been identified by the U.S. Department of Commerce as a nonmarket economy country as of the date of enactment of the Passenger Rail Expansion and Rail Safety Act of 2021 (i.e., as of November 15, 2021).¹² Second, a country must have been identified by the USTR in the most recent report under section 182 of the Trade Act of 1974 (Section 301 Report) as a foreign country included on the “priority watch list.”¹³ Finally, a country must also be subject to USTR monitoring under section 306 of the Trade Act.

In recent years, Congress has taken action concerning rail equipment and components manufactured by or sourced from COCs or SOEs.¹⁴ Generally, these laws limit the availability of Federal funds for certain equipment or projects funded or controlled by foreign entities. For example, the National Defense Authorization Act

⁸ *Id.* at (b)(1)(A).

⁹ *Id.* at (a)(7).

¹⁰ *Id.* at (a)(6).

¹¹ *Id.* at (a)(10).

¹² *Id.* at (a)(4)(A).

¹³ *Id.* at (a)(4)(B). Section 182 of the Trade Act of 1974 (19 U.S.C. 2242), commonly known as the “Special 301 provisions,” requires the U.S. Trade Representative (USTR) to identify countries that deny adequate and effective IP protections or fair and equitable market access to U.S. persons who rely on IP protection. The Trade Act requires the USTR to determine which, if any, of these countries to identify as Priority Foreign Countries. Such a designation can subject those countries to particular processes under the Trade Act.

¹⁴ *See, e.g.,* the National Defense Authorization Act (49 U.S.C. 5323(u)).

limits the use of FTA funds, and in some circumstances, local funds, to procure rolling stock from certain transit vehicle manufacturers who “are owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in” certain foreign countries.¹⁵ However, because the freight rail car sector and its equipment are privately owned, those laws do not apply to the freight rail car industry. Congress has now extended similar limitations on rail equipment and components manufactured by or sourced from COCs or SOEs to the freight rail car industry by issuing the Act.

Similarly, President Biden issued Executive Order 14005 of January 25, 2021 “Ensuring the Future Is Made in All of America by All of America’s Workers,”¹⁶ stating “the United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive.”¹⁷ The President also issued Executive Order 14028 of May 12, 2021 “Improving the Nation’s Cybersecurity”¹⁸ stating that “prevention, detection, assessment, and remediation of cyber incidents is a top priority and essential to national and economic security.”¹⁹ While the Act is consistent with those Executive orders, the Act has more stringent content limitations than those provided in the Executive orders.

The Act has a similar legal framework as the United States-Mexico-Canada Agreement (USMCA),²⁰ which replaced the North American Free Trade Agreement (NAFTA). The USMCA contains a certification process for certifying the origin of

¹⁵ Section 7613 of the National Defense Authorization Act for Fiscal Year 2020 (NDAA 2020), Public Law 116-92 (Dec. 20, 2019), which added a new subsection, 49 U.S.C. 5323(u), to Federal public transportation law.

¹⁶ 86 FR 7475.

¹⁷ *Id.*

¹⁸ 86 FR 26633.

¹⁹ *Id.*

²⁰ USMCA, July 1, 2020, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

materials used in products.²¹ The Act builds on the certification process of the USMCA, by requiring manufacturers to certify the origins and sources of railroad freight car components.²² The Act also directly borrows many terms from the USMCA, including the definitions for “net cost” and “substantially transformed,” two key terms that help set parameters for the limitations built into the Act and help instruct manufacturers how to comply with it.²³ These similarities have helped inform FRA’s understanding of the requirements of the Act. The similarities also help eliminate certain potential burdens arising from this proposed rulemaking. As such, FRA expects that the steps involved certifying compliance under the USMCA will be substantially the same as those needed to certify compliance with the Act. FRA welcomes comments to this NPRM to help further develop its understanding of the issues.

III. Application of the Infrastructure Investment and Jobs Act to Railroad Freight Car Manufacturers Including Discussions with RSA

To understand how railroad industry manufacturers were complying with other Congressional requirements concerning equipment and components manufactured by or sourced from COCs or SOEs and the certification requirements of the USMCA, FRA conducted a series of listening sessions with RSA, including two in person meetings on September 26, 2022, and March 3, 2023. While the proposals in this NPRM are FRA’s alone, based on its independent assessments of the issues, the meetings with RSA helped FRA analyze the requirements of the Act. A summary of the meetings is in the public docket for this rulemaking (Docket Number FRA-2023-21).

A. The Infrastructure Investment and Jobs Act content limitations apply only at the time of manufacture

²¹ USMCA chapters 4 and 5, July 1, 2020, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

²² 49 U.S.C. 20171(c)(2).

²³ *Id.* at (a).

Section 20171(b)(2) of the Act sets forth certain content limitations that must be met for “railroad freight cars” (as defined in the statute) “wholly” manufactured after a certain date to operate on the U.S. general railroad system of transportation.

Understanding this subsection within the context of the Act as a whole (49 U.S.C. 20171), FRA concluded that the Act regulates railroad freight cars by imposing such requirements at the time of initial manufacture but does not require FRA to ensure that the content limitations set forth in section 20171(b)(2) are met throughout the useful life of the equipment or at each re-entry into service following any changes to the railroad freight car including, repair, alteration, modification, rebuild, refurbishment, restoration, or reconstruction.

First, in the Act’s definitions, Congress explicitly defined *who* would be qualified to *manufacture* railroad freight cars eligible to operate on the general railroad system of transportation by limiting the manufacturing process to “qualified manufacturers” in “qualified facilities.”²⁴ The statute does not define those who would be qualified to perform repairs or maintenance or otherwise address such “aftermarket” activities. References to the manufacturing process are also found in the definition of “substantially transformed,” which is a trade term of art used to describe a “change in tariff classification as a result of the manufacturing process.”²⁵

Second, the Act requires *manufacturers* to provide an annual certification that any railroad freight cars they provide for operation on the U.S. general railroad system of

²⁴ *Id.* at (a)(7) and (6).

²⁵ This term refers to the manufacturing process and is generally used to help determine the country of origin for a product in international trade. Generally, substantial transformation means that the good underwent a fundamental change (normally as a result of processing or manufacturing in the country claiming origin) in form, appearance, nature, or character, which adds to its value an amount or percentage that is significant in comparison to the value which the good (or its components or materials) had when exported from the country in which it was first made or grown. Usually a new article of commerce—normally one with a different name—is found to result from any process that Customs decides has brought about a “substantial transformation” in the pre-existing components. Thus, leading to a change in the tariff classification of the substantially transformed item. *See* <https://www.trade.gov/rules-origin-substantial-transformation>.

transportation meet the Act's requirements.²⁶ Manufacturers are capable of making such a certification, particularly with respect to the content limitations, only in connection with the initial manufacturing process.

Third, the Act requires manufacturers to have a valid certification *at the time a railroad freight car begins operation*.²⁷ Given the emphasis on manufacturers and the manufacturing process, it is reasonable to interpret this phrase to mean at the time a railroad freight car *first begins* operation, but not *every time* the car is returned to service.

Accordingly, reading the Act as a whole, content limitations imposed by Congress apply to only newly-manufactured railroad freight cars at the point when cars first enter the U.S. general railroad system of transportation.²⁸ The Act does not impose a continuing obligation on the manufacturer to certify to the content limitations throughout the useful life of the assets and does not require FRA to enforce section 20171(b)(2)'s content limitations at all times a railcar is in service.

B. *After-manufacture changes to a railroad freight car are not covered by the Infrastructure Investment and Jobs Act*

Because the Act regulates railroad freight cars at the time a railcar first begins operation, the content limitations set forth in section 20171(b)(2) do not apply at the time of repair. As a result, the statute does not contemplate FRA enforcing the content limitations at the time of repair.

The Act limits by whom and where a railroad freight car is “manufactured, assembled, or substantially transformed.”²⁹ As noted above, Congress focused on who may perform the manufacturing or assembly of a railroad freight car and sought to ensure such activity was not carried out in a facility that is owned or controlled by a state-owned enterprise. Congress also sought to regulate who may “substantially transform” a

²⁶ 49 U.S.C. 20171(c)(2).

²⁷ *Id.* at (c)(3).

²⁸ *Id.* at (b)(2).

²⁹ *Id.* at (b)(1)(A).

component of a railroad freight car during the manufacturing process. “Substantially transformed” is a defined term of art, borrowed from trade law, that relates to tariff classification as a result of the manufacturing process.

Requiring enforcement of the content limitations for the railroad freight car’s entire useful life—including repairs—would be a departure from the compliance scheme dictated by the statute, which is tied to manufacturer certifications. If Congress intended FRA to enforce content limitations in section 20171(b)(2) throughout the life of the railcar, including upon repair, it would have explicitly said so.³⁰ Moreover, Congress does not define or reference any type of repair or aftermarket component replacement within the scope of the Act at any place. Because terms like “for the life of the asset,” “at all times,” or “at the time of repair” are absent from the text of the Act, FRA has concluded that its enforcement obligation does not extend beyond the time of manufacture for the content limitations in section 20171(b)(2).

C. *Railroad freight cars already placed in service in the U.S. are not subject to the Infrastructure Investment and Jobs Act*

The Act requires FRA to issue regulations to implement the requirements set forth in the Act.³¹ For purposes of this analysis, FRA has proposed to define the date on which FRA promulgates regulations as the “Issuance Date.” With respect to applicability, the plain language of section 20171 states that only railroad freight cars that are wholly manufactured on or after a date that is one year after the Issuance Date are subject to Act’s requirements.³² Thus, if FRA promulgates regulations on June 1, 2023, the only railroad freight cars that are wholly manufactured on or after June 1, 2024, are subject to the Act’s requirements. Using this hypothetical issuance date of June 1, 2023, as an example, existing railroad freight cars manufactured prior to June 1, 2024, and new

³⁰ *Whitman v. American Trucking Ass’n*, 531 U.S. 457, 468 (2001) (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions— it does not, one might say, hide elephants in mouseholes.”).

³¹ 49 U.S.C. 20171(c)(1).

³² *Id.* at (b)(1) and (2).

railroad freight cars that were partially manufactured prior to June 1, 2024, are not subject to the Act. Thus, railroad freight cars that are currently in-use are not subject to the Act, including when parts are replaced during maintenance or repair; because the Act only imposes forward-looking requirements.

D. The Act's requirements apply only to manufacturers, not railroads

The Act imposes certification and compliance obligations on manufacturers, not railroads. Specifically, the certification requirement set forth in section 20171(c)(2) and the prohibition on false registration in Umler³³ both attach to a railroad freight car manufacturer.³⁴ Further, FRA is permitted to prohibit a railroad freight car *manufacturer* from providing additional railroad freight cars for operation in the U.S. if the manufacturer is a repeat violator of section 20171.³⁵ The statute does not impose obligations on a railroad to ensure the railroad freight cars meet content limitations nor does the statute require FRA to hold railroads accountable for compliance with the Act. FRA requests comments on whether a railroad should be responsible for the operation of freight cars known to be in noncompliance with the Act.

IV. Overview of the Proposal to Implement the Infrastructure Investment and Jobs Act Requirement for Freight Car Compliance Certification

The Act requires manufacturers to annually certify to FRA, as delegated by the Secretary, that any railroad freight cars it offers for operation on the U.S. general railroad system of transportation meet the requirements of the Act.³⁶ This rulemaking proposes to

³³ Railinc Corp.'s Umler system is an electronic resource that contains critical data for the North American rail fleet, such as internal and external dimensions, cubic or gallon capacity, and weight information for each unit. *See* Association of American Railroads Rule 93 and UMLER Data Specification Manual; *see also* The Umler® System at <https://public.railinc.com/products-services/umler-system#:~:text=Umler%C2%AE%20is%20the%20source,to%20logistics%20partners%20and%20customer> s.

³⁴ 49 U.S.C. 20171(c)(2) and 20171(c)(3).

³⁵ *Id.* at (c)(4).

³⁶ *Id.* at (c)(3).

incorporate the certification requirement into the FCSS³⁷ and establish a process for FRA to access necessary information to determine compliance with the Act.

FRA proposes to require manufacturers' certifications to be submitted electronically to FRA's Office of Railroad Safety. The certifications would include the manufacturer's name and address, the name, signature and contact information for the person responsible for certifying compliance, and a car identification number for each car being certified. Manufacturers would be required to maintain records to support their compliance and FRA would be able to access those records upon request. FRA expects freight car manufacturers to certify groups of cars together coinciding with bulk orders for equipment. For convenience, manufacturers may submit the certification to FRA at the same time as they request a safety appliance drawing review and/or courtesy sample base car inspection for the same build order.³⁸ At its discretion, FRA may request the percentage break down on the content for a specific car, as needed, to determine compliance for that car.³⁹

FRA is also proposing that manufacturers maintain records showing the calculations made to support certification under this section and such records shall be made available to FRA upon request. This would provide FRA access to the information necessary to determine the percentage of components originating from COCs and SOE for each freight car. FRA understands that manufacturers currently generate such a break

³⁷ 49 CFR part 215.

³⁸ FRA performs sample car inspections as a courtesy to the manufacturers, to better ensure equipment is built in accordance with all applicable Federal railroad safety laws. Generally, manufacturers that desire to have FRA review their equipment for compliance with safety appliance standards are to submit their safety appliance arrangement drawings, prints, etc., to FRA's Office of Railroad Safety, Office of Railroad Infrastructure and Mechanical Equipment for review, at least 60 days prior to construction. FRA reviews the documents submitted and advises the manufacturer if any specifications laid out in the drawings do not conform with the applicable regulation(s). The sample base car inspection generally provides the manufacturer an opportunity to make any necessary changes in the design or manufacturing process to meet compliance before building the remaining cars of that order. *See* <https://railroads.dot.gov/sites/fra.dot.gov/files/2020-05/MPEComplianceManual2013.pdf>

³⁹ The percentage breakdown for evaluating content is the net cost of materials (excluding the cost of sensitive technology) compared to total cost of the freight car.

down for their cars to comply with the USMCA and does not anticipate that assembling the information will result in an additional burden to the industry.

FRA anticipates that certain documents submitted by manufacturers pursuant to 49 U.S.C. 20171(c)(3) may contain proprietary or other confidential business information. Manufacturers should follow the procedures in 49 CFR 209.11 to ensure proper handling of such information, and manufacturers may redact portions of submitted information so long as FRA is able to accurately ascertain the manufacturer's compliance with the Act. However, FRA retains the right to make its own determinations regarding disclosure of submitted information. In making these determinations, FRA will consider all exemptions to Freedom of Information Act disclosure, including the exemption on disclosure of commercial or financial information and privileged or confidential information.⁴⁰

V. Section-by-Section Analysis

This section-by-section analysis is intended to explain the rationale for each revised or new provision FRA is proposing to incorporate into the FCSS. The proposed regulatory changes are organized by section number. FRA seeks comments on all proposals in this NPRM.

Section 215.5 Definitions

FRA proposes to incorporate several new, defined terms into the FCSS, most pulled directly from the Act and some proposed as necessary to effectively implement the Act. FRA also proposes to organize the existing FCSS definitions along with the newly proposed definitions in alphabetical order to conform with FRA's other regulations. The Act's definition for the term "railroad freight car" mirrors the definition for the same term in the current FCSS. Accordingly, this rulemaking would keep the definition in the FCSS unchanged. The new definitions FRA proposes to add are discussed below:

⁴⁰ 5 U.S.C. 552(b)(4).

Component is defined by the Act,⁴¹ and FRA is proposing to adopt it in the FCSS. Although the proposed definition does not identify specific parts and subassemblies of freight cars as “components,” FRA believes Congress intends this definition to include the major components of freight cars (e.g., trucks, wheel sets, center sills, draft gears, couplers, walkways, running boards) when calculating content limitations under proposed section 49 CFR 215.401(b)(1). FRA does not intend the definition of “component” to include smaller parts that do not significantly impact manufacturing costs (e.g., wear plates, roof liners, or small pieces of hardware such as screws). FRA welcomes comment on how freight car items fit into this definition.

Control is defined by the Act,⁴² and FRA is proposing to adopt it in the FCSS. This definition relates to the definitions of “qualified facility” and “qualified manufacturer” discussed below.

Cost of sensitive technology is defined by the Act,⁴³ and FRA is proposing to adopt it in the FCSS.

Country of concern is defined by the Act⁴⁴ and FRA is proposing to adopt it in the FCSS.⁴⁵ As noted in the *Infrastructure Investment and Jobs Act Background* section above a country must meet all three criteria to qualify as a “country of concern.” Each of the criteria within the definition of “country of concern” are separated by “and” instead of “or,” meaning a country must meet all three criteria to meet the definition.

First, to qualify as a “country of concern” under section 20171, the U.S. DOC must have identified that country as a nonmarket economy country pursuant to the Tariff

⁴¹ 49 U.S.C. 20171(a)(1).

⁴² *Id.* at (a)(2).

⁴³ *Id.* at (a)(3).

⁴⁴ *Id.* at (a)(4).

⁴⁵ These same criteria are used to define “country of concern” in 49 U.S.C. 5323(u) (placing limitations on certain rolling stock procurements for public transportation that qualify for financial assistance), and the FTA has published Frequently Asked Questions Regarding Section 7613 of the National Defense Authorization Act for Fiscal Year 2020 that discusses the criteria and the definition of “country of concern.” <https://www.transit.dot.gov/funding/procurement/frequently-asked-questions-regarding-section-7613-national-defense>.

Act of 1930 *at the date* of enactment (i.e., as of Nov. 15, 2021).⁴⁶ In 2021, when the Act became law, the U.S. DOC had named eleven countries as nonmarket economy countries: Armenia, Azerbaijan, Belarus, China, Georgia, Kyrgyzstan, Moldova, Tajikistan, Turkmenistan, Uzbekistan, and Vietnam.⁴⁷ FRA notes that this criterion is tied to the Passenger Rail Expansion and Rail Safety Act of 2021 enactment date and accordingly, the countries that meet this first prong of the definition will not change.

Second, to constitute a “country of concern,” the USTR must also name that country on the priority watch list in the most recent report required by the Trade Act of 1974.⁴⁸ In the most recently required report, the USTR identified seven countries on the priority watch list: Argentina, Chile, China, India, Indonesia, Russia, and Venezuela.⁴⁹

Third, a country is deemed a “country of concern” only if it is subject to monitoring by the USTR under section 306 of the Trade Act of 1974.⁵⁰ In the 2022 Special 301 Report, the USTR identifies seven countries that are on the priority watch list: Argentina, Chile, China, India, Indonesia, Russia, and Venezuela. Of these seven, only China is monitored pursuant to section 306.

Accordingly, China is currently the only country that meets all three criteria and therefore is the only “country of concern” as defined in the Act.

⁴⁶ 49 U.S.C. 20171(a)(4)(A).

⁴⁷ Int’l Trade Admin, *Countries Currently Designated by Commerce as Non-Market Economy Countries*, <https://www.trade.gov/nme-countries-list> (identifying the *Federal Register* notices wherein a country was designated as a non-market economy country).

⁴⁸ 49 U.S.C. 20171(a)(4)(B).

⁴⁹ Office of the U.S. Trade Rep., *2022 Special 301 Report*, 5 (2022), (2022 Special 301 Report.pdf (ustr.gov)).

⁵⁰ 49 U.S.C. 20171(a)(4)(C). See Office of the U.S. Trade Rep., *2022 Special 301 Report*, 44 (2022), <https://ustr.gov/issue-areas/intellectual-property/special-301/2022-special-301-review>, (listing countries included on the priority watch list and whether such countries are subject to monitoring under section 306 of the Trade Act of 1974).

Net cost is defined by the Act,^{51 52} and FRA is proposing to adopt it in the FCSS. Currently, chapter 4 of the USMCA defines *net cost*.⁵³

Qualified facility is defined by the Act,⁵⁴ and FRA is proposing to adopt it in the FCSS. When read in combination with the definition of the term *control* the Act provides, FRA finds that the Act intends for general corporate law principles to apply to determine whether a particular railroad freight car or component manufacturer is “owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in” a country that meets the statutory criteria.

Qualified manufacturer is defined by the Act,⁵⁵ and FRA is proposing to adopt it in the FCSS. For the purpose of this definition, a supplier, component and repair part manufacturer, or other entity may be a railroad freight car manufacturer, if it manufactures, assembles, or substantially transforms a freight car, as described in proposed 49 CFR 215.401(a)(1). Like the definition of *qualified facility*, when read in combination with the Act’s definition of the term *control*, FRA again finds that the Act intends for general corporate law principles to apply to determine whether a particular railroad freight car or component manufacturer is “owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in” a country that meets the statutory criteria.

Sensitive technology is defined by the Act,⁵⁶ and FRA is proposing to adopt it in the FCSS. While FRA understands the list of devices included in this definition to be

⁵¹USMCA chapter 4, July 1, 2020, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>.

⁵²49 U.S.C. 20171(a)(5).

⁵³*Uniform Regulations Regarding the Interpretation, Application, and Administration of Chapter 4 (Rules or Origin) and Related Provisions in Chapter 6 (Textile and Apparel Goods) of the Agreement Between the United States of America, The United Mexican States, and Canada.* <https://ustr.gov/sites/default/files/files/agreements/usmca/UniformROO.pdf>.

⁵⁴49 U.S.C. 20171(a)(6).

⁵⁵*Id.* at (a)(7).

⁵⁶*Id.* at (a)(9).

examples that can be considered sensitive technology, FRA is not currently aware of any additional devices that should be included in the list.

State-owned enterprise is defined by the Act,⁵⁷ and FRA is proposing to adopt it in the FCSS.

Substantially transformed is defined by the Act,⁵⁸ and FRA is proposing to adopt it in the FCSS. FRA understands that a manufacturing process which changes an article's name, character, or use will often result in a change in the article's tariff classification. Accordingly, FRA understands the Act's definition of *substantially transformed* to mean a manufacturing process that changes an article's name, character, or use. FRA notes that the U.S. Customs and Border Protection (CBP) is an implementing agency for USMCA and although CBP uses a slightly different definition of *substantially transformed* than that provided in the Act, CBP explains that substantial transformation "occurs when, as a result of manufacturing processes, a new and different article emerges, having a distinctive name, character, or use, which is different from that originally possessed by the article or material before being subject to the manufacturing process."⁵⁹ FRA finds that the definition of *substantially transformed* provided in the Act and CBP's definition of the same term are compatible in that a manufacturing process which changes an article's name, character, or use will often also result in a change in the article's tariff classification.

USMCA is defined by the Act,⁶⁰ and FRA is proposing to adopt it in the FCSS.

Section 215.401 Requirements for Railroad Freight Cars Placed into Service in the United States

⁵⁷ *Id.* at (a)(10).

⁵⁸ *Id.* at (a)(11).

⁵⁹ <https://www.trade.gov/rules-origin-substantial-transformation>.

⁶⁰ 49 U.S.C. 20171(a)(12).

This section proposes to incorporate the requirements of paragraph (b)(1) of the Act into the FCSS. Paragraph (b)(1) of the Act provides that for a railroad freight car to operate on the U.S. general railroad system of transportation: (1) any car wholly manufactured after a certain date must be manufactured, assembled, and substantially transformed by a qualified manufacturer in a qualified facility; (2) none of the sensitive technology located on the car may originate from a COC or be sourced from a SOE; and (3) none of the content of the car (except sensitive technology) may originate from a COC or be sourced from a SOE with a history of problematic trade practices or respect for IP rights.

Proposed paragraph (a)(1) mirrors paragraph (b)(1)(A) of the Act and mandates that any railroad freight car to be operated on the U.S. general railroad system of transportation and wholly constructed one year from a final rule in this proceeding, must be manufactured, assembled, and substantially transformed by a qualified manufacturer or a qualified facility.

Sensitive technology prohibition

Proposed paragraph (a)(2) mirrors paragraph (b)(1)(B) of the Act and addresses sensitive technology. This paragraph proposes to incorporate the Act's general prohibition on operating a freight car on the U.S. general railroad system of transportation, if any of its "sensitive technology" or "components necessary to the functionality of the sensitive technology" originates from a COC or is sourced from a SOE.

As noted above, the Act defines "sensitive technology," but does not define or provide any guidance on what constitutes "components necessary to the functionality of the sensitive technology." FRA understands this phrase to generally include the active components that work with the sensitive technology, because they may also be able to collect and transmit data. Passive components are excluded from this phrase because

they cannot collect or transmit data. Examples of *active* components include, but are not limited to, any type of processor, transmitter, receiver, or data storage device. While the *passive* components are still necessary for the device to function as a whole, these components do not play a vital role in the storage, collection, exchange, transmittal, or manipulation of any data. Examples of *passive* components include, but are not limited to, printed circuit boards, power supplies, temperature sensors, pressure gauges, resistors, capacitors, etc. FRA welcomes comments to this NPRM about what constitutes “components necessary to the functionality of the sensitive technology” under the Act.

Intellectual property infringement prohibition

Proposed paragraph (a)(3) mirrors paragraph (b)(1)(C) of the Act and addresses IP infringement. This language forbids the inclusion in any railroad freight car of any content from a COC or SOE “that has been determined by a recognized court or administrative agency of competent jurisdiction and legal authority to have violated or infringed valid U.S. intellectual property rights of another.” The Act includes both “a finding by a Federal district court under title 35” and a finding by the U.S. International Trade Commission (ITC) under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) as determinations sufficient to trigger the prohibition.

For the purposes of this requirement, the ITC makes a finding that an entity has violated or infringed valid U.S. IP rights when the ITC issues a final determination under section 337. Under ITC procedure, an administrative law judge, who concludes that an entity violated section 337 of the Tariff Act, first files an initial determination.⁶¹ This initial determination becomes a final determination of the ITC 60 days after it is filed, unless the ITC orders review of the initial determination, in which case the ITC’s ultimate finding would be the final determination.⁶² These determinations are available

⁶¹ 19 CFR 210.42(a)(1)(i).

⁶² *Id.* at (h)(2).

on the ITC's website.⁶³ FRA does not anticipate tracking determinations on an ongoing basis; manufacturers seeking certification are responsible for researching determinations against their own suppliers.

As an example, in October 2009, the ITC issued a 10-year Limited Exclusion Order against two Chinese companies (Tianrui Group Company Limited and Tianrui Group Foundry Company Limited) and two U.S. companies (Standard Car Truck Company, Inc. and Barber Tianrui Railway Supply, LLC) that an administrative law judge determined had violated section 337.⁶⁴ The U.S. Court of Appeals for the Federal Circuit upheld the ITC's decision on October 11, 2021.⁶⁵

Furthermore, FRA finds that section 20171(b)(1)(C)'s prohibition applies not only to the entity determined to be the IP infringer, but to the content of that infringement as well. For example, in 2009, the ITC determined that four respondents violated section 337 of the Tariff Act by misappropriating numerous Amsted trade secrets relating to the manufacture of cast steel railway wheels, importing into the U.S. cast steel railway wheels and substantially injuring, and threatening substantial injury to, Amsted's domestic cast steel railway wheel operations, which manufacture Amsted's Griffin® wheels.⁶⁶ The ITC determination excluded any such steel railway wheels from entering into the U.S. for ten years. On appeal, the Federal Circuit upheld the ITC's decision.⁶⁷ FRA understands that section 20171(b)(1)(C) would prohibit a railroad freight car to be equipped with steel wheels that were manufactured using the stolen IP that was the subject of this case. The Act does not expressly provide a timeframe for the prohibitions

⁶³ https://usitc.gov/intellectual_property/337_determinations.htm.

⁶⁴ *See In the matter of Certain Cast Steel Railway Wheels*, et al. USITC Inv. No. 337-TA-655 (U.S. Intern. Trade Com'n), 2009 WL 10693128.

⁶⁵ *Tianrui Group Co. Ltd. V. Intl. Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011).

⁶⁶ *In the matter of Certain Cast Steel Railway Wheels*, et al. USITC Inv. No. 337-TA-655 (U.S. Intern. Trade Com'n), 2009 WL 4261206.

⁶⁷ *Tianrui Group Co. Ltd. V. Intl. Trade Comm'n*, 661 F.3d 1322 (Fed. Cir. 2011).

under this section or connect it to the length of the ITC exclusion or any other time limitations. As such, FRA understands the prohibition to be permanent.

Content limitations

Proposed paragraph (b) mirrors section 20171(b)(2) of the Act and addresses content limitations from COCs and SOEs generally. Consistent with the Act, beginning 1 year after this regulation is issued, proposed paragraph (b)(1)(i) would initially prohibit newly manufactured freight cars from operating on the U.S. general railroad system of transportation if more than 20 percent of the car's content originates from a COC or is sourced from a SOE. After 3 years, proposed paragraph (b)(1)(ii) would reduce that threshold to no more than 15 percent. Cars not meeting these thresholds would be noncompliant and the manufacturer would be subject to civil penalties under proposed § 215.407. Consistent with the Act, as proposed, the percent of content is measured by the net cost of materials (excluding the cost of sensitive technology).⁶⁸ Proposed paragraph (b)(2) mirrors paragraph (b)(2)(B) of the Act and explains that the content limitations provided in the Act shall apply notwithstanding any apparent conflict with provisions of chapter 4 of the USMCA. Chapter 4 of the USMCA and the Act both establish rules for the country of origin for a product in international trade. This paragraph clarifies that compliance with chapter 4 of the USMCA does not constitute, or in any way affect, the content limitations in the Act, which apply independently.

Section 215.403 Certification of Compliance

This proposed section incorporates the requirements of paragraph (c) of the Act and includes requirements designed to help FRA monitor and enforce the Act's standards.

⁶⁸ The proposed definition of "net cost" is provided in section 215.5 of this proposed rule. For a discussion of "net cost," see the section-by-section analysis above.

Consistent with paragraph (c)(2) of section 20171, proposed paragraph (a) requires railroad freight car manufacturers to annually certify to FRA, as delegated by the Secretary of Transportation, that any railroad freight car it provides for operation in the United States, meets the requirements of section 20171.

Proposed paragraph (a)(1) would require railroad freight car manufacturers to submit a certification report to FRA, identifying and certifying compliance for, each freight car before it can operate on the U.S. general railroad system of transportation. Each certification report submitted to FRA may identify a single freight car or multiple freight cars based on the manufacturer's preference. For convenience, a manufacturer may submit its certification report directly to the Office of Railroad Safety along with any customary request to FRA for a sample base car inspection or safety appliance arrangement drawing review. Paragraph (a)(1)(i) would require the report to include a statement certifying compliance, the manufacturer's name, the individual responsible for certifying compliance with the Act and this rule, and the car identification number for each car being certified. Paragraph (a)(1)(ii) would require the freight car manufacturer to maintain all records showing the information, including calculations, made to support certification under this section and such records shall be made available to FRA upon request.

Section 215.405 Prohibition on Registering Noncompliant Railroad Freight Cars

This section proposes to incorporate the requirements in 49 U.S.C. 20171(c)(3)(B) into the FCSS. FRA will review registration records when there is evidence of noncompliance with the Act. For example, when FRA determines a railroad freight car manufacturer is not in compliance with the Act's substantive requirements (e.g., it is equipped with sensitive technology, or 20 percent or 15% of its components, sourced from an SOE and operating on the U.S. general railroad system of transportation), FRA would request documentation to determine whether the freight car

was registered with the Umler system. If the freight car was so registered, the freight car would also be in noncompliance with this section.

Section 215.407 Civil Penalties

This section proposes to incorporate the requirements in 49 U.S.C. 20171(c)(4) into the FCSS. The Act specifies penalty amounts for violations of its substantive requirements and specifies that the unit of violation is the freight car. FRA anticipates utilizing the *Railroad Safety Enforcement Procedures* to enforce these penalties in the same manner as other civil penalties enforced by FRA.⁶⁹

VI. Regulatory Impact and Notices

A. Executive Orders 12866 as Amended by Executive Order 14094

This proposed rule is not a significant regulatory action within the meaning of Executive Order (E.O.) 12866 (“Regulatory Planning and Review”), as amended by Executive Order 14094, Modernizing Regulatory Review,⁷⁰ and DOT Order 2100.6A (“Rulemaking and Guidance Procedures”). This proposed rule aims to enforce the Act’s restrictions on content and technology originating from COCs and SOEs in newly built freight cars entering service on the U.S. general railroad system of transportation. Issuing this proposed rulemaking would authorize FRA to monitor and enforce industry compliance with the Act. This section qualitatively explains benefits and quantitatively explains costs for the freight car industry and FRA associated with implementing this proposed rule over a 10-year period, considering discount rates of 7 percent and 3 percent.⁷¹

FRA has concluded that the Act does not impose a continuing obligation on manufacturers or railcar owners related to certifying content and technology limitations

⁶⁹ 49 CFR part 209.

⁷⁰ 88 FR 21879 (April 6, 2023) located at <https://www.federalregister.gov/documents/2023/04/11/2023-07760/modernizing-regulatory-review>.

⁷¹ All costs are expressed in 2022 base year dollars.

throughout the useful life of each freight car. As such, the proposed rule would not require FRA to enforce the requirements set forth in the Act at all times a freight railcar is in service on the U.S. general railroad system of transportation. Therefore, this proposed rule would only impact original freight car manufacturers related to the initial entry of freight cars into service in the U.S. general railroad system of transportation.

Based on discussions with FRA subject matter experts in the Office of Motive Power and Equipment, this analysis estimates that the proposed rule would impact six freight car manufacturers that have manufacturing facilities within North America. This proposed rule would not significantly impact any other entity. Over a 10-year period, this analysis estimates the impact of issuing this proposed rule on freight car manufacturing industry and FRA related to: (1) limiting content sourced from COCs or SOEs; (2) prohibiting the use of sensitive technology and components necessary to the functionality of the sensitive technology from a COC or SOE; (3) compliance costs; and (4) government administrative costs associated with enforcing this proposed rule. Additionally, this analysis provides a summary of the regulatory impact and describes some alternative regulatory options that FRA considered.

(1) Limit content sourced from COCs or SOEs

Based on conversations with RSA and FRA subject matter experts, all six freight car manufacturers currently comply with the 15 percent content limitation, which would be required three years after this proposed rule's implementation date. Also, absent FRA issuing this proposed rule, over the next 10 years, this analysis forecasts that no freight car manufacturer plans to change its materials sourcing whereby a freight car manufacturer would not be in compliance with the content limitation set forth in this proposed rule. Lastly, this analysis does not anticipate any new freight car manufacturers entering the North American freight car industry over the next 10 years (during the period of analysis). Therefore, related to complying with content limitation, issuing this

proposed rule would not result in any costs or benefits. FRA welcomes public comment related to this conclusion.

(2) Prohibit the use of sensitive technology from COCs or SOEs

As explained earlier in this NPRM, FRA understands the prohibition on the use of sensitive technology that originates from a COC or SOE to also include any *active* technological components necessary to the functionality of the sensitive technology (excluding *passive* technological components) that originates from a COC or SOE.

Based on this understanding and input from the RSA and FRA subject matter experts, all six freight car manufacturers currently comply with the limitations on use of sensitive technological components as set forth in this proposed rule. Also, absent FRA issuing this proposed rule, over the next 10 years, this analysis forecasts that no freight car manufacturer plans to change its materials sourcing whereby a freight car manufacturer would not comply with the sensitive technology limitation set forth in this proposed rule. Further, over the next 10 years (during the period of analysis), this analysis does not anticipate any new freight car manufacturer entering the North American freight car industry. Therefore, the provision that would prohibit the use of sensitive technology, or *active* technological components necessary to the functionality of the sensitive technology that originates from a COC or SOE for freight cars entering service in the U.S. general railroad system of transportation would not result in any costs. FRA welcomes public comment related to this conclusion.

However, issuing this provision (prohibiting the use of sensitive technology from COCs or SOEs) may provide benefit. That is, issuing this proposed rule would mitigate concerns related to compromised national security and potential corporate espionage that exists if newly built freight cars with sensitive technology and *active* technological components necessary to the functionality of the sensitive technology from COC or SOE

enter service into the U.S. general railroad system of transportation. FRA welcomes public comment related to these conclusions.

(3) Compliance costs

Issuing the proposed rule would create a few compliance burdens for freight car manufacturers including affirming compliance with this proposed rule, submitting an annual certification, and participating in periodic audits.

Manufacturers affirm compliance prior to a freight car entering service

Prior to a manufacturer providing a freight car for operation on the U.S. general railroad system of transportation, a manufacturer would affirm that the freight car is compliant with this regulation. Currently, FRA provides a courtesy safety appliance drawing review and/or sample car inspection to freight car manufacturers that request it for all freight cars that they intend to manufacture for operation on the U.S. general system. FRA anticipates that manufacturers would affirm compliance with the Act by certifying at the time of their safety appliance drawing review and/or sample car inspection.⁷²

Based on input from FRA subject matter experts, this analysis estimates that each year manufacturers introduce approximately 35 freight car orders. Based on FRA subject matter expert input, this analysis assumes that an administrative professional in the freight car's contract office would draft the document affirming compliance with the Act (1 hour) and a vice-president of engineering would review and sign the letter (15 minutes).⁷³ Each year, the burden on manufacturers to affirm compliance with the Act

⁷² A freight car manufacture may also certify compliance with Act by submitting an independent document to FRA for any build order (e.g., for subsequent orders of the same car builds utilizing the same safety appliance arrangement that have already been reviewed and/or inspected by FRA). This analysis concluded that the cost to submit an independent document to affirm compliance with the Act follows similarly to including such affirmation along with safety appliance review and/or sample car inspection request package.

⁷³ U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Statistics, May 2023 NAICS 336500 Railroad Rolling Stock Manufacturing "Sales and Related Occupations" \$40.45 (mean wage), "Top Executives" (\$62.74) [May

for all newly built freight cars intended for operation on the U.S. general railroad system of transportation is \$3,438.⁷⁴ Over the 10-year period of analysis, the industry burden is approximately, \$34,400 (undiscounted), \$29,200 (present value (PV), 3%), and \$20,400 (PV, 7%).

Periodic audit of freight car manufacturers

As part of FRA's enforcement of the proposed rule, FRA expects to randomly audit freight car manufacturers to ensure compliance with the Act. Based on input from FRA subject matter experts, FRA would likely randomly audit one-third of the freight car manufacturers each year (approximately two freight car manufacturers each year). Based on FRA subject matter expert input, the likely audit process would comprise of FRA selecting one freight car order from the manufacturer's product line and have the freight car manufacturer provide evidence of compliance. FRA would audit the bill of materials to determine if the manufacturer complied with this regulation. If the freight car manufacturer provides sufficient evidence to show its freight car is compliant with the rule, FRA would take no further action. Based on FRA subject matter expert input, FRA anticipates that the results of FRA's random audit is that FRA will find all freight car manufacturers compliant with the proposed rule.

Based on input from FRA subject matter experts, this analysis estimates that it would take four hours for a freight car manufacturer to retrieve existing information that shows compliance with this proposed rule and provide it to an FRA inspector. This analysis placed a relatively low hourly burden for the periodic audit because this proposed rule requires freight railroads to maintain records that show compliance. Thus,

2023] https://www.bls.gov/oes/current/naics4_336500.htm. When estimating labor burden, this analysis added a compensation factor of 1.75, so the administrative employee's hourly burden rate is \$70.79 and the VP of engineering's hourly burden rate is \$109.80.

⁷⁴ Industry burden for affirming compliance, annual = Number of freight cars introduced (35) * [time to write the document affirming compliance with the Act (1 hour) * administrative professional's hour compensation rate (\$70.79) + time to review and sign the document (15 minutes) * VP of engineering compensation rate (\$109.80)] = \$3,438.

other than retrieving records that should already exist, freight car manufacturers would have no additional burden. With an estimated two audits per year, the audit burden for all freight car manufacturers is 8 hours or \$566.⁷⁵ Over the 10-year period of analysis, the burden periodic audits of freight car manufacturers is approximately \$5,700 (undiscounted), \$4,800 (PV, 3%), and \$3,400 (PV, 7%).

Total cost and benefit for industry

As shown, in table 2, over the 10-year period of analysis, the industry burden is approximately \$44,800 (undiscounted), \$38,200 (PV, 3%), and \$30,900 (PV, 7%).

Table 2: Freight car industry, total cost, round (\$100)

Type of Cost	Total Cost (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Compliance certification	34,400	29,200	20,400	3,400	2,900
Periodic audit	5,700	4,800	3,400	600	500
Total	40,100	34,000	23,800	4,000	3,400

FRA is issuing this regulation as required by the Act. In this economic analysis, FRA qualitatively explains the potential benefits that may result from implementing the proposed rule. FRA requests public comment regarding these cost estimates and the benefit that would come from issuing the proposed rule.

(4) Governmental administrative costs

Issuing the proposed rule would create enforcement costs for FRA, including the review of freight car manufacturers certifying compliance, periodic audits of freight car manufacturers, and creating an annual report to Congress.

Review of certification of compliance reports

⁷⁵ Freight car manufacturers, participating in an audit, annual = Number of annual audits (2) * hours to prepare and participate in an audit (4 hours) * freight car administrative employee compensation rate (\$70.78) = \$566.

Based on input from FRA subject matter experts, this analysis estimates that each year manufacturers introduce approximately 35 freight car orders and certify to FRA that their freight cars comply with this Act. FRA staff would spend approximately 30 minutes to review each of the 35 submissions. Therefore, FRA's annual burden related to reviewing the manufacturer's is \$2,201.^{76,77} Over the 10-year period of analysis, the total burden is approximately \$22,00 (undiscounted), \$18,700 (present value (PV), 3%), and \$13,000 (PV, 7%).

FRA periodic audit of freight car manufacturers

As explained in the above section that describes industry burden, each year FRA expects to audit approximately two freight car manufacturers as part of FRA's enforcement efforts. To minimize compliance costs, FRA would use FRA field staff who have duty stations in close proximity to the freight car manufacturing facility. However, based on subject matter expert input, in the first five years of implementation of the proposed rule, FRA expects that it would send both an FRA field inspector and FRA headquarters employee to conduct the audit. Beginning with the sixth year, FRA expects that only FRA field inspectors would conduct audits.

Based on FRA subject matter expert input, FRA's burden related to periodic audits of freight car manufacturers is 20 hours for FRA headquarters staff (4 hours to prepare for audit, 4 hours to conduct audit, and 12 hours of travel time) and 12 hours for FRA field staff (4 hours to prepare for audit, 4 hours to conduct audit, and 4 hours travel time). In addition, FRA will incur travel expenses of \$500 for FRA headquarters staff and \$100 for FRA field staff per audit. In the first year of analysis, the cost related to

⁷⁶ FRA headquarters staff salary estimated at the GS-14 step 5 rate (Washington DC) of \$71.88 with a burden rate of 1.75 for an hourly burden rate of \$125.79. See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2023/general-schedule/>.

⁷⁷ FRA burden for affirming compliance, annual = Number of freight cars introduced (35) * [time to review affirmation (0.5 hour) * FRA headquarters employee compensation rate (\$125.79)] = \$2,201.

conducting two audit is \$8,121.^{78,79} Over the 10-year period of analysis, FRA’s burden for conducting periodic audits is \$51,000 (undiscounted), \$45,300 (PV, 3%), and \$34,800 (PV, 7%).

Preparing an annual report to Congress

After the final rule becomes effective, FRA expects that it will prepare and submit an annual report to Congress that would summarize all certification submissions that FRA received from all the manufacturers during the calendar year. FRA anticipates that it may include this report within its existing Fiscal Year Enforcement Report to Congress. Based on input from subject matter experts, it would take FRA staff approximately 24 hours to prepare and submit an annual report with an associated cost of \$3,019.⁸⁰ Over the 10-year period of analysis, the costs of preparing and submitting annual reports to Congress is \$30,200 (undiscounted), \$25,600 (present value (PV), 3%), and \$17,900 (PV, 7%).

Total FRA burden

As shown, in table 3, over the 10-year period of analysis, FRA’s enforcement burden is approximately \$103,200 (undiscounted), \$89,600 (PV, 3%), and \$65,700 (PV, 7%).

Table 3: FRA enforcement burden from issuing the proposed rule, total cost, round (\$100)

Type of Cost	Total Cost (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Review affirmations	22,000	18,700	13,000	2,200	1,900

⁷⁸ FRA headquarters staff salary estimated at the GS-14 step 5 rate Washington DC) of \$71.88 with a burden rate of 1.75 for an hourly burden rate of \$125.79. FRA field staff salary estimated at the GS-12 step 5 rate (Rest of United States) of \$44.98 with a burden rate of 1.75 for an hourly burden rate of \$78.72. See <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2023/general-schedule/>.

⁷⁹ FRA audit burden, annual = number of audits per year (2 audits) * [FRA headquarters staff time per audit (20 hours) * FRA headquarters staff compensation rate (\$125.79) + FRA headquarters staff travel expense (\$500) + FRA field staff time per audit (12 hours) * FRA field staff compensation rate (\$78.72) + FRA field staff travel expense (\$100)] = 2 * \$4,060 = \$8,121.

⁸⁰ Prepare and submit annual report to Congress, annual = FRA staff hourly labor burden rate (\$125.79) * hours to complete and submit report (24 hours) = \$3,019.

Periodic audit	51,000	45,300	34,800	5,300	5,000
Annual report to Congress	30,200	25,600	17,900	3,000	2,500
Total cost	103,200	89,600	65,700	10,500	9,400

(5) Summary of regulatory impact

As shown below in table 4, the total impact that would come from issuing the proposed rule including the impact on industry and FRA is approximately \$143,300 (undiscounted), \$123,600 (PV, 3%), and \$89,500 (PV, 7%). In this economic analysis, FRA qualitatively explains the potential benefits that may result from implementing the proposed rule, including addressing concerns related to compromised national security and potential corporate espionage if newly built freight cars with sensitive technology and active technological components necessary to the functionality of the sensitive technology from COC or SOE enter service into the U.S. general railroad system of transportation. FRA welcomes public comment related to the potential costs and benefits associated with implementing this proposed rule.

Table 4: Industry compliance burden and FRA’s enforcement burden, total cost, round (\$100)

Entity	Total Cost (\$)			Annualized (\$)	
	Undiscounted	PV 3%	PV 7%	PV 3%	PV 7%
Industry costs	40,100	34,000	23,800	4,000	3,400
FRA costs	103,200	89,600	65,700	10,500	9,400
Total cost	143,300	123,600	89,500	14,500	12,800

(6) Alternatives considered

FRA considered different ways to interpret the Act related to satisfying its duties of issuing a rule. The following alternatives, the baseline alternative and reoccurring annual certification alternatives, provide insight into FRA’s decision-making process related to issuing this proposed rule pursuant to implementing the Act.

Baseline alternative

The core of a regulatory impact analysis is an assessment of the benefits and costs of regulation in comparison to a “without regulation” (or “no action”) baseline. If FRA did not issue this proposed rule, FRA would not implement the Act and would not codify a process for FRA to monitor and enforce industry compliance with the Act.

If FRA failed to follow the statutory requirement of the Act, the Act may not be binding and FRA would not meet its statutory obligations.

Reoccurring annual certification alternative

FRA considered alternative interpretations of the statutory requirement in the Act, with the aim of ensuring that freight cars on the U.S. general railroad system of transportation comply with the Act. The first interpretation would require that freight car owners submit annual certifications for each of the approximately 1.6 million freight cars in service on the U.S. general railroad system of transportation. The second interpretation would grandfather in existing freight cars and only require owners of freight cars built after the rule’s implementation date to submit annual certifications. The third interpretation would grandfather in existing freight cars but require any freight car owner that adds or replaces sensitive technology (including the *active* components within) on a freight car to submit an annual certification that the sensitive technology in each augmented freight car complies with the sensitive technology provision of the proposed rule.

Under the first interpretation, each year freight car owners would need to ensure that all their freight cars comply with the Act. Not only would this interpretation not comport with FRA’s understanding that the Act applies to freight car manufacturers and not freight car owners, but it would also be problematic because existing freight car owners are unlikely to know the percentage of content of each freight car that comes from COCs or SOEs and whether the existing sensitive technology in each freight car

was sourced from a COC or SOE. FRA determined that car owners lacked sufficient information to comply with this alternative.

Under the second interpretation, owners of freight cars entering service after the implementation date would need to ensure that all aftermarket reconfigurations and repairs comply with the Act (both the content limitation and the sensitive technology sourcing provisions). Owners of freight cars would need to maintain records of the source origin for all parts in each augmented freight car. This alternative might help ensure that aftermarket reconfigurations of freight cars entering service after the implementation date would not use sensitive technology (including the *active* technological components within) that originate from a COC or SOE, this alternative would impose a significantly greater burden on both the industry (railroads and private car owners) and FRA as compared to the proposed rule. FRA is also concerned about how such an interpretation would impact Class III railroads and small private car owners. FRA welcomes public comment on this alternative.

Under a third alternative, FRA would require that any freight car owner that adds or replaces sensitive technology (including the *active* technological components within) on a freight car submit an annual certification to affirm that the freight car maintained compliance with the sensitive technology limitations of the proposed rule. While this alternative may help protect the U.S. general railroad system of transportation from safety risks and data breaches, this alternative would impose a significantly greater burden on both the industry (railroads and private car owners) and FRA as compared to the proposed rule. Moreover, this alternative would not comport with FRA's understanding that the Act applies to freight car manufacturers and not freight car owners. FRA welcomes public comment on this alternative.

FRA concluded that the proposed rule strikes an appropriate balance between enhancing the safety and security of the U.S. general railroad system of transportation while minimizing the burden.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980⁸¹ and E.O. 13272⁸² require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities and provides the following IRFA.

1. Reasons for Considering Agency Action

The Act mandates that FRA issue a regulation to monitor and enforce freight car manufacturers' compliance with the standards of the Act. FRA's implementation of this regulation would carry out the Act's mandate.

2. A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule

On November 15, 2021, President Biden signed the Act,⁸³ which includes a mandate that FRA issue regulations to implement the statute.⁸⁴ The Act provides that freight cars wholly manufactured after a certain date may only operate on the U.S. general railroad system of transportation if the cars are manufactured by a "qualified manufacturer" in a "qualified facility." Further the Act prohibits newly built freight cars from being operated on the U.S. general railroad system of transportation, if they are manufactured: (1) with sensitive technology originating from a COC or sourced from a

⁸¹ 5 U.S.C. 601 *et seq.*

⁸² 67 FR 53461 (Aug. 16, 2002).

⁸³ 49 U.S.C. 20171. *See* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/11/15/executive-order-on-implementation-of-the-infrastructure-investment-and-jobs-act/>.

⁸⁴ *Id.* at (c)(1).

SOE; (2) with any components originating from a COC or sourced from a SOE with a history of problematic trade practices or respect for IP rights; or, (3) with components originating from a COC or sourced from a SOE exceeding 20 percent of the freight car after 1 year from the date of issuance of regulations or 15 percent of the freight car after 3 years from the date of issuance of regulations. The Act requires manufacturers to annually certify that they meet the requirements of the Act.⁸⁵

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

Freight car manufacturers are classified within NAICS 336510 *Railroad rolling stock manufacturing*.⁸⁶ The SBA size standard for NAICS 336510 is 1,500 employees.⁸⁷ Based on FRA subject matter expert input, three of the six freight car manufacturers are considered small entities.

Census data shows that there are 153 establishments⁸⁸ classified within NAICS 336510. Therefore, because freight car manufacturers that produce newly built freight railcars comprise of about four percent (6 of 153 establishments) of establishments classified within NAICS 336510, a breakdown of small entities using Census data for NAICS 336510 would not yield a reliable distribution of small firms by firm size (number of employees).

Based on input from FRA subject matter experts, this analysis concludes that the three small freight car manufacturers currently comply with the proposed requirements in this rule related to content and sensitive technology limitations. Therefore, this analysis

⁸⁵ *Id.* at (c)(2).

⁸⁶ This NAICS classification comprises establishments primarily engaged in one or more of the following: (1) manufacturing and/or rebuilding locomotives, locomotive frames, and parts; (2) manufacturing railroad, street, and rapid transit cars and car equipment for operation on rails for freight and passenger service; and (3) manufacturing rail layers, ballast distributors, rail tamping equipment, and other railway track maintenance equipment.

<https://www.census.gov/naics/?input=336510&year=2022&details=336510>

⁸⁷ “Table of Small Business Size Standard”, U.S. Small Business Administration, Size Standards effective as of March 17, 2023, p. 16 of 41 <https://www.sba.gov/document/support-table-size-standards>.

⁸⁸ An establishment is a fixed physical location or permanent structure where some form of business activity is conducted.

concludes that the provisions related to content and sensitive technology limitations would not create a cost or benefit that would be borne by the three small freight car manufacturers.

With respect to the three small freight car manufacturers, the proposed rule would create compliance costs⁸⁹ related to: (1) affirming newly designed freight cars comply with the Act; (2) annual certification of compliance letter; and (3) participation in a periodic audit of freight car manufacturers.

Based on input from FRA subject matter experts, this analysis estimates that each year small manufacturers introduce approximately six unique freight car design builds. For each of these introductions, the small manufacturer would need to inform FRA that the new designs are compliant with the Act. Based on FRA subject matter expert input, this analysis assumes that an administrative professional in the freight car's contract office would draft a document certifying compliance with the Act (1 hour) and a vice-president of engineering would review and sign the letter (15 minutes).⁹⁰ Each year, the industry burden for small entities is \$589,⁹¹ or approximately \$200 per small manufacturer. Over the 10-year period of analysis, the industry burden is approximately \$5,900 (undiscounted), \$5,000 (present value (PV), 3%), and \$4,000 (PV, 7%).

Based on input from FRA subject matter experts, FRA expects to audit approximately one small freight car manufacturer each year, which would result in an

⁸⁹ These compliance cost estimates follow from the estimates in "VI. A. Executive Orders 12866."

⁹⁰ U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, National Industry-Specific Occupational Employment and Wage Statistics, May 2023 NAICS 336500 Railroad Rolling Stock Manufacturing "Sales and Related Occupations" \$40.45 (mean wage), "Top Executives" (\$62.74) [May 2023] https://www.bls.gov/oes/current/naics4_336500.htm. When estimating labor burden, this analysis added a compensation factor of 1.75, so the administrative employee's hourly burden rate is \$70.79 and the VP of engineering's hourly burden rate is \$109.80.

⁹¹ Industry burden for affirming compliance, annual = Number of freight car designs introduced (6) * [time to write the document affirming compliance with the Act (1 hour) * administrative professional's hour compensation rate (\$70.79) + time to review and sign the document (15 minutes) * VP of engineering compensation rate (\$109.80)] = \$589.

annual burden on small manufacturers of 4 hours or \$283,⁹² or approximately \$90 per small freight car manufacturer. Over the 10-year period of analysis, the burden of periodic audits on small manufacturers is \$2,800 (undiscounted), \$2,400 (PV, 3%), and \$1,900 (PV, 7%).

The total cost for small freight car manufacturers is approximately \$8,700 (undiscounted)⁹³, \$7,400 (PV, 3%), and \$5,200 (PV, 7%). The annualized burden for small freight cars related to participating in an FRA audit is approximately \$900 (PV, 3%), or approximately \$300 per small freight car manufacturer. Based on subject matter expert input, each of the three small freight car manufacturers have annual revenue exceeding \$1 million. Therefore, issuing the proposed rule would result in an annual burden for each of the small freight car manufacturers of less than one-tenth of one-percent of its annual revenue. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. FRA welcomes public comment on these findings and conclusion.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Would Be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

The proposed rule would create three reporting, recordkeeping, and other compliance requirements. The three affected freight car manufacturers would need to make a dedicated service notification to FRA, submit an annual certification of compliance to FRA, and maintain and make available to FRA records that affirm compliance with the Act. The types of professional skills necessary for preparing and

⁹² Freight car manufacturers, participating in an audit, annual (undiscounted) = Number of annual audits (1) * hours to prepare and participate in an audit (4 hours) * freight car employee compensation rate (\$70.79) = \$283.

⁹³ Total cost, small manufacturers (undiscounted) = affirming newly built cars comply with Act (\$5,900) + participation in periodic audit (\$2,800) = \$8,700.

maintaining these reports include administrative professional skills (basic accounting, writing, organizing) and clerical skills.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict with the Proposed Rule

For a list of all Federal rules that may duplicate, overlap, or conflict with this proposed rule, please see the rules described in section II. above.

6. A Description of Significant Alternatives to the Rule

FRA considered three significant alternative interpretations to the proposed rule with the aim of ensuring that freight cars on the U.S. general railroad system of transportation comply with the Act. The first interpretation would require that all freight car owners submit annual certifications for each of the approximately 1.6 million freight cars in service on U.S. general railroad system of transportation. The second interpretation would grandfather in existing freight cars and only require owners of freight cars built after the rule's implementation date to submit annual certifications with the Act. The third interpretation would grandfather in existing freight cars, but require any freight car owner that adds or replaces sensitive technology (including the *active* components within) on a freight car to submit an annual certification with the Act; specifying that the sensitive technology in each augmented freight car complies with the sensitive technology provision of the proposed rule. As explained in section VI. Regulatory Impact and Notices A. Executive Order 12866, FRA concluded that the primary alternative is preferred to each of these significant alternatives.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule are being submitted for approval to OMB⁹⁴ under the Paperwork Reduction Act of 1995.⁹⁵ The information

⁹⁴ FRA will be using the OMB control number (OMB No. 2130-0502) that was issued with when the previous NPRM was issued in 1979 for this information collection.

⁹⁵ 44 U.S.C. 3501 *et seq.*

collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent Universe	Total Annual Responses (A)	Average Time per Response (B)	Total Annual Burden Hours (C)=(A*B)	Total Cost Equivalent in U.S. Dollars (D)= (C * wage rates) ⁹⁶
215.5(d)(6)—Dedicated Service—Notification to FRA	784 railroads	4 notifications	1 hour	4.00 hours	\$311.64
215.403(a)(1)—Certification of Compliance—Manufacturers to electronically certify to FRA that the cars comply with the requirements of this subpart (New requirement)	6 manufacturers	35 Affirmations	1.25 hours	43.75	\$2,786.00
—(a)(1)(ii) Records and such records shall be made available to FRA upon request (New requirement)	6 manufacturers	0.33 report	6 hours	1.98 hours	\$126.09
Total ⁹⁷	784 railroads + 6 manufacturers	39.33 notifications	N/A	49.73 hours	\$3,223.73

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

⁹⁶ The dollar equivalent cost is derived from U.S. Bureau of Labor Statistics, 2021 NAICS 336500 – Railroad Rolling Stock Manufacturing; 13-1000 Business Operations Specialist median wage \$63.68 (\$36.39 + 1.75 overhead costs. The one exception is section 215.5 (d)(6), which is derived from the Surface Transportation Board’s Full Year Wage 2021, group 200 Professional and Administrative.

⁹⁷ Totals may not add due to rounding.

FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. Organizations and individuals desiring to submit comments on the collection of information requirements or to request a copy of the paperwork package submitted to OMB should contact Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: (571) 609-1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: (757) 897-9908.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required.

D. Federalism Implications

Executive Order 13132, Federalism,⁹⁸ 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 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

⁹⁸ 64 FR 43255 (Aug. 10, 1999).

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 government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

E. International Trade Impact Assessment

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

F. Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), the Council of Environmental Quality’s NEPA implementing regulations at 40 CFR parts 1500 through 1508, and FRA’s NEPA

implementing regulations at 23 CFR part 771 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 (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.⁹⁹ Specifically, FRA has determined that this proposed 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 main purpose of this rulemaking is to revise FRA's FCSS to reduce unnecessary costs and provide regulatory flexibility while maintaining safety. This rulemaking would not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.¹⁰⁰ FRA has concluded that no such unusual circumstances exist with respect to this proposed rule 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.¹⁰¹ FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by section 4(f).¹⁰²

⁹⁹ 40 CFR 1508.4.

¹⁰⁰ 23 CFR 771.116(b).

¹⁰¹ See 16 U.S.C. 470.

¹⁰² See Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

G. Environmental Justice

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations” 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. DOT Order 5610.2C (“U.S. Department of Transportation Actions to Address Environmental Justice in Minority Populations and Low-Income Populations”) instructs DOT agencies to address compliance with Executive Order 12898 and requirements within DOT Order 5610.2C in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations.¹⁰³ FRA has evaluated this proposed rule under Executive Orders 12898, 14096 and DOT Order 5610.2C and has determined it would not cause disproportionate and adverse human health and environmental effects on communities with environmental justice concerns.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,¹⁰⁴ each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in

¹⁰³ Executive Order 14096 “Revitalizing Our Nation’s Commitment to Environmental Justice,” issued on April 26, 2023, supplements Executive Order 12898, but is not currently referenced in DOT Order 5610.2C.

¹⁰⁴ Public Law 104-4, 2 U.S.C. 1531.

law).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in 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 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of \$100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”¹⁰⁵ FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.dot.gov/privacy. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide

¹⁰⁵ 66 FR 28355 (May 22, 2001).

comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 215

Freight cars, Infrastructure Investment and Jobs Act.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 215 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 215—RAILROAD FREIGHT CAR SAFETY STANDARDS

1. The authority citation for part 215 is revised to read as follows:

Authority: 49 U.S.C. 20171(c)(1), 49 U.S.C. 20102-03, 20107, 20133, 20137-38, 20143, 20701-03, 21301-02, 21304; 28 U.S.C. 2401, note; and 49 CFR 1.49.

2. Revise § 215.5 to read as follows:

§ 215.5 Definitions.

As used in this part:

Break means a fracture resulting in complete separation into parts;

Component means a part or subassembly of a railroad freight car;

Control means the power, whether direct or indirect and whether or not exercised, through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity; representation on the board of directors of an entity; proxy voting on the board of directors of an entity; a special share in the entity; a contractual arrangement with the entity; a formal or informal arrangement to act in concert with an entity; or any other means, to determine, direct, make decisions, or cause decisions to be made for the entity;

Cost of sensitive technology means the aggregate cost of the sensitive technology located on a railroad freight car.

Country of concern means a country that—

(1) Was identified by the Department of Commerce as a nonmarket economy country (as defined in section 771(18) of the Tariff Act of 1930 (19 U.S.C. 1677(18))) as of November 15, 2021;

(2) Was identified by the United States Trade Representative in the most recent report required by section 182 of the Trade Act of 1974 (19 U.S.C. 2242) as a foreign country included on the priority watch list (as defined in subsection (g)(3) of such section); and

(3) Is subject to monitoring by the Trade Representative under section 306 of the Trade Act of 1974 (19 U.S.C. 2416).

Dedicated service means the exclusive assignment of cars to the transportation of freight between specified points under the following conditions:

(1) The cars are operated -

(i) Primarily on track that is inside an industrial or other non-railroad installation;

and

(ii) Only occasionally over track of a railroad;

(2) The cars are not operated -

(i) At speeds of more than 15 miles per hour; and

(ii) Over track of a railroad -

(A) For more than 30 miles in one direction; or

(B) On a round trip of more than 60 miles;

(3) The cars are not freely interchanged among railroads;

(4) The words “Dedicated Service” are stenciled, or otherwise displayed, in clearly legible letters on each side of the car body;

(5) The cars have been examined and found safe to operate in dedicated service;

and

(6) The railroad must -

- (i) Notify FRA in writing that the cars are to be operated in dedicated service;
- (ii) Identify in that notice -
 - (A) The railroads affected;
 - (B) The number and type of cars involved;
 - (C) The commodities being carried; and
 - (D) The territorial and speed limits within which the cars will be operated; and
- (iii) File the notice required by this paragraph (6)(iii) of the definition not less than 30 days before the cars operate in dedicated service;

In service when used in connection with a railroad freight car, means each railroad freight car subject to this part unless the car:

- (1) Has a “bad order” or “home shop for repairs” tag or card containing the prescribed information attached to each side of the car and is being handled in accordance with § 215.9;
- (2) Is in a repair shop or on a repair track;
- (3) Is on a storage track and is empty; or
- (4) Has been delivered in interchange but has not been accepted by the receiving carrier.

Net cost has the meaning given such term in chapter 4 of the USMCA or any subsequent free trade agreement between the United States, Mexico, and Canada.

Qualified facility means a facility that is not owned or under the control of a state-owned enterprise.

Qualified manufacturer means a railroad freight car manufacturer that is not owned or under the control of a state-owned enterprise.

Railroad means all forms of non-highway ground transportation that run on rails or electromagnetic guideways, including:

(1) Commuter or other short-haul rail passenger service in a metropolitan or suburban area, and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Railroad freight car means a car designed to carry freight or railroad personnel by rail, including—

- (1) A box car;
- (2) A refrigerator car;
- (3) A ventilator car;
- (4) An intermodal well car;
- (5) A gondola car;
- (6) A hopper car;
- (7) An auto rack car;
- (8) A flat car;
- (9) A special car;
- (10) A cabooses car;
- (11) A tank car; and
- (12) A yard car.

Sensitive technology means any device embedded with electronics, software, sensors, or other connectivity, that enables the device to connect to, collect data from, or exchange data with another device, including—

- (1) Onboard telematics;

- (2) Remote monitoring software;
- (3) Firmware;
- (4) Analytics;
- (5) Global positioning system satellite and cellular location tracking systems;
- (6) Event status sensors;
- (7) Predictive component condition and performance monitoring sensors; and
- (8) Similar sensitive technologies embedded into freight railcar components and sub-assemblies.

State inspector means an inspector who is participating in investigative and surveillance activities under section 206 of the Federal Railroad Safety Act of 1970 (45 U.S.C. 435).

State-owned enterprise means—

- (1) An entity that is owned by, or under the control of, a national, provincial, or local government of a country of concern, or an agency of such government; or
- (2) An individual acting under the direction or influence of a government or agency described in paragraph (1) of this definition.

Substantially transformed means a component of a railroad freight car that undergoes an applicable change in tariff classification as a result of the manufacturing process, as described in chapter 4 and related annexes of the USMCA or any subsequent free trade agreement between the United States, Mexico, and Canada.

USMCA. The acronym ‘USMCA’ has the meaning given the term in section 3 of the United States-Mexico-Canada Agreement Implementation Act (19 U.S.C. 4502).

3. Add subpart E to part 215 to read as follows:

Subpart E – Manufacturing
Sec.

- 215.401 Requirements for railroad freight cars placed into service in the United States.
215.403 Certification of compliance.
215.405 Prohibition on registering noncompliant railroad freight cars.
215.407 Civil penalties.

Subpart E – Manufacturing

§ 215.401 Requirements for railroad freight cars placed into service in the United States.

(a) *Limitation on railroad freight cars.* A railroad freight car wholly manufactured on or after [**DATE 365 DAYS AFTER DATE OF PUBLICATION OF THE FINAL RULE IN THE *FEDERAL REGISTER***] may only operate on the United States general railroad system of transportation if:

(1) The railroad freight car is manufactured, assembled, and substantially transformed, as applicable, by a qualified manufacturer in a qualified facility;

(2) None of the sensitive technology located on the railroad freight car, including components necessary to the functionality of the sensitive technology, originates from a country of concern or is sourced from a state-owned enterprise; and

(3) None of the content of the railroad freight car, excluding sensitive technology, originates from a country of concern or is sourced from a state-owned enterprise that has been determined by a recognized court or administrative agency of competent jurisdiction and legal authority to have violated or infringed valid United States intellectual property rights of another including such a finding by a Federal district court under title 35 or the U.S. International Trade Commission under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337).

(b) *Limitation on railroad freight car content.* (1) Percentage limitation—

(i) *Initial limitation.* Not later than [**DATE 365 DAYS AFTER DATE THE FINAL RULE IS ISSUED**], a railroad freight car described in paragraph (a) of this section may operate on the United States general railroad system of transportation only if

not more than 20 percent of the content of the railroad freight car, calculated by the net cost of all components of the car and excluding the cost of sensitive technology, originates from a country of concern or is sourced from a state-owned enterprise.

(ii) *Subsequent limitation.* Effective beginning on [**DATE 1461 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER***], a railroad freight car described in paragraph (a) of this section may operate on the United States general railroad system of transportation only if not more than 15 percent of the content of the railroad freight car, calculated by the net cost of all components of the car and excluding the cost of sensitive technology, originates from a country of concern or is sourced from a state-owned enterprise.

(2) *Conflict.* The percentages specified in the clauses in paragraphs (b)(1)(i) and (ii) of this section, as applicable, shall apply notwithstanding any apparent conflict with provisions of chapter 4 of the USMCA.

§ 215.403 Certification of compliance.

(a) *Certification required.* To be eligible to provide a railroad freight car for operation on the United States general railroad system of transportation, the manufacturer of such car shall certify, at least annually, to the Railroad Administrator that any railroad freight cars to be so provided comply with the 49 U.S.C. 20171.

(1) *Certification procedure.* Prior to providing any cars for operation on the United States general railroad system of transportation, each freight car manufacturer shall certify to FRA that the cars comply with the 49 U.S.C. 20171. Such certification shall be submitted via electronic mail by an authorized representative of the manufacturer to FRAMP&E@dot.gov. A manufacturer may submit this certification to FRA annually provided it covers all cars to be provided in the relevant year, or a manufacturer may submit separate certifications throughout the year.

(i) The certification shall include the statement “I certify that all freight cars that will be provided for operation on the United States general railroad system of transportation will comply with the 49 U.S.C. 20171, and the implementing regulations at 49 CFR part 215” and contain:

(A) The manufacturer’s name and address;

(B) The name, signature, and contact information for the person designated to certify compliance with this subpart; and

(C) A car identification number for each car being certified.

(ii) Manufacturers shall maintain records showing the information, including the calculations, made to support certification under this section and such records shall be made available to FRA upon request.

(2) *Valid certification required.* At the time a railroad freight car begins operation on the United States general railroad system of transportation, the manufacturer of such railroad freight car shall have valid certification described in paragraph (a) of this section for the year in which such car begins operation.

(b) [Reserved]

§ 215.405 Prohibition on registering noncompliant railroad freight cars.

(a) *Cars prohibited.* A railroad freight car manufacturer may not register, or cause to be registered, a railroad freight car that does not comply with the requirements under this subpart in the Umler system.

(b) [Reserved]

§ 215.407 Civil penalties.

(a) *In general.* A railroad freight car manufacturer that has manufactured a railroad freight car for operation on the United States freight railroad interchange system that the Secretary of Transportation determines, after written notice and an opportunity for a hearing, has violated this subpart is liable to the United States Government for a

civil penalty of at least \$100,000, but not more than \$250,000, for each such violation for each railroad freight car.

(b) *Prohibition for violations.* The Secretary of Transportation may prohibit a railroad freight car manufacturer with respect to which the Secretary has assessed more than 3 violations under this section from providing additional railroad freight cars for operation on the United States freight railroad interchange system until the Secretary determines:

(1) Such manufacturer is in compliance with this section; and

(2) All civil penalties assessed to such manufacturer pursuant to this section have been paid in full.

Issued in Washington, DC.

Amitabha Bose,

Administrator.

[FR Doc. 2023-26133 Filed: 12/7/2023 8:45 am; Publication Date: 12/8/2023]