FEDERAL RAILROAD ADMINISTRATION
U.S. DEPARTMENT OF TRANSPORTATION

DOT DOCKET NO. FRA 2009-0033
TRAINING, QUALIFICATION, AND OVERSIGHT FOR
SAFETY-RELATED RAILROAD EMPLOYEES

FEDERAL RAILROAD ADMINISTRATION'S RESPONSE TO:

THE PETITION FOR RECONSIDERATION OF THE FINAL RULE SUBMITTED BY
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION,
THE AMERICAN PUBLIC TRANSPORTATION ASSOCIATION, AND
NATIONAL RAILROAD CONSTRUCTION AND MAINTENANCE ASSOCIATION

AND SUPPORTING COMMENT SUBMITTED BY
ASSOCIATION OF TOURIST RAILROADS & RAILWAY MUSEUMS, INC.

On November 7, 2014, the Federal Railroad Administration (FRA) published a final rule titled "Training, Qualification, and Oversight for Safety-Related Railroad Employees" (79 FR 66460) and specified that petitions for reconsideration must be received no later than December 29, 2014. On December 22, 2014, FRA received a petition for reconsideration (petition) of this final rule filed by three associations: (1) the American Short Line and Regional Railroad Association (ASLRRA); (2) the American Public Transportation Association (APTA); and (3) the National Railroad Construction and Maintenance Association (NRC) (collectively "the Petitioners"). The final rule also specified that comments on any submitted petition must be received by no later than February 10, 2015, and FRA received one comment in support of the petition filed by the Association of Tourist Railroads & Railway Museums, Inc. (ATRRM) on

January 28, 2015.[1] Under the agency's procedures found in 49 C.F.R. §§ 211.29 and 211.31, FRA is denying the petition in its entirety for the reasons set forth in this response.

EXECUTIVE SUMMARY

The petition contains four headings which outline Petitioners' concerns. The following is a summary of the concerns raised and an overview of FRA's response. FRA's full response follows this summary section.

1. Petitioners' Request. The first request, titled "Regulatory Overreach and Conflicting Statutes," makes a legal argument that FRA should have granted a blanket exemption for all small employers with less than 400,000 total employee annual work hours, regardless of whether the employer is a short line railroad, commuter railroad, or contractor/subcontractor to a railroad, and that FRA had the statutory authority to issue such an exemption. ATRRM concurs with this request, especially as it applies to tourist railroads on the general system.

   FRA's Response: FRA believes it is legally barred from granting Petitioners' request for a blanket exemption for all small employers with less than 400,000 total employee annual work hours because such an exception would directly conflict with the statutory mandate contained in the Rail Safety Improvement Act of 2008 (RSIA). Moreover, FRA believes it has maximized its authority to exclude small entities under competing statutes.

2. Petitioners' Request. The second request, titled "Relief Should be in Regulation Not Through Interpretation," argues that any relief granted in response to the petition should result in FRA

[1] ATRRM's comment was filed 30 days after the December 29, 2014 deadline for petitions for reconsideration, but within the comment period. FRA recognized that some of ATRRM's comments raised issues not raised by Petitioners. If FRA were to address these additional issues, this response would have been materially delayed and thus FRA decided not to address them and they should be considered denied. ATRRM's additional issues included that: (1) the rule did not make enough allowances for small entities; (2) the rule's small business impact analysis only takes a limited view of the actual, cumulative impact of all of the RSIA statutory mandates; and (3) FRA should refer the Compliance Guide to RSAC for input before issuance.

revising the regulation itself and not a guidance document, such as the promised Compliance Guide. *See* 79 FR at 66494. ATRRM concurs with this request.

FRA's Response. As FRA is denying Petitioners' requests for relief, FRA is not making any amendments to the final rule. Thus, this concern is moot. However, the general concern reveals that Petitioners misplaced belief that the purpose of the Compliance Guide is to be a document containing interpretations. Instead, the Compliance Guide will (1) illustrate acceptable methods for complying with the rule, (2) provide the same requirements as the rule in a different format that should allow for quicker and easier comprehension, and (3) provide answers to questions that are likely to be frequently asked.

3. Petitioners' Request: The third request, titled "ASLRRA, APTA and NRC Can and Should Not Keep Track of Who Uses a Program as Required Under 243.109," is an objection to certain regulatory text which Petitioners believe imposes on them specific duties that result in an unacceptable level of liability if they voluntarily choose to develop model programs for use by employers. ATRRM concurs with this request.

   FRA's Response: FRA believes Petitioners' concerns are the result of a misunderstanding of the final rule's requirements and that their fear of FRA enforcement and liability are misplaced if they act as model program developers. Petitioners cite a regulatory requirement that specifies a burden placed on an employer that utilizes a model program, not on a model program developer. FRA hopes that Petitioners, and other interested associations, businesses, and organizations, will develop model programs for a wide-variety of employers to use and that these same developers will have a continuing interest in maintaining their model programs each year, as needed. FRA would lack the authority under the final rule to take enforcement action against model program developers for failing to update a program because a model program developer is not under any obligation to update a previously submitted model program on behalf of its users. Petitioners cite a provision that merely provides an employer with a means of informing FRA that the reason it is adopting changes to a previously submitted model training program is that the model program developer has notified the employer of the need to comply with the developer's updates to the model program. Because the model program developer is likely to explain to users of the model program any reasons for adopting the revised program, the employer would likely be able to supply the developer's statement in lieu of a separate description of the changes made to the program. *See* 243.109(b)(1).

4. Petitioners' Request: The fourth request, titled "ASLRRA and NRC Believe Oversight of Contractors in 243.205 is Unnecessary and Goes Far Beyond the Requirements as Specified in the Statute," seeks a full exemption for all small railroads and contractors from the periodic oversight requirements contained in the final rule. Petitioners also claim that FRA largely ignored their cost estimates and believe that there is a lack of relief for small entities in this rule. ATRRM did not comment on this request.

   FRA's Response: Without addressing whether periodic oversight is explicitly or implicitly addressed by 49 U.S.C 20162, it is well established that the Secretary of Transportation has delegated general authority to the FRA Administrator that would allow FRA to issue its periodic oversight requirements in this rule. Thus, it is irrelevant whether the statutory provision cited requires periodic oversight or not.

   Even though FRA has the authority to require periodic oversight, prior to issuing the final rule, FRA considered the burden on small entities and exempted some and allowed others to opt out under certain circumstances. FRA is not requiring any employer to conduct periodic oversight under this final rule for locomotive engineers or conductors (as those employees are tested and observed under other FRA regulations). The limited oversight requirement is carefully tailored to close a gap which previously did not require monitoring of employees doing work particular to FRA-regulated personal and work group safety (49 C.F.R. parts 214, 218, and 220). Furthermore, FRA deliberately considered different options and believes the option it chose burdens the least number of small entities while still closing an important safety gap.

Finally, FRA did not ignore Petitioners' cost estimates. This document summarizes FRA's responses, with citations to the final Regulatory Impact Analysis (RIA), explaining how FRA directly addressed them. The final rule includes many special considerations for small employers which should help ensure strong compliance and reduce burdens. FRA has detailed those special considerations again in this response.

BACKGROUND

FRA has great respect for the four associations filing and commenting on this petition and works closely with each association on issues of mutual interest. The associations are active members of FRA's Railroad Safety Advisory Committee (RSAC), and the three associations that submitted the petition were each voting members of the RSAC Working Group that helped develop the recommendations that formed the basis for the Notice of Proposed Rulemaking (NPRM). FRA also held a meeting of the RSAC Working Group after the NPRM was published, which gave Petitioners another opportunity to raise comments and concerns about the NPRM. Each of the associations' active participation in the RSAC recommendation process, and the comment period following publication of the NPRM, was appreciated by FRA and provided the agency with information that it used to develop the final rule. Furthermore, in the interest of all parties involved, FRA hopes each of these associations will become model program developers pursuant to the final rule. FRA believes most small, and some medium, railroads and contractors would prefer to adopt a model program rather than develop training programs themselves, and the use of model programs will make the process easier for such employers to submit and FRA to approve training programs.

FRA and its Office of Research and Development fully support helping small entities develop training materials and the building blocks necessary to develop model training programs. For example, FRA issued grants to ASLRRA's Shortline Railroad Safety Institute Initiative that will assist in: (1) developing position descriptions and new job analyses for safety assessment teams; developing training materials for short line railroads to enhance safety compliance; (2) implementing and validating safety culture assessment tools; (3) helping identify, select, hire, and train assessors in preparation for conducting pilot initiatives regarding the safety culture on short line railroads hauling crude oil; (4) conducting gap analyses of short line industry training needs; and (5) holding preliminary information, data gathering, and planning meetings to help kick-start the initiative. FRA also provided funding that will allow the Department of Transportation's (DOT) Volpe National Transportation Systems Center to help conduct a needs assessment for ASLRRA's Safety Institute (Institute), help develop the Institute's conceptual framework, and spearhead the development of safety culture and safety compliance assessment strategies for the Institute. This is not a comprehensive list of FRA's activities that will help small entities, but is a reminder that FRA understands and intends to help the small business community to improve training for its safety-related railroad employees in ways that will specifically help that community comply with the final rule.

FRA'S FULL RESPONSE TO THE FOUR RECONSIDERATION REQUESTS

As stated above, the Petitioners argue that FRA should revise the final rule to: (1) grant a blanket exemption for all small employers with less than 400,000 total employee annual work hours; (2) remove text they believe unacceptably imposes liability on entities that voluntarily choose to develop model programs; and (3) grant an exemption for all small railroads and contractors from the rule's periodic oversight requirements. The Petitioners also request that any relief granted in response to the petition should result in FRA revising the regulation itself and not a guidance document, such as the promised Compliance Guide.

After reviewing the petition and the comment to the petition, FRA determined it adequately considered and addressed each concern raised during the rulemaking and in this response and, is therefore, denying the petition in its entirety. However, FRA's denial decision should not be interpreted to mean the concerns were wholly without merit and the agency appreciates the opportunity to clarify the rule. FRA believes the following detailed response to the issues raised in the petition provides an adequate explanation for the basis of FRA's reasoning in reaching this denial decision.

I. The Plain Language of the Statute Makes Clear FRA Must Include Small Entities and Contractors

Petitioners urge FRA to write exemptions into the statue that do not exist and are not supported by the plain language of the statute. When the judiciary interprets how a statute should apply in a particular case, there are certain methods or "canons of construction" it uses to interpret the meaning of the statute.[2] Courts "begin with the familiar canon of statutory

[2] "Statutory Interpretation: General Principles and Recent Trends," Congressional Research Service (CRS) Report for Congress, Order Code 97-589 (Aug. 31, 2008) (providing background on canons of construction). http://fas.org/sgp/crs/misc/97-589.pdf. (CRS Report).

construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980). "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). Indeed, "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" 503 U.S. at 254. Thus, where there is a plain meaning, there is neither a need to look outside the statute to its legislative history to ascertain the statute's meaning[3] nor a need to look to the various canons of construction to decipher the intent of the legislature at the time they passed the legislation because the language is not in doubt.[4] If there is any ambiguity, the courts may apply one or more of the canons of construction to decide what the statute means.

A. The Plain Meaning of the Rail Safety Improvement Act of 2008 (RSIA) Requires Inclusion of All Entities Regardless of Their Size or Whether They Are a Contractor

Here, the language of the statue is clear. First, the plain language of RSIA mandates that DOT establish minimum training standards for "*each* class and craft of safety-related railroad employee (as defined in section 20102) and equivalent railroad carrier contractor and subcontractor employees" and that the employers (whether they be railroad carriers, contractors, or subcontractors) are required "to qualify or otherwise document the proficiency of such employees . . . regarding their knowledge of, and ability to comply with, Federal railroad safety laws and regulations and railroad carrier rules and procedures promulgated to implement those

[3] CRS Report at 2.

[4] CRS Report at 4.

Federal railroad safety laws and regulations." 49 U.S.C 20162(a)(1) (emphasis added). "Each" means "every one of the persons or things mentioned," Black's Law Dictionary 597 (4th ed. 1968) and "every" Webster's New Riverside University Dictionary 413 (1994).

Clearly, if the statute requires all employees to be trained by their employers, then the statute requires all employers of such employees to develop the training. There is simply no other logical reading of the statute. Therefore, the statute's plain meaning is to apply its terms to all employers of one or more safety-related railroad employees, regardless of the size of the employer railroad, contractor, or subcontractor. If the statute had not included the term "each" "safety-related railroad employee" then it could have been interpreted to only apply to certain "railroad employees" and therefore could exclude small entities and contractors or subcontractors. 49 U.S.C 20102(4).[5]

Second, the plain language of RSIA mandates that railroad carriers, contractors, and subcontractors submit training plans for the Secretary's approval, to "ensure that *all* safety-related railroad employees receive appropriate training in a timely manner." 49 U.S.C 20162(a)(2) (emphasis added). It does not say *some* "railroad carriers, contractors, and subcontractors" or *large* "railroad carriers, contractors, and subcontractors." Indeed, it plainly seeks to protect "*all* safety-related railroad employees."

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[5] RSIA also amended the statutory definitions set forth in 49 U.S.C. 20102 by adding the following definition of "safety-related railroad employee":

> A safety-related railroad employee means (A) a railroad employee who is subject to chapter 211; (B) another operating railroad employee who is not subject to chapter 211; (C) an employee who maintains the right of way of a railroad; (D) an employee of a railroad carrier who is a hazmat employee as defined in section 5102(3) of this title; (E) an employee who inspects, repairs, or maintains locomotives, passenger cars, or freight cars; and (F) any other employee of a railroad carrier who directly affects railroad safety, as determined by the Secretary.

The plain language of RSIA Section 20162(a)(2) does not provide the Secretary with any discretion to exclude small businesses and contractors from the training plan submission requirement. To the contrary, the plain language of the statute purposely includes even the smallest businesses and contractors that might provide a railroad with safety-related railroad employees because the statute explicitly requires the inclusion of contractors and subcontractors. Indeed, like Section 20162(a)(1), Section 20162(a)(2) clearly states it is to "ensure that *all* safety-related railroad employees receive appropriate training." (Emphasis added.) The only way for "all safety-related railroad employees [to] receive appropriate training" is if all railroads, contractors, and subcontractors submit training plans. RSIA does not mention or consider the size of the contractor/subcontractor or the size of the railroad utilizing the contractor/subcontractor's services. Therefore, because the plain language of the statute covers *all* railroad carriers, contractors, and subcontractors, and contains no exemption for size, we cannot read such an exemption into the text of the statute.[6]

[6] Another example that favors reading the RSIA section on minimum training standards and plans to mandate application to all railroads, contractors, and subcontractors that employ safety-related railroad employees (or the equivalent) can be found when comparing it to the limited scope language used in the RSIA section on railroad safety risk reduction programs (RRP), codified at 49 U.S.C 20156. The RRP statutory mandate is limited to railroads that are Class I railroads, a railroad that has inadequate safety performance (as determined by the Secretary), or a railroad that provides intercity rail passenger or commuter passenger transportation. 49 U.S.C 20156(a)(1). In contrast, the training standards mandate contains no limitations by class of railroad, no Secretarial discretion to include or exclude a railroad based on adequate or inadequate performance, and no Secretarial discretion with regard to passenger or commuter railroads. Certainly, if Congress had wanted to mandate greater discretion to the Secretary on the training standards mandate, a court could look to the RRP mandate and find that the legislature picked and chose which mandates to provide discretion within the RSIA harmonious whole. Thus, this canon of construction adds to the overwhelming strength of the position that Congress purposely decided to treat these two statutory mandates differently, and suggests that Congress would be perplexed by FRA trying to delay implementation for some railroads based on the need to study the issue more or addressing the minimum training standards mandate through the same framework as the RRP rulemaking.

B. FRA Included the Limited Exception and Discretion Provided in the Plain Language of the Statute

The only exclusion in the statute allows the Secretary to "exempt railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which the Secretary has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008." 49 U.S.C 20162(c). FRA exercised that express and limited exemption authority in the final rule. 49 C.F.R. 243.103(b).[7]

And, FRA is precluded from adding additional exemptions under the canon of construction that "exceptions not made cannot be supplied."[8] The fact that the statute specifies a one exception means other exceptions are excluded.[9] Therefore, because Congress explicitly only excluded "railroad carriers and railroad carrier contractors and subcontractors from submitting training plans for which the Secretary has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008" FRA is prohibited from adding an additional exclusion.

RSIA contains a provision where Congress gave the Secretary discretion to exempt "railroad carriers and railroad carrier contractors and subcontractors from submitting training

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[7] This section states that "An employer that is required to submit similar training programs or plans pursuant to other regulatory requirements contained elsewhere in this chapter may elect to cross-reference these other programs or plans in the program required by this part rather than resubmitting that similar program or plan. When any such similar program or plan did not include the OJT components specified in paragraph (a)(3) of this section, the employer shall supplement its program in accordance with this part by providing that additional information."

[8] This canon is also known as *expressio unius est exclusio alterius* (the inclusion of one is the exclusion of others). CRS Report at 16-17 (citations omitted).

[9] *Id.* "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Id.*

plans for which the Secretary has issued training regulations before the date of enactment of the Rail Safety Improvement Act of 2008." Therefore, the fact that the minimum training standards and plans section had no discretion indicates that Congress did not intend to provide such discretion.

Nevertheless, FRA considered whether it had the discretion to study whether the benefits of the statutorily required training program would exceed the costs of trying to plug the gaps in safety before initiating this rulemaking. For example, in RSIA (49 U.S.C 20163), the statute mandated a regulation for the certification of train conductors; required the Secretary to issue a report to the Senate "about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety;" and provided the Secretary with the discretion whether to prescribe additional certification regulations for other crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees based on the findings in the Secretary's report to the Senate. However, because Congress did not grant the Secretary such discretion elsewhere to study an issue prior to initiating a rulemaking, logically, Congress did not intend to require the Secretary to study all issues related to this particular statutory mandate prior to the initiation of a rulemaking.

C. <u>FRA is Under a Separate Statutory Requirement to Consider Excluding Tourist Railroads and FRA Maximized Its Authority to Exclude Those Small Entities</u>

In the statute granting the Secretary general authority over rail programs, there is a provision that explicitly requires the Secretary to consider factors unique to tourist railroads whenever DOT prescribes regulations that pertain to railroad safety. 49 U.S.C. 20103(f). Section 20103(f), titled "[t]ourist railroad carriers," states in relevant part that "[i]n prescribing regulations that pertain to railroad safety that affect tourist, historic, scenic, or excursion railroad carriers, the Secretary of Transportation shall take into consideration any financial, operational, or other factors that may be unique to such railroad carriers." To comply with this mandate, in 1988, FRA published an enforcement policy applicable to tourist railroads.[10] 49 CFR part 209, app. A. FRA can presume Congress was aware of this policy and intended for FRA to continue its application to this rulemaking and to its implementation of other mandates set forth in RSIA. *See BedRoc Ltd. v. U.S.*, 541 U.S. 176, 183 (2004) (acknowledging that agencies are permitted to presume that Congress was aware of the agencies' administrative or adjudicative interpretations of certain terms and intent to adopt those meanings); *see also Haig v. Agee*, 453 U.S. 280, 300 (1981); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). However, that statutory provision and FRA policy do not apply to entities other than tourist railroads. Therefore, FRA cannot expand that consideration to other entities.

D. Legislative History Supports Finding that Congress Intended the Statute to Apply to All Employers of Safety-Related Railroad Employees

Even though the statutory language is clear on its face and requires no further review, FRA also reviewed the legislative history and determined that FRA's implementation of this mandate is consistent with the history of this provision. First, we note that there are no conference committee notes on the legislation that passed. Thus, FRA analyzed similar bills that did not pass.

H.R. 2095, "Federal Railroad Safety Improvement Act of 2007," contained three provisions similar to 49 U.S.C. 20162(a)(1)-(a)(3). However, unlike the final version of the RSIA, none of H.R. 2095's provisions applied to all the "safety-related railroad employees" of

[10] FRA limited the rail safety regulations that apply to tourist railroads mostly to situations where there is a corresponding statutory requirement expressly applicable to tourist railroads.

contractors and subcontractors. Thus, the fact that Congress added contractors and subcontractors to the RSIA clearly reflects Congress' intent for this provision to apply to all contractors and subcontractors.

Another bill, S. 1889, "Railroad Safety Enhancement Act of 2007," also contained some similar provisions to RSIA, but had some significant differences. The important similarities are that the bill applied to all "railroad carriers and railroad carrier contractors and subcontractors" and it allowed the Secretary to exempt all of those employers "from submitting training plans covering employees for which the Secretary has issued regulations" prior to enactment of the bill. However, the bill was significantly different from the RSIA in that it did not mandate that the Secretary cover all safety-related railroad employees, but instead permitted the Secretary the discretion to require employers to produce training plans "for crafts and classes of employees . . . [that] the Secretary determines appropriate." S. Rep. No. 110-270, at 68 (2008). Thus, the bill's provisions would have permitted the Secretary to exclude certain employers, presumably allowing the exclusion of some contractors and subcontractors, but not an exclusion for any railroad whenever an employer only employed crafts or classes of employees that the Secretary did not find needed training programs.

The section-by-section analysis of the S. 1889 bill states that the bill's provisions for employers to produce training plans "for crafts and classes of employees . . . [that] the Secretary determines appropriate" was to apply to "all employees . . . throughout the industry," regardless of whether the employer was a railroad or contractor, to ensure the employees are properly trained not just the employees of those railroads that currently have sufficient programs. The Committee recognized that:

> [a]ll railroads have existing training programs for most railroad employees and that many of these programs are currently

> sufficient. However, the Committee believes that regulations that govern the basic elements of these training programs and that establish a clear and consistent curriculum that is appropriate for each class or craft of employees would help to ensure that *all employees* are properly trained for their assigned duties, would promote safe operating practices and behaviors *throughout the industry*, and would enhance compliance with Federal law.

Id. at 32 (2008) (emphasis added). Clearly, since Congress already narrowed the type of employees to safety-related railroad employees in RSIA from application to "all industry employees" to "all safety-related railroad employees," if it wanted to narrow the category of employers, it could have done so. Moreover, because Congress stated it should apply "throughout industry," that indicates they meant to broadly include all employers – not just large railroads.

The significant difference between S. 1889 and RSIA is that S. 1889 would have provided the Secretary with discretion to exempt some railroads, contractors or subcontractors. Paragraph (a) of S. 1889 required the Secretary to issue regulations requiring those employers to "develop training plans for crafts and classes of employees, *as the Secretary determines appropriate*." (Emphasis added.) The fact that this language was not in RSIA despite being in the Senate version of the earlier bill clearly demonstrates that Congress did not want the Secretary to have any discretion to exempt some employers from developing and submitting training plans.

E. <u>The Legal Authorities the Petitioners Cite Do Not Support That FRA Has the Authority to Issue a Blanket Exemption for Small Employers</u>

The petition cites several legal authorities that Petitioners believe support their claim that FRA's rule overreached and violated competing statutes. For instance, Petitioners cite the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), the Regulatory Flexibility

Act (RFA), the Equal Justice Act, and Executive Order 13272.[11] The Petitioners do not clearly articulate how any of these legal authorities would allow FRA to issue a blanket exemption for small entities from the final rule in the face of the overwhelming certainty of the plain statutory requirements in the RSIA (49 U.S.C. 20162), and FRA is not swayed by Petitioners' arguments based on a review of the legal authorities cited. Moreover, in the final rule, FRA explained in detail how FRA complied with SBREFA, the RFA, and Executive Order 13272. *See* 79 FR at 66491-97.

II. FRA Has Not Used the Compliance Guide to Provide Relief

Petitioners seem to have a misconception of what information FRA intended to place in the Compliance Guide. On April 21, FRA posted the Guide to the docket and noted that FRA considers the issuance date to be May 1, 2015.[12] The Guide does not change the requirements or provide interpretations of the final rule. Instead, the Guide merely illustrates acceptable methods for complying with the rule, demonstrates the requirements in a different format to allow quicker and easier comprehension, and provides answers to questions that are likely to be frequently asked. In short, the explanations provided in the Guide should show employers of any size a quick way to determine whether the employer's training program will be compliant with the final rule.

III. The Final Rule Does Not Require Model Program Developers to Track Users

Section 243.109(b)(4) of the final rule provides that if there is a modification to an approved model program an employer uses, then the *employer* must submit to FRA: "[a] statement from an organization, business, or association that has submitted a model program

[11] The petition also cites Executive Order "132725," but as no such executive order exists, FRA assumes Petitioners mean Executive Order 13272.
[12] http://www.regulations.gov/#!documentDetail;D=FRA-2009-0033-0031.

pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the affected training program of the changes and the need for the employer to comply with those changes that apply to the employer's operation." Petitioners request that FRA amend the final rule to not require associations that develop model programs to track railroads and businesses using their programs. The concern is that an association that fails to track which employer uses a program, and fails to notify an employer that uses the model program, would be potentially liable under FRA's enforcement authority. FRA appreciates that the associations raised this issue now, rather than remaining silent and not developing model programs based on this mistaken impression.

FRA believes that Petitioners have misunderstood the final rule's requirements. FRA would take enforcement action against a model program developer only if the developer falsely claimed a model program is FRA-approved. *See* Appendix to Part 243—Schedule of Civil Penalties (citing § 243.105). Section 243.109 of the final rule, which is the section identified in the petition, requires employers to take certain action when submitting an initial training program and when later modifying an initial program that FRA previously approved. It is this latter modification process that contains the regulatory language Petitioners mistakenly believe applies to model program developers.

To keep training programs up-to-date, the final rule requires an employer to make an informational filing whenever an employer must modify a previously approved program because "new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or modification of existing safety-related duties." 49 C.F.R. § 243.109(b). As quoted above, the regulation requires that the employer's informational filing include a statement "from an organization, business, or association that has submitted a model program pursuant to this part, that the organization, business, or association has informed each employer who requested the right to use the affected training program of the changes and the need for the employer to comply with those changes that apply to the employer's operation." 49 C.F.R. § 243.109(b)(4). This particular requirement applies only to an employer that has previously submitted a model program to FRA and, since that model program was approved, needs to update the program. This provision is not intended to regulate the conduct of model program developers.

As background, FRA envisioned that a model program developer would want to continue servicing the employer users of a model program by updating the program annually. Model program developers who offered such an updating service would want to get the word out to employer users that the program the user previously submitted to FRA was updated. FRA believes that a model program developer would most likely put out a statement, in the normal course of its business, that it was updating its existing approved program. FRA's belief fits squarely with the position of Petitioners that they intend to let employers know about the model programs they have developed or updated through a newsletter, e-mail, printout, or directly on the developer's website. FRA believes that most model programs will be available through websites or other electronic means for free or by purchase, and that any updates would be available in the same way. FRA also expects that each model program developer would inform users in the same way it informed those users when it originally developed a model program, if it wanted to provide an update to a developed program.[13] As noted above, this might be through a

[13] Because model programs help streamline FRA's program review process, FRA's expectation is that model program developers and employer users could similarly help FRA streamline the informational filing requirement. Thus, if a model program developer received FRA-approval of an update to one of its existing model programs, it would be able share that

newsletter, e-mail, printout, or notice posted directly on the model program developer's website. And, FRA anticipates that the employer could use the developer's newsletter, e-mail, printout, or notice from the model program developer's website to comply with Section 243.109(b)(4).

FRA begins the early stages of implementing this rule anticipating that Petitioners, and other interested associations, businesses, and organizations, will begin developing model programs for a wide-variety of employers to use and that these same parties will have a continuing interest in maintaining their model programs each year, as needed. However, FRA wants to be clear that this final rule does not place specific requirements on the developers of model programs, but is instead regulating the conduct of any employer that has adopted a model program. To be clear, a model program developer is not under any obligation to update a previously submitted model program on behalf of its users. For this reason, Petitioners should not be concerned about FRA taking enforcement action against them pursuant to their anticipated roles as model program developers as long as they do not market a model program as FRA-approved, when it is not.

IV. Periodic Oversight and Petitioners' Comments on Costs of Rule

A. Periodic Oversight Requirements Are Narrowly Tailored to Focus on Employee Safety, but Allow Some Small Employers to Opt Out

Petitioners request a complete exemption for all small railroads and contractors from the periodic oversight requirements. FRA disagrees with such a wide-ranging exemption that revisits the periodic oversight requirements for several reasons. First, the petition does not

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update with its employer users and the employer users would then merely need to alert FRA to the unique identifier for the program modification or to a statement from the developer for the reasons for the update. In that way, FRA would be spared looking at each employer's filing that utilizes a model program as if it were a unique filing and FRA would be assured that the employer user had adopted the latest version of the model program (and was thus not using an outdated version).

articulate why Petitioners' concerns were not presented to FRA within the allotted time for comments, or even during the RSAC Working Group meeting that took place after the comment period closed. *See* 49 C.F.R. § 211.29(b) (requiring a petitioner who requests consideration of additional facts to state the reason why those facts were not presented to the Administrator within the allotted time). Each Petitioner filed a comment to the NPRM and did not raise any concern with the periodic oversight provision found in § 243.205. Second, during the RSAC process that resulted in a consensus recommendation, FRA's original position was a suggestion to require each employer to conduct "annual task proficiency oversight over each safety-related railroad employee." 77 FR 6412, 6438 (Feb. 7, 2012). FRA detailed in the NPRM the reasons why it accepted RSAC's recommendation for the more narrow compromise, rather than the more comprehensive oversight provision FRA suggested initially. Id. Third, the NPRM and final rule explain how FRA has already considered the burden on small entities, and believes it has provided appropriate exemptions and allowances for various small entities under certain conditions (which will be summarized in greater detail below). Fourth, the limited oversight requirement is carefully tailored to close a gap which previously did not require monitoring of employees doing work particular to FRA-regulated personal and work group safety (49 C.F.R. parts 214, 218, and 220). Thus, FRA believes that periodic oversight is a necessary part of any quality training program.[14] Moreover, FRA deliberately considered different options and

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[14] Without addressing whether periodic oversight is explicitly required or implicitly raised by 49 U.S.C. 20162, it is well established that the Secretary of Transportation (Secretary) has delegated general authority to the FRA Administrator that would allow FRA to issue its periodic oversight requirements in this rule. The general authority states, in relevant part, that the Secretary "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970." 49 U.S.C. § 20103. The Secretary delegated this authority to the Federal Railroad Administrator. 49 C.F.R. § 1.89(a). Thus, it is irrelevant whether the statutory provision cited requires periodic oversight or not.

believes the option it chose in the final rule affects the fewest number of small entities while still closing an important safety gap.

We are however further explaining the oversight requirements in this response. When considering the periodic oversight requirements in § 243.205, please remember to advise your members of the following:

<u>All Employers (Railroads and Contractors)</u>

- FRA is requiring periodic oversight of employees doing work particular to FRA-regulated personal and work group safety under 49 C.F.R. parts 214, 218, and 220, <u>not</u> all Federal laws, regulations and orders.
- Periodic oversight includes both tests and inspections. Tests change the work environment requiring employee action. Inspections are observations determining compliance at a job site.
- FRA is <u>not</u> requiring any employer to conduct periodic oversight under this final rule for locomotive engineers or conductors (as those employees are tested and observed under other FRA regulations).

<u>Contractors</u>

- A contractor is only required to conduct periodic oversight of its own safety-related railroad employees doing work particular to FRA-regulated personal and work group safety if all three of the following conditions are present:

  1) A contractor employs more than 15 safety-related railroad employees;
  2) A contractor relies on training it directly provides to its own employees as the basis for qualifying those employees to perform safety-related duties on a railroad; and
  3) A contractor employs supervisory safety-related railroad employees capable of performing oversight.

- Please note that a contractor that is not required to conduct periodic oversight may voluntarily agree to provide such oversight of its own employees to relieve a railroad that may be required to provide the oversight. 49 C.F.R. § 243.205(h).

Railroads

- Each railroad, regardless of size, is required to provide periodic oversight of its own employees with regard to personal and work group safety.
- Any railroad finding it difficult to comply may request a waiver. 49 C.F.R. part 211, subpart C.
- The final rule does not require a railroad to:
  1) Provide oversight for a contractor's safety-related railroad employees if that contractor is required to conduct its own periodic oversight because it meets the three criteria specified in the contractor section outlined above, which is taken from 49 C.F.R. § 243.205(g);
  2) Provide oversight for categories or subcategories of a contractor's safety-related railroad employees if the railroad does not employ supervisory employees who are qualified as safety-related railroad employees in those categories or subcategories; or
  3) Provide oversight for any supervisory employee identified by the railroad as responsible for conducting oversight in accordance with this section.

Even when a railroad is required to conduct oversight of a contractor's safety-related railroad employees, it is only required to perform inspections, i.e., observations, and is not required to perform any tests which would require changing the work environment.

In addition, if any railroad or contractor believes that a waiver of any requirement of this final rule is justified, such as periodic oversight, the employer may request a permanent or temporary waiver. 49 C.F.R. part 211, subpart C. Of course, FRA will consider each waiver request on a case-by-case basis.

B. FRA Did Address Petitioners' Comments on the Costs of the Rule

FRA strongly disagrees with Petitioners' contention that FRA largely ignored Petitioners' cost estimates and failed to provide relief for small entities in this rule. FRA made a number of revisions to its regulatory impact analysis based on the associations' comments to the NPRM (*see* RIA at 12-50), as well as changes to the final regulatory requirements. FRA addressed industry comments and further input from review at RSAC meetings on cost estimates and substantially revised those estimates in the final rule accordingly. Regarding providing relief for small entities, and reflecting such in the regulatory impact analysis, the following list provides a quick overview of changes made based in response to specific cost estimates[15] and comments Petitioners filed in response to the NPRM:

- Costs of creating and revising training programs delayed: In their comments, each Petitioner requested additional time to submit programs, explaining that nearly all their members would likely adopt a model program one of them developed. A full recitation of Petitioners' requests and FRA's responses are found in the final rule. 79 FR at 66463. FRA expects that model program developers will use a modular approach in the design phase because that approach will enable employer users to easily customize a model program to fit the employer's operational needs. RIA at 13. Petitioners' comments to the NPRM stated they did not believe they could develop model programs on the proposed schedule. The NPRM provided that employers would have to file their programs within one year and 120 days after the effective date of the rule, which meant that if Petitioners wanted to develop model programs and make them available to their members they would have to do so well within that timeframe. FRA extended the deadline for filing a program until at least January 1, 2018

[15] FRA notes that NRC made specific cost estimates in its comment that were supported by ASLRRA and APTA in their comments.

(nearly three years after the January 6, 2015 effective date of the rule). For an employer with less than 400,000 total employee work hours annually, the deadline for filing a program is May 1, 2019, which is four years from the date of issuance of FRA's Interim Final Compliance Guide. Thus, based on the expected issuance date of the Guide, these small railroads and contractors will have nearly 4 years and 4 months after the effective date of the rule to submit a program. Furthermore, FRA created a fast track approval process for model programs, as long as the program is submitted before May 1, 2017 (i.e., nearly two years and four months after the effective date of the rule). FRA accounted for the extensions of the implementation of the rule as cost savings in the first three years after the effective date of the rule;

- NRC noted in its comments to the docket that the NPRM's RIA did not consider the cost of hiring and indoctrinating one safety professional per company to create new formalized training. NRC estimated the one year unit cost of hiring a trainer at $133,680. FRA agreed that the NPRM's RIA did not include this cost and added the cost of trainers in the final rule. However, FRA did not accept NRC's salary estimate for trainers. Instead, FRA estimated the cost of trainers based on average wage rates provided by the Surface Transportation Board (STB). Using the STB average hourly salary rate of $32.48 for 2,080 annual hours equals an annual hiring expense of $67,492 per trainer. RIA at 41-43.
- NRC noted in its comments to the docket that the NPRM's RIA did not consider the cost of filing and maintaining a database of training records. NRC estimated that a person making $65,000 would spend approximately 30% of their job filing paperwork and maintaining a database of training records related to this rule, thus costing each company $19,500 annually. The final RIA addressed these costs and the comment, although FRA assessed the costs

differently than NRC. FRA stated in reply to NRC's comment that the "incremental time demanded for Part 243 compliance will be minimal" as training records are already currently maintained on individual employees and company's training programs. RIA at 44-47. The total present discounted incremental cost of filing a program and documenting training at a 3% discounted rate is $1,979,076 and at a 7% discounted rate is $1,546,783. RIA at 45, Table 19.

- NRC stated in its comments to the NPRM that the RIA did not consider the costs when there is a loss of productivity due to the increase in training time the rule requires. NRC estimates each employee will require an additional four days of training. In the final RIA, FRA stated that, because FRA already accounted for all training costs for all training activities, "it does not agree [with NRC] that it is necessary to account separately for any alleged productivity loss as to do so would be double counting the costs." RIA at 37, 44-47.
- NRC noted in its comments to the docket that the NPRM's RIA did not consider the loss of productivity when a company has to respond to FRA on Part 243 oversight matters. NRC estimates that 20 employees will lose a full day of productivity each year due to oversight. Although FRA did not agree to NRC's cost estimates, FRA did address NRC's concern in the final RIA[16] and did add "a reasonable amount of time to cover the costs of such visits when they occur." RIA at 47.

[16] "The NRC in its comments to the docket on the NPRM suggested that 20 employees per company per year will spend on average 1 day with FRA on Part 243 oversight matters. However, FRA does not anticipate conducting random audits or oversight on small railroads or contractors without cause. An audit or oversight would likely be triggered by a fatality or major accident/incident, a complaint, or other systemic safety concern related to training. Also, FRA will not possibly be able to visit every railroad every year on Part 243 or other matters, much less occupy 20 employees per day for such purposes at each company. Finally, FRA has added a reasonable amount of time to cover the costs of such visits when they occur." RIA at 47.

- APTA also stated in its comments that the NPRM's RIA greatly underestimated the actual cost to produce high quality training programs and the amount of time employers need to tailor a model program to the employer's liking. APTA raised the issue by describing two projects where APTA was involved with producing training programs. The first project involved developing four training programs for a "National Transit Industry Rail Vehicle Technician Qualification Program" in cooperation with the Transportation Research Board that resulted in $1.9 million in expenditures and completion of only about half the work. The second project involved APTA working with the Federal Transit Administration to develop a Model Bus Safety Program. However, APTA reported that after "that first effort, the model plan was found to be too difficult for smaller agencies to successfully implement." FRA has addressed the former concern by specifically not prescribing the particular model of training known as task analysis. Instead, FRA has explained that the employer can choose to design its standards "using whatever model best suits the needs and desires of the employer that will implement the training program . . . [and thus] employers [have] the flexibility to design high quality training programs in the most cost effective way." RIA at 6-7. FRA has addressed the latter concern by delaying the implementation dates significantly, as previously described.

CONCLUSION

The final rule includes many special considerations for small employers, which will help ensure strong compliance and reduce burdens.

- The rule features delayed implementation for small railroads.
- There is no periodic oversight requirement for any contractor that employs 15 or fewer safety-related railroad employees.

- There is no periodic oversight requirement for a railroad over a contractor's employees on its property if the railroad does not employ supervisory employees who are qualified to conduct such oversight.
- There is no annual review requirement for any contractor.
- There is no annual review requirement for any railroad with less than 400,000 total employee work hours annually.
- Any railroad with less than 400,000 total employee work hours annually may opt to file a program in writing instead of electronically.

In addition to the steps taken in the final rule itself to ease the burden of compliance:

- On May 1, 2015, FRA issued its Compliance Guide in the rulemaking docket, which can be used by an employer of any size but was designed with small entities in mind. *See* http://www.regulations.gov/#!documentDetail;D=FRA-2009-0033-0031.
- In Appendix B of the RIA, FRA has provided a matrix showing which FRA regulations each type of employee will have to be trained on.
- FRA will provide timely feedback on all model program submissions.
- FRA has already started engaging in regulatory outreach and educational seminars/workshops. It recently presented an overview of the rule at the ASLRRA conference in Orlando, Florida on March 30. Upon request, FRA will make additional presentations at industry events and conferences. FRA will hold a series of workshops led by subject matter experts beginning in late 2015 and throughout 2016 nationwide to assist small businesses with rule compliance. Notice of each workshop will be published in the Federal Register no later than 90 days prior to the scheduled event. Workshops will entail lectures, Q&A, and the dissemination of templates/examples of program documentation. FRA will

publish its On-the-Job Training Standards that can be tailored for a small business by December 31, 2015. FRA's OJT standards satisfy the requirements contained in Part 243 if administered correctly. Upon request, FRA will provide subject matter expertise to help with the development of OJT standards.

On behalf of FRA, I thank you for your partnership, and for all of the efforts each of your associations will take in advancing implementation of this rule. Please do not hesitate to contact Robert Castiglione, Staff Director of Human Performance Programs, , at (817) 447-2715 if you need any assistance or have any further questions.

Sincerely,

Sarah E. Feinberg

Sarah Feinberg

Acting Administrator