

**SECTION-BY-SECTION ANALYSIS OF
THE FEDERAL RAILROAD SAFETY IMPROVEMENT ACT**

Section 1 would provide that this proposal may be cited as the “Federal Railroad Safety Improvement Act.”

Section 2 would provide that references in the proposal to the amendment or repeal of a section or other provision are references to a section or other provision of title 49 of the United States Code, unless the proposal explicitly states that the section or other provision is from a different source.

Section 3 would list the section and title headings of each section and title of this proposal, in the order in which the sections and titles appear.

TITLE I--RULEMAKING, INSPECTION, AND ENFORCEMENT AUTHORITY

Section 101, "National Crossing Inventory," would establish a new section and subsection¹ to require railroads and States, respectively, to provide the Secretary of Transportation with information necessary for risk analysis of the country’s more than 250,000 highway-rail crossings and pedestrian crossings.² Such information has been collected by the Department of Transportation since 1974, and maintained in a national database called the "US DOT National Crossing Inventory File" (Inventory) since 1975. The Inventory is the only nationwide database on the characteristics of crossings. However, the information has not been

¹ Section 20154 and new subsection (k) of 23 U.S.C. 130

² A “pedestrian crossing” is an intersection of a dedicated pedestrian pathway and a railroad track.

required, and thus some crossing information has not been reported at all or not adequately updated by the States and the railroads.

The primary purpose of the Inventory is to serve as a uniform computerized database on crossings throughout the country that can be merged with other data, including the Federal Railroad Administration's (FRA) accident/incident database, and used to promote crossing safety. States, railroads, and other entities responsible for crossing safety analyze information in the Inventory for planning and implementation of crossing-improvement programs such as the vital "Section 130" program,³ which provides Federal funds to the States to install or improve warning devices at crossings or to eliminate crossings altogether. This is done with States or railroads or both providing funds on a matching basis. In addition to being used for proper allocation of Section 130 resources, the Inventory is used by Federal, State, and local law enforcement personnel to identify especially hazardous crossings on which to focus inspection and enforcement efforts. It is also used extensively by the Department, States, railroads, and researchers for crossing safety studies, some of which have helped FRA formulate regulatory actions.

Currently, data for the Inventory are usually supplied partially by the railroad that operates through the crossing, with the remainder supplied by the State where the crossing is located. For example, for public highway-rail crossings, the railroad typically provides such information as the volume of railroad traffic through the crossing and the type of warning device

³ 23 U.S.C. 130

at the crossing, while the State typically provides such information as the volume of highway traffic through the crossing.

Because information in the Inventory is not adequately reported and maintained, decisions about how to allocate scarce warning-device, inspection, and enforcement resources must be made on the basis of outdated or incomplete information. On January 22, 2002, the National Transportation Safety Board issued a safety recommendation⁴ that arose out of a fatal crossing collision involving a school bus and that detailed some of the shortcomings of the Inventory. The Board's safety recommendation indicated that "[b]ecause the States and others rely on this inventory for determining hazards and predicting accidents at grade crossings, inaccurate information can lead to invalid assessments" of the relative level of hazard at one particular crossing as compared to another. To remedy the deficiencies in the system, it is imperative that the Department receive accurate reports. The legislation seeks to achieve that objective in several ways.

Section 101 would require that railroads provide the Secretary with three kinds of reports.

First, railroads would be required to provide initial reports on previously unreported crossings, including new crossings. (The reports would be due within six months after enactment of this bill or within six months of a new crossing becoming operational, whichever occurs later.)

Second, updates to the Inventory would be required on a periodic basis beginning no later than 18 months after enactment, and continuing on a schedule no less

⁴ Safety Recommendation No. H-01-42

often than by September 30 of every third year thereafter, or as otherwise specified by the Secretary.

Third, for crossings that are transferred to other ownership, notice to the Secretary would be required from the seller within three months of the sale or within 18 months after enactment, whichever occurs later, or as otherwise specified by the Secretary.

Each railroad would have to provide an initial, periodic, and, if applicable, change-of-ownership report on each crossing through which it operates, or else see to it that the same information is provided to the Secretary by another railroad that operates through the same crossing.

Section 101 would also require each State to provide information on crossings within its borders, with initial reports to the Inventory and periodic updates on the same schedule as the railroads'.⁵

The Secretary would be authorized to determine which crossing data would be supplied by the railroad and which would be supplied by the State. The particular information to be included in these reports and the entity responsible for providing the data would be specified by the Secretary. The Secretary would be permitted to enforce each provision of FRA's Highway-Rail Crossing Inventory Instructions and Procedures Manual that is in effect upon enactment of this section, until such provision is superseded by a regulation issued under this section.

Section 102, "Transportation Security," would amend current law to clarify that the Secretary of Transportation's authority to issue regulations and orders governing "every area of

⁵ A new subsection (k) would be added to section 130 of title 23, United States Code.

railroad safety"⁶ includes "security." The issues of rail safety and security are often inextricably linked in railroad operations. Prior to creation of the Transportation Security Administration (TSA) in the wake of the events of September 11, 2001, the distinction was not critical. However, the authority over rail and other transportation security generally was transferred to TSA, first as an entity under the Department of Transportation and later under the Department of Homeland Security. FRA, TSA, and Homeland Security have an extremely cooperative relationship. However, clarification of FRA's jurisdiction is necessary to ensure that any regulations and orders which may have some carryover into the security arena will withstand legal challenge and protracted litigation by outside parties. The Homeland Security Act of 2002 supports the conclusion that "safety" includes "security" when it defines "safety" for purposes of the Railroad Safety State Participation Program as including security.⁷ It also provides that the Secretary of Transportation's authority to issue hazardous materials transportation safety regulations includes security measures.⁸ The proposed language provides more consistency overall.

The inseparability of the safety and security issues is not new. Current statute provides the Secretary of Transportation with plenary authority, delegated to the Federal Railroad Administrator, to address any hazards to life and property, regardless of the source of the potential threat, that may arise in the context of railroad operations. These threats include not

⁶ 49 U.S.C. 20103(a)

⁷ See Pub. L. No. 107-296, section 1710(a), amending 49 U.S.C. 20105.

⁸ See Pub. L. No. 107-296, section 1711(a), amending 49 U.S.C. 5103(b).

just threats to trains, passengers, employees, communities near railroads, and railroad property, but also threats to the general public that could be posed by exploitation of railroad operations and equipment by terrorists. FRA has issued various rules which necessarily overlap safety and security, including the following:

- a 1998 final rule on Passenger Train Emergency Preparedness⁹ that requires passenger railroads to conduct detailed planning for emergency situations, which are defined to include a "security situation" such as a bomb threat; and
- a December 2001 interim final rule and a January 2002 final rule on foreign dispatching of railroad operations in the United States¹⁰ that are based in part on the agency's concerns about the security of foreign dispatching facilities.

In each of these cases, rules focused on the safety of railroad operations necessarily have an impact on security and are to some degree motivated by security concerns.

Further, FRA has issued many other safety regulations regarding track, structures, equipment, signal and train control systems, and employee qualifications, rules that are not explicitly based on security concerns, but that have a bearing on security. FRA may find it necessary to issue amendments of these safety regulations or entirely new safety regulations or orders that have security implications.

Section 103, "High-speed rail noise regulation," proposes to require the Secretary of Transportation to set standards governing the maximum permissible sound energy emissions

⁹ 49 C.F.R. part 239

¹⁰ 49 C.F.R. part 241

from certain high-speed rail operations. The Environmental Protection Agency (EPA) has issued noise emission standards for interstate railroads pursuant to the Noise Control Act of 1972¹¹. The regulations establish maximum noise emission levels for specific kinds of (i) on-track railroad equipment, (ii) railroad operations, and (iii) railroad facilities. These standards have, in effect, become the noise-design criteria for railroad equipment in the United States, and there has been little or no problem with compliance by the traditional freight and passenger rail equipment. High-speed rail operations at more than 150 mph, however, emit a different type of noise, which exceeds EPA standards and does not lend itself to being reduced to the levels covered by the existing standards. The authority is proposed for the Department of Transportation, delegated to FRA, since the EPA noise office has been dismantled for about 20 years, and FRA holds the expertise in high-speed rail engineering.

Under current EPA regulations, moving locomotives may emit a maximum of 90 decibels when measured at 100 feet from the track centerline.¹² Recent research for FRA has shown that at train speeds greater than 150 mph, aerodynamic noise becomes the dominant noise source. This proposal would address the shift from equipment noise to aerodynamic noise as the dominant source of noise during operations above 150 mph.

Under this provision, the Secretary, with the concurrence of the Administrator of the EPA, would be required to issue a regulation that specifies the maximum permissible sound

¹¹ 40 C.F.R. part 201

¹² 40 C.F.R. 201.12(b)

energy emissions received along the right of way due to the passage of a high-speed train, as opposed to the maximum permissible noise emission levels for specific pieces of rail equipment. The specification of maximum sound energy level is consistent with the current European approach to the regulation of high-speed rail operation noise. In establishing the maximum permissible sound energy level for high-speed rail operations, the Secretary would be authorized to consider the maximum levels permitted by countries with extensive experience with high-speed rail operations as well as the maximum sound exposure levels resulting from average or typical U.S. rail freight trains operating in compliance with existing EPA standards.

Standards established by the Secretary under to this section would replace the standards issued under the Noise Control Act of 1972 only when the rail equipment is operating in excess of 150 mph. At all other times, the equipment would be required to conform to the existing EPA noise standards applicable to railroad equipment.

Section 104, "Railroad Accident and Incident Reporting," would amend section 20901(a) of title 49, United States Code, in two ways. First, it would eliminate the statutory requirement that railroads' reports to FRA regarding accidents and incidents on their properties be made under oath and notarized. The oath and notarization requirement causes unnecessary expense and delay, and is an obstacle to filing reports electronically. Federal statutes call for criminal penalties for filing false statements.¹³ Thus, at a time when efficiency and technology allow for electronic filing, the current requirement is redundant and unnecessary.

¹³ See, e.g., 49 U.S.C. 21311.

Second, section 104 would allow the Secretary of Transportation to specify the frequency with which the accident and incident reports must be filed, providing discretion to set different reporting requirements for different classes of railroads or different types of situations and to permit a reduction in the frequency of filings. Although the Secretary would be authorized to set any reporting interval, the Secretary would be expected to require reports at least on a quarterly basis.

Section 105 would permit the Secretary of Transportation to authorize his or her subordinates and agents, such as Federal railroad safety inspectors to monitor (“intercept”) and record railroad radio communications and, with certain exceptions, to use those communications and the information they contain, for the purpose of accident prevention, including, but not limited to, accident investigation. Communication by radio is one of the most critical elements of railroad operations and safety. Both the railroads and FRA have prescribed rules governing radio use.¹⁴ Railroads permit employees to use the company radio exclusively for railroad operations and prohibit them from using the company radio for any unnecessary or irrelevant communications, such as personal, non-business conversations.¹⁵

While the railroad is authorized to monitor the communications of its employees to determine whether safety rules and operations are being followed, current law arguably

¹⁴ See, e.g., FRA’s Railroad Communications rules (49 C.F.R. part 220), roadway worker protection rules at 49 C.F.R. 214.319-214.325, and Railroad Operating Rules (49 C.F.R. part 217).

¹⁵ See Rule 700, “Radio Use,” and Rule 709, “Prohibited Transmissions,” Northeast Operating Rules Advisory Committee Rules, which apply to more than 30 railroads in the United States.

precludes FRA inspectors from monitoring these communications without the presence of a railroad employee who is an authorized sender or receiver of the communication. FRA access to railroads' radio communications would likewise help ascertain that Federal railroad safety rules are being followed.

Railroads use their dedicated radio frequencies to control, and promote the safety of, various types of operations. In connection with road train and switching operations, radio communications are used in at least six major ways. First, railroads use radio to transmit movement authorities from the dispatcher directly to the crew in the cab of the locomotive. Second, radio is used to communicate intra-crew directives, that is, communications on when to go, stop, back up, slow down, etc., both in road trains and in switching operations. Third, radio is used to relay information from one crew to another crew, e.g., when traffic conditions result in more than one train in the block or when a train stops because of work or the need to be inspected. Fourth, radio is often used to transmit wayside detector information. Fifth, radio is used to transmit information from wayside employees to crews or dispatchers regarding defects on passing trains. Sixth, radio provides a way for trains in distress to summon help immediately and a way for employees to prevent accidents or mitigate their severity by alerting dispatchers and crews to track obstructions or washouts, etc. In addition to being used in road train and switching operations, radio is also used in the maintenance and inspection of railroad track and structures, as well as railroad signal and train control systems.

Although FRA inspectors may monitor radio communications in the presence of an authorized railroad employee, typically, when an FRA inspector arrives on railroad property, railroad users of radio are often informed by their coworkers to be guarded as they are being

monitored by FRA. Thus it is difficult to determine what is normal behavior or what is particular attention to the regulations due to FRA's presence. Access to candid communications from off-site would yield a truer picture of compliance levels.

FRA's objective of accident prevention is ordinarily fulfilled by means of the safety inspection of railroad operations on a daily basis and the enforcement of the rail safety laws. Monitoring of radio communications would not only help achieve that objective, but would greatly improve the efficiency of those inspections, the accuracy of their results, and the effective redeployment of FRA's limited inspection resources based on those more accurate results.

Section 105 would cover only a communication by radio over a frequency that the Federal Communications Commission (FCC) authorizes to one or more railroads.¹⁶ It would not apply to railroads' communications by such means as cellular or cordless telephones. It would also require that the monitoring of railroad radio communications be conducted "at reasonable times," defined as whenever the railroad being inspected or investigated is performing its rail transportation business.

Section 105 of the proposed legislation is intended to create an exception to existing prohibitions on intercepting railroad radio communications for the Secretary's subordinates and agents, such as Federal inspectors administering the Federal railroad safety laws, including the

¹⁶ See FCC regulations at 47 C.F.R. part 90, especially sections 90.35(b)(2)(i), (b)(3), and (c)(50) and Subpart G. Frequencies lying between 160.215 and 161.610, inclusive, in the Industrial/Business Pool are authorized to railroads. See 47 C.F.R. 90.35(b)(2)(i) and the Industrial/Business Pool Frequency Table at 47 C.F.R. 90.35(b)(3).

hazardous materials transportation laws.¹⁷ All authorities that would be granted by proposed subsection 20107(c)(1) would be usable for the purpose of accident prevention, including, but not limited to, accident investigation.

Information obtained through the Government's activities described in the proposal would not be admissible into evidence in any administrative or judicial proceeding, except in the six enumerated types of railroad safety proceedings for impeachment purposes only and then only if the Government's monitoring was done not solely for the purpose of accident investigation. (If the Government's interception of a communication under proposed subsection 20107(a)(1)(A) was done solely for the purpose of accident investigation, then the information obtained from it would not be admissible for any purpose in an administrative or judicial proceeding in which criminal or civil penalties might be imposed.) In situations in which information intercepted would not itself be admissible into evidence in a proceeding, it would constitute background material, which might suggest further investigation and ultimately lead to the discovery of admissible evidence; other information that is the fruit of the intercepted information would be admissible (if otherwise admissible under applicable procedural rules). Such admissible evidence might include a tape recording or transcript of the communication made by the railroad (under its own authority to monitor the communications) or the testimony of a participant in the communication.

Further, the proposal would provide a mechanism for ensuring confidentiality, when appropriate, of intercepted communications introduced in rail safety proceedings as

¹⁷ 49 U.S.C. subtitle V, part A (49 U.S.C. ch. 201-213), and 49 U.S.C. ch. 51

impeachment evidence. It would also take the intercepted communications outside the scope of the Freedom of Information Act, thereby effectuating the agency's intent to assure that it does not release the communications to railroad carriers. Finally, the proposed legislation would preserve unaffected other statutory authorities for interception of communications.

Section 106, "Technical Amendments Regarding Enforcement by the Attorney General," would clarify that the Federal district courts have jurisdiction to entertain three types of civil actions brought by the Attorney General at the request of the Secretary of Transportation. First, section 106 would explicitly authorize the Attorney General to seek an injunction against violation of a rail safety statute.¹⁸ The Attorney General is already authorized to sue in Federal district court to enjoin a violation of rail safety regulations, but not rail safety statutes. The new section would permit suits for these injunctions except for those dealing with employee protections against discrimination for whistleblower activities or for reasonably refusing to work in the face of an imminent danger of death or serious injury, rights that would continue to be enforced under the Railway Labor Act. Second, section 106 would clarify the availability of another enforcement tool by stating that the Attorney General may enforce the Secretary's requests for production of documents or other tangible things and requests for testimony by deposition under the rail safety laws. The existing rail safety laws lack an explicit provision for enforcement of these discovery devices. Finally, section 106 would conform the Attorney General's enforcement powers under the pre-1970 rail safety statutes to those under the 1970 rail

¹⁸ 49 U.S.C. ch. 201-213

safety statute with respect to collection of civil penalty settlements and the enforcement of administrative subpoenas.¹⁹

Section 107 has a dual purpose. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, maximum civil penalties are required to be adjusted for inflation. That statute did not directly amend the civil penalty provisions of the substantive laws affected, but rather required the Federal agencies charged with enforcing those laws to issue regulations revising the penalty amounts. This new proposal would cross-reference the appropriate provisions of that Act. Although inflation adjustments have been and will continue to be made by regulation, this provision in the railroad statutes would provide further notice to the regulated public of this requirement and prevent having to search through related statutes to determine a respondent's maximum liability.²⁰

Second, section 107 would revise the civil penalty provisions to make them more uniform. Under the 1970 rail statute, the Government may deduct the amount of any unpaid penalty or settlement owed by a respondent from any funds (such as tax refunds) owed by the Government to the respondent. These technical amendments would put enforcement of the pre-1970 safety statutes on an equal footing with enforcement of the 1970 statute.

TITLE II—MISCELLANEOUS PROVISIONS

¹⁹ The pre-1970 rail safety statutes are found primarily in 49 U.S.C. ch. 203-211. The “1970 statute” refers primarily to 49 U.S.C. ch. 201, where the provisions of the now repealed Federal Railroad Safety Act of 1970 have been recodified.

²⁰ Pub. L. No. 101-410, 104 Stat. 890, 28 U.S.C. 2461 note, as amended

Section 201 would eliminate several provisions of the rail safety laws that are unnecessary because they have been executed or become obsolete. First, the proposal would strike as executed the following three provisions that require the Secretary to submit a report to Congress: the second sentence of section 20103(f) (report on tourist railroads); section 20145 (report on detection of bridge displacement); and section 20150 (report on positive train control). The Secretary has submitted each of these reports already. Second, the proposal would repeal section 20146, a provision to establish, and authorize appropriations to fund, an Institute for Railroad Safety at \$1 million per year for fiscal years 1996-2000. Congress did not appropriate funds for the institute and, in any event, the authorization of appropriations for fiscal years 1996-2000 has expired.

Section 202 of the proposal would assign convenient, alternate names to the chapters of the U.S. Code that comprise the railroad safety laws. This is intended to facilitate communication about the Federal railroad safety laws (49 U.S.C. chapters 201-213), in order to improve the administration and enforcement of those laws, litigation under those laws, and compliance with those laws. Currently, each of these chapters is denoted by a three-digit number and a verbal heading. With the exception of chapters 203 and 213, each chapter generally corresponds to a single railroad safety statute that was formerly codified primarily in title 45 of the U.S. Code. In 1994, as part of the recodification of certain general and permanent Federal laws related to transportation, these railroad safety statutes were repealed, and their provisions were revised and reenacted without substantive change as positive law in title 49.²¹ For example,

²¹See Pub. L. No. 103-272 (July 5, 1994); H.R. Rep. No. 103-180 (1993).

chapter 201, “General,” contains all of the general and permanent provisions of the Federal Railroad Safety Act of 1970, as amended, except for the provisions on civil and criminal penalties.

In all cases, the current chapter heading does not restate the name of the statute that the chapter supersedes. In some cases, the current chapter heading does not even readily connote the name of the statute that the chapter supersedes. For example, to a person who has no knowledge of the rail safety laws, the heading “chapter 201, General” does not immediately suggest that the chapter is a recodified version of the Federal Railroad Safety Act of 1970. This is unfortunate primarily because decades, if not a century, of administrative interpretations, court filings, and court decisions have been developed under the statutes as they were named before the 1994 recodification. That body of administrative interpretations, briefs, and case law, which uses the pre-recodification names of the statutes, is more difficult to understand without a ready reference to those pre-recodification statutory names within the text of the current U.S. Code; this is particularly true for new practitioners and others who are not already acquainted with the original names of the statutes. Although the legislative history of the recodification law provides tables that may be used to identify the pre-recodification statute, the process is fairly cumbersome and dependent on material not as readily available as the U.S. Code.

Furthermore, not only old (pre-recodification) case law but also new (post-recodification) case law often uses the old names of the statutes. E.g., in Norfolk Southern Ry. v. Shanklin, 529 U.S. 344 (2000), the Supreme Court helpfully referred to the “Federal Railroad Safety Act of 1970” as if it still existed. Courts and litigators use the old names for the ease of reference they provide, but use of those names is not, in fact, consistent with existing law. With the new case

law, the problem is that the old statutory name does not lead the reader to the new statutory citation and that the new case law also becomes difficult to integrate into the recodified statute. After a case provides an initial citation to the recodified section, all other references are to the original name of the statute, e.g., the “Locomotive Inspection Act” or the “Federal Railroad Safety Act of 1970.” If the novice misses the initial citation, the references to the old statutes can become confusing.

To provide a bridge between the old statutory names and the recodified statutes, section 202 would incorporate into the U.S. Code one alternate name for each chapter of the rail safety laws or, in the case of chapter 203, an alternate name for each of two portions of that chapter. With respect to each of chapters 201 and 205-211, section 202 would establish one alternate name that clearly corresponds to the name of the statute that the chapter supersedes. With respect to chapter 203, the proposal would permit sections 20301-20304 and 20406 to be cited as the “Safety Appliance Act.” Section 20305 (formerly 45 U.S.C. 37), which is an independent provision that was never part of the old Safety Appliance Acts, would be permitted to be cited as the “Mail Car Inspection Act.” With respect to chapter 213, the chapter where the civil and criminal civil penalty provisions for all of the various Federal railroad safety statutes are now consolidated, the section would allow that chapter to be cited as “Penalties for Railroad Safety Violations.” The names proposed in the bill would allow plainer discussion of the railroad safety laws on a daily basis within the legal community and more lucid written interpretations of those laws by FRA, litigants generally, and the courts. The names proposed in the section for chapters 201-211 would also help link the recodified statutory provisions in title 49 with the administrative interpretations, court filings, and judicial case law under earlier versions of the

original statutory provisions. For example, section 202 would allow chapter 201 to be cited as the “Federal Railroad Safety Act,” thereby linking the reader to the case law on the Federal Railroad Safety Act of 1970.

There is precedent for enacting a provision such as section 202, both with respect to chapters that, like those in title 49, are positive law and with respect to those that are not positive law. For example, section 220501(a) of title 36 says that chapter 2205 may be referred to as the “Ted Stevens Olympic and Amateur Sports Act.” Title 36 is positive law. In addition, section 1403(a) of title 26 allows chapter 2 of subtitle A to be called the “Self-Employment Contributions Act of 1954.” Title 26 is not positive law.

Section 203 of the proposal would clarify the scope of FRA’s safety and operations program and its research and development program and authorize appropriations for those programs. Subsection (a) would indicate that these programs include FRA’s activities to carry out not only 49 U.S.C. chapter 201. In particular, these programs also include implementation of chapters 203-213, as well as program activities to administer chapter 51 in all modes of transportation, but particularly in the rail mode.

Subsection (b) would authorize appropriations for FRA’s safety and operations program and research and development program for four fiscal years--2004 through 2007. A total of \$166,200,000 would be authorized for fiscal year 2004; this amount includes two components: (1) \$131,175,000 for FRA’s safety and operations program and (2) \$35,025,000 for FRA’s research and development program. The authorization levels for fiscal years 2005 through 2007 would be for such sums as may be necessary.