SECTION-BY-SECTION ANALYSIS OF

THE FEDERAL RAILROAD SAFETY

ACCOUNTABILITY AND IMPROVEMENT ACT

Section 1 would provide that this proposal may be cited as the "Federal Railroad Safety Accountability and 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 U.S. Code, unless the proposal explicitly states that the section or other provision is from a different source.

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

TITLE I–AUTHORIZATION OF APPROPRIATIONS

AND ESTABLISHMENT OF SAFETY RISK REDUCTION PROGRAM

Section 101 of the proposal would clarify the scope of the Federal Railroad Administration's (FRA's) safety and operations program and its research and development program, authorize appropriations for those activities, and authorize appropriations to supplement those activities with a risk reduction program that will make the railroads more accountable for their own safety. Subsection (a) would indicate that these programs include FRA's activities to carry out not only the general railroad safety provisions at 49 U.S.C. chapter 201 (formerly, the Federal Railroad Safety Act of 1970). In particular, these programs also include implementation of chapters 203-213 (the older railroad safety laws), as well as program

activities to administer chapter 51 (formerly, the Hazardous Materials Transportation Act) in all modes of transportation, but particularly in the rail mode. Subsection (a) would also authorize appropriations for FRA's safety and operations program and research and development program for four fiscal years--2008 through 2011. A total of $180,722,000 would be authorized for fiscal year 2008; this amount includes two components: (1) $148,472,000 for FRA's safety and operations program and (2) $32,250,000 for FRA's research and development program. The authorization levels for fiscal years 2009 through 2011 would be for such sums as may be necessary.

Subsection (b) would authorize appropriations for the addition of a safety risk reduction program to FRA's current safety activities and enhance the accountability of railroads for their own safety. The authorization level of the safety risk reduction program would be no more than $2,363,000 of the $180,722,000 for fiscal year 2008 and then such sums as may be necessary of the totals for fiscal years 2009 through 2011. The $2,363,000 figure includes $2 million for a Voluntary Protection Pilot Program or other risk reduction program, $0.25 million for a Confidential Close Call Reporting Program, and $0.113 million for an additional full-time-equivalent employee. Safety risk reduction is a key tool FRA must use to produce continuous improvement in safety. Accidents, injuries, and deaths from railroad-related causes are already at very low levels, and it is necessary to augment FRA's traditional behavior-based and design-specification-based regulations with a robust safety risk reduction program in order to continue to drive down those key safety outcomes at an affordable cost. This is analogous in many ways to a company having both a quality control program and a quality assurance program; both are needed to produce the best products in today's competitive environment. Safety risk reduction

emphasizes investing up front in safety in order to "do it right the first time," instead of focusing on correction after there is noncompliance with a fixed standard. A safety risk reduction program is designed to ensure that the systems by which railroads operate and maintain their property remain adequate to meet safety objectives as conditions and technology change. Instead of focusing on rewarding safe behaviors and discouraging unsafe behaviors, which the traditional approach does well, the risk reduction approach improves systems to eliminate or reduce processes that cause or too readily permit workers to make errors which result in accidents, injuries, or deaths. For example, where the traditional approach focuses on finding cracked joint bars and securing their prompt repair, the safety risk reduction approach focuses on systemic issues such as the process for deciding whether to use a joint bar or a weld, the process for installing joint bars, the process for managing joint bars that have been installed, and the process for eliminating them in order to reduce or eliminate the opportunity for joint bars to crack and cause wrecks. Safety risk reduction is a key tool for the armed forces to continuously improve quality at reasonable cost. Safety risk reduction facilitates the timely and cost-effective introduction of new technology to improve safety. Safety risk reduction also provides a cost-effective way for FRA to leverage its scarce resources to maximize safety results for the funds invested by the public. To implement a safety risk reduction program properly, FRA will have to acquire new skills and adapt to new ways of thinking. Rail safety will clearly be improved by using both approaches.

Section 102 of the bill, "Protection of Railroad Safety Risk Reduction Program Information," would add two new sections to title 49 of the U.S. Code that would, except as may be necessary for law enforcement purposes, prohibit the disclosure by the Secretary, through the

Freedom of Information Act (FOIA) or otherwise, and that would bar the release to any private party through civil litigation by a private party for damages, of certain information developed by a railroad pursuant to a regulation prescribed or order issued as part of FRA's new safety risk reduction program. The purpose of the proposed shielding of this information would be to encourage the railroad to describe its safety vulnerabilities, including its security vulnerabilities, and the mitigation measures it has identified with which it will address those risks, in documents that are not simply recitations of platitudes or pamphlets suitable for public relations campaigns but instead serious, comprehensive, and in-depth analyses. In other words, because railroads will not want to produce professional risk reduction analyses if they may be released under FOIA or in response to discovery requests, safety is enhanced by prohibiting their release. In addition, because terrorists could use these analyses to plot attacks against railroads, security requires that the analyses not be released.

Proposed 49 U.S.C. 20118, "Prohibition on public disclosure of required railroad safety risk reduction records," would bring FRA-required risk reduction program records within FOIA Exemption 3(A) (records prohibited from disclosure by another statute if the statute "requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue"). A current example of a record absolutely barred from release is a cockpit voice recording (the actual recording, not a transcript of it). The only exception to the bar on public release of FRA-required risk reduction program records by the Secretary of Transportation (Secretary) would be for the purpose of enforcement of Federal law by the Secretary or by another Federal agency. For example, the Department of Justice would be permitted to use the records as evidence in litigation against a railroad related to collection of civil penalties for

failure to comply with an FRA risk reduction program regulation or for violation of the Clean Water Act or the Comprehensive Environmental Response, Compensation, and Liability Act.

The other proposed new section, 49 U.S.C. 20119, would bar discovery or admission into evidence of certain risk reduction information in a civil action by a private party or parties for damages. All information compiled or collected in order to identify, evaluate, plan, or implement a railroad safety risk reduction program pursuant to an FRA regulation or order requiring a risk reduction program would be shielded. FRA modeled this provision on 23 U.S.C. 409 ("Section 409"), which Congress enacted pursuant to a Federal Highway Administration (FHWA) proposal to shield information provided to that agency by State and local governments to further highway transportation safety and which the U.S. Supreme Court upheld as a proper exercise of Federal authority under the Commerce Clause of the U.S. Constitution in Pierce County, Washington v. Guillen, 537 U.S. 129 (2003) (Guillen). Section 409 reads as follows:

> **Sec. 409. Discovery and admission as evidence of certain reports and surveys**
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> Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 148 of this title or for the purpose of developing any highway safety construction project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

Proposed new section 20119 is based largely on this FHWA statute, with three main exceptions. First, the proposal deletes the text of Section 409 that protects information only if the information mentions or addresses the particular place where an event occurred that gave rise to the action for damages. The text referring to particular locations is changed because many tort

suits against railroads involve the railroad's general practices, such as its operating rules, and specific locations on the property would not necessarily be mentioned or overtly addressed even though they were affected by the given information. Second, a comma is added before and after the phrase "or considered for other purposes" in order to stress that the prohibition on the discovery or admission into evidence of the specified risk reduction information pertains only to civil actions for damages. This punctuation is consistent with FHWA's interpretation of Section 409 as applying only in the context of a civil suit for damages. The proposal would adequately protect railroads' internal, sensitive information from such civil actions. It is narrowly tailored to cover only information produced for a railroad safety risk reduction program pursuant to FRA's safety risk reduction program, so as to be amenable to the Supreme Court's interpretation in Guillen. Under the proposal, railroads would have to continue to produce that which they would have to produce today in the absence of a regulation requiring a safety risk reduction program, but they would be allowed to withhold anything collected or created as part of that program. Third, the proposal includes explicit language limiting nondisclosure to civil actions by a private party or parties for damages; the proposal would not bar release of the information to governmental entities.

TITLE II–HIGHWAY-RAIL CROSSING SAFETY

Section 201, "National Crossing Inventory," would establish a new section and subsection[1] to require that railroads and States provide the Secretary of Transportation (Secretary) with current information necessary for risk analysis regarding the country's

[1]New section 20156 of title 49, U.S. Code, and new subsection (l) of section 130 of title 23, U.S. Code.

approximately 280,000 crossings.[2] Vital facts about such crossings have 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. Part of this key information in the Inventory about a crossing is supplied by the railroad that operates through the crossing, and the rest of the information is supplied by the State where the crossing is located. For example, with regard to 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 at the crossing, and the State typically provides such information as the volume of highway traffic through the crossing.

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 collected data, including the Federal Railroad Administration's (FRA) accident/incident database, and used to promote crossing safety. Some public agencies (e.g., States) and private organizations (e.g., railroads) that are responsible for crossing safety analyze information in the Inventory for planning and implementation of crossing-improvement programs such as the "Section 130" program, which provides Federal funds to install or improve warning devices at crossings or to eliminate crossings altogether. See 23 U.S.C. 130. In addition, Federal, State, and local law enforcement personnel may use the Inventory to identify especially hazardous crossings on which to focus their inspection and enforcement efforts. Since the Inventory is the only nationwide database on the characteristics of crossings, it is also used extensively by the Department, States, railroads,

[2]The approximately 280,000 crossings include not only highway-rail crossings but also the intersections of railroad track(s) with pathway(s) dedicated for the use of non-vehicular traffic, including pedestrians, bicyclists, and others, that are not associated with a public highway, road, or street or a private road or street. Both crossings at

and researchers for crossing safety studies, some of which have helped FRA formulate regulatory actions.

Unfortunately, some crossings have not been reported to the Inventory, and for crossings that have been reported, many entries concerning them are not being adequately updated by the States and the railroads. (For example, a recent review of Inventory data showed that figures on the average daily train and motor vehicle traffic through a crossing were an average of about 11 years old.) As a result, decisions about how to allocate scarce safety, inspection, and enforcement resources must be made by the States and others on the basis of incomplete or outdated information. The National Transportation Safety Board's Safety Recommendation H-01-42, dated January 22, 2002, which arose out of a fatal crossing collision involving a school bus, 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 assure that the most hazardous crossings are identified and their deficiencies are remedied, it is imperative that the Department receive initial reports on crossings that have not been reported to the Inventory and that the Department obtain current information on all crossings on a systematic and cyclical basis. To achieve that objective, section 201 would amend title 49 by adding a new section 20156 to require that railroads provide the Secretary with three kinds of reports. First, initial reports with regard to previously unreported crossings, including new crossings, would be required within 12 months after the enactment of the proposal

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grade and grade-separated crossings are included in the Inventory.

or within 12 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 three years after enactment, and continuing on a schedule no less 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 three years after enactment of the Act, whichever occurs later, or as otherwise specified by the Secretary.

Section 201 would also amend section 130 of title 23, U.S. Code, by adding a new subsection (l) to require that States provide the Secretary with reports on public crossings only. (Since States lack access to private crossings, reports on private crossings would be required only of the railroads that operate through them.) States would be required to file initial reports on previously unreported public crossings and updated reports with current information on all public crossings on the same schedule as that prescribed for railroads, except that for crossings involving a local or county street, road, or highway or involving a publicly owned pathway dedicated for the use of nonvehicular traffic not associated with a public or private road, the State's updates would be due by September 30 of every fifth year after the filing of the first update report, or as otherwise specified by the Secretary.

The particular, current information to be included in these reports (e.g., the required data fields) and the entity responsible for providing the data would include information on warning devices and signage at the crossing and would be specified by the Secretary in either of two ways. Initially, the requirements would be those existing requirements set forth in the edition of DOT's Inventory policy, procedures, and instructions statement (DOT Inventory Instructions)

that is in effect on the date of enactment of the section. Eventually, any regulations issued under proposed 49 U.S.C. 20156 and 23 U.S.C. 130(l) would control instead. Under proposed section 20156(c), the Secretary's rulemaking would have to consider (1) the projected costs and benefits of collecting different information than that that would be required under the DOT Inventory Instructions (including how the benefits and costs are distributed) and (2) the merits of requiring that reports be less elaborate or less frequent, or both, for categories of crossings that pose lower risks.

Each railroad would have to provide an initial, periodic, and, if applicable, change-of-ownership report on each crossing through which it operates with respect to the trackage over 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 on the same trackage. If more than one railroad operates on the same trackage through a single crossing and the Secretary does not have on file already, or receive within 12 months after enactment of the proposal, a required initial report concerning the crossing, then each of the railroads that operates through the crossing on the same trackage would be subject to liability for the omission. However, if one of the railroads has already made the required initial report to the Secretary with respect to the trackage over which it operates through the crossing, then the other railroad would not need to report that information again.

The Secretary would be authorized to determine which data elements concerning a crossing shall be supplied by the railroad and which shall be supplied by the State. The following examples illustrate how the system would work.

- First, with respect to a newly created public crossing, in determining the particular information that must be included by the railroad and the State, respectively, in the provided report, the Secretary anticipates that the railroad would supply railroad-related data elements concerning the crossing and then transmit the Inventory form (or the same data in a form permitted by the DOT Inventory Instructions or the implementing regulations, as applicable) to the applicable State for the State to provide highway-department information. The railroad would simultaneously provide a copy of its own submission to DOT. Later, when the State submitted its portion of the information to DOT, the State would provide a copy of its submission to the railroad.
- Second, with respect to an existing public crossing, the Secretary expects that the State and the railroad would report to DOT independently, with the railroad supplying railroad-related data elements concerning the crossing and the States providing highway-department information. The Secretary also expects that States and the railroads would provide each other with a copy of their respective submissions.

For each public crossing located within the State, it is expected that the State would ascertain and report during its portion of the updating process such matters as changes in the volume of motor vehicle traffic (annual average daily highway traffic) since the last submission of data to the Inventory for that crossing. It should be noted that the States would not be required to make actual counts of the numbers of motor vehicles passing through a crossing. Vehicle traffic data would be supplied by whatever method or methods that the road authority uses for its traffic engineering purposes.

Section 202 of the bill would encourage the development and use of new safety technology at highway-rail grade crossings in four ways. First, it would establish a Federal policy to support the development of new crossing safety technology. Second, the provision would relieve suppliers, State and local authorities, and railroads of tort liability for an accident at a crossing based upon selection of that technology if the Secretary has approved the use of the technology and if the technology has been installed at the crossing in accordance with the conditions set by the Secretary. Third, the provision would relieve railroads of tort liability for an accident at a grade crossing based upon inadequate maintenance of that technology at a crossing if the carrier has inspected and maintained the technology in accordance with the conditions set by the Secretary. Thus, this provision creates two Federal standards of care that preempt State law standards of care: one bearing on selection and installation of the technology and the other applying to inspection and maintenance of the technology. An action in tort might be brought for violation of either of the Federal standards of care. Fourth, since new technology can be expensive and railroads will wish to gather feedback on the effectiveness of the technology in practice before engaging in widespread usage, the bill provides that no party shall be found liable for damages for failure to apply the technology at a different grade crossing location.

To lay the groundwork for these changes, the section begins with a series of Congressional findings. Although crossing elimination and grade separation hold the greatest potential for improving crossing safety, there are still more than 140,000 public grade crossings. Less than half of the public crossings are protected with conventional active warning devices. Both the cost of installing and maintaining these devices and the concern that enhancing

protection at one crossing on a system could be used as evidence of the insufficiency of protections at other crossings on the system combine to slow or halt progress at the remaining crossings.

Fortunately, new technologies supporting Intelligent Transportation Systems offer the chance to provide crossing warnings that are more effective and affordable. Under FRA regulations at 49 C.F.R. part 236, subpart H, and 49 C.F.R. part 234, any new and novel technology for safety devices at highway-rail grade crossings has to go through the process of developing railroad safety program plans and product safety plans, just as is required of a railroad signal system or train control system. These regulations provide an appropriate structure for evaluating innovative technology at crossings. The FHWA's Manual on Uniform Traffic Control Devices remains the appropriate means for specifying the highway user's interface with this new railroad technology, including in-vehicle warning. Three DOT agencies--FRA, FHWA, and the Research and Innovative Technology Administration--would cooperate, as appropriate, to bring a new system on line. Most likely applications on the core of the national rail system would marry positive train control with in-vehicle warning. In the short term, train location based on the Global Positioning System may be used to activate conventional warning systems on short lines where dedicated locomotives are used exclusively.

The preemptive effect of section 202 is consistent with the preemptive effect of FHWA's regulations at 49 C.F.R. 646.214(b)(3) and (4), which deal with the adequacy of highway-rail grade crossing warning devices installed using Federal funds. In Norfolk Southern Ry. v. Shanklin, 529 U.S. 344, 357 (2000), the Supreme Court held that "[w]hen the FHWA approves a crossing improvement project and the State installs the warning devices using federal funds, §§

646.214(b)(3) and (4) establish a federal standard for the adequacy of those devices that displaces state tort law addressing the same subject." A defendant must comply with the Secretary's conditions for (1) installing the new technology in order to be insulated from liability under State law based on the adequacy of the warning provided by the technology and (2) inspecting and maintaining the new technology in order to be insulated from State tort liability regarding the adequacy of the testing and maintenance performed. In addition, section 202 would insulate suppliers, State and local governments, and railroads from tort liability for an accident at one crossing based on the absence of the technology at another crossing. This provision is similar to a provision of the signal inspection laws, 49 U.S.C. 20505(a)(2), which reads as follows:

> (2) A railroad carrier ordered . . . to install a signal system on one part of its railroad line may not be held negligent for not installing the system on any part of its line that was not included in the order. If an accident or incident occurs on a part of the line on which the signal system was not required to be installed and was not installed, the use of the system on another part of the line may not be considered in a civil action brought because of the accident or incident.

In summary, section 202 would encourage the creation and deployment of new, cost-effective technology at the Nation's approximately 80,000 public grade crossings that still lack active warning devices.

Section 203 of the bill would authorize the Secretary to buy and distribute to the public small gifts, such as coloring books, key chains, lapel pins, pencils, and calendars, as part of the U.S. Department of Transportation's (DOT) message on railroad crossing safety and railroad trespass prevention. In the year 2004, deaths at highway-rail crossings and from trespassing on railroad property accounted for 850 of the total of 898 railroad-related fatalities, or 95 percent. This amendment to 49 U.S.C. 20134, "Grade crossings and railroad rights of way," would allow

DOT to communicate safety information and warnings more effectively by permitting DOT to purchase and give to the public, without charge, little railroad safety souvenirs during crossing safety and trespass prevention outreach activities, such as a presentation to school children, a workshop for State or local police or judges, or a booth at a county fair. These tokens, though inexpensive, would help save lives and prevent injuries by reminding children and adults, pedestrians and motorists, of what they need to remember and do to protect themselves and others at railroad crossings and at other points on railroad tracks and roadbed. To avoid waste and assure that public funds are spent properly, section 203 would also require the Secretary to issue guidance on how to execute this new authority.

TITLE III--RULEMAKING, INSPECTION, AND ENFORCEMENT AUTHORITY

Section 301, "Railroad Security," would amend 49 U.S.C. 20103(a) in two respects. First, it would delete as unnecessary the last sentence of existing 20103(a), which requires the Secretary of Homeland Security, when developing a security regulation or order that affects railroad safety, to consult with the Secretary of Transportation. Second, the proposal would add a sentence explicitly stating that a safety regulation prescribed or safety order issued by the Secretary of Transportation may not be challenged in court for the reason that the regulation or order affects 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 (DHS).

FRA's relationship with TSA and with all of DHS has been extremely cooperative. However, clarification of FRA's jurisdiction through the amendment to the "general authority" provision at 49 U.S.C. 20103(a) is necessary to ensure that any FRA regulations and orders issued under that provision that may have some carryover into the security arena will withstand legal challenge and avoid protracted litigation by outside parties.

Several of FRA's railroad safety rules have been developed with specific consideration of security concerns. For example, FRA's January 2002 final rule barring most extraterritorial dispatching of U.S. railroad operations is based in part on the agency's concerns about the security of foreign dispatching facilities. Similarly, FRA's rule on passenger train emergency preparedness requires carriers to prepare plans that deal with criminal as well as accidental events. FRA has issued many other safety regulations that are not explicitly based on security concerns, but that have a bearing on security. For example, Federal passenger and freight equipment standards are intended to ensure that the equipment can withstand forces of derailments and collisions, whether caused by accidents or deliberate acts, thereby helping to protect passengers, employees, and surrounding communities.

In addition, FRA has an active rulemaking agenda that includes many projects to develop rules that have an effect on rail security. For example, currently, FRA is pursuing a rulemaking through its Railroad Safety Advisory Committee to strengthen requirements for emergency systems (such as emergency doors, windows, and communication systems) on rail passenger equipment.

It is inappropriate for Congress to specify how the agencies of the Executive Branch should interact, and the language found in the last sentence of existing section 20103(a) is

unnecessary given the existence of Homeland Security Presidential Directive 7 and Executive Order 3416, both of which require coordination between DHS and DOT. Further, the proposed language in no way undercuts the primacy of DHS or TSA in the railroad security area (as already recognized in statute, Executive Orders, the memorandum of understanding between DHS and DOT, and the TSA-FRA rail security annex), but instead would discourage or quickly rebut challenges to FRA safety regulations and orders that advance not only railroad safety but also railroad security.

Section 302 of the bill, "Emergency Waivers," would add a new subsection (g) to 49 U.S.C. 20103, "General Authority," to make explicit FRA's authority to expedite consideration and disposition of a request for temporary waiver of an FRA safety regulation or order if the request is directly related to an emergency event or needed to aid in recovery efforts. In particular, the bill provision would clarify the existence of FRA's authority to provide such temporary relief without first providing an opportunity for public comment.

This provision of the bill would enable FRA to deter or rebuff any legal challenges to recent or future emergency waivers issued under expedited procedures (such as FRA's existing temporary or interim expedited procedures), lawsuits based on language at 49 U.S.C. 20103(e), which could be read to require, in all cases, the provision of "a hearing as provided by section 553 of title 5" and an "opportunity for an oral presentation" when issuing an order "waiving compliance with a railroad safety regulation . . . under [chapter 201]." 70 Fed. Reg. 53413 (Sept. 8, 2005); 71 Fed. Reg. 51522 (Aug. 30, 2006). As FRA said in the preamble to its August 2006 interim procedures for obtaining emergency waivers, "FRA believes that the emergency waiver procedures and the need to quickly address these types of waiver petitions fall within the

good cause exemption under section 553 of the Administrative Procedure Act relating to providing prior notice and comment." 71 Fed. Reg. 51519. Nevertheless, contrary to FRA's view, 49 U.S.C. 20103(e) could be read to require the utilization of the ordinary, much lengthier process provided under FRA's regulatory procedures at 49 C.F.R. 211.41 for seeking and obtaining a safety waiver that is permanent. Under those procedures, FRA publishes a notice of any petition for waiver in the Federal Register, allows interested parties a period of time in which to comment on any such petition, generally 30 days, and provides for a public hearing should one be requested. Measured from FRA's receipt of the petition to FRA's action on the petition, this process generally takes several months to accomplish. This process is not appropriate for handling petitions for waivers directly related to addressing an emergency event, such as Hurricane Katrina and related floods or an influenza pandemic, the outcome of which event could have a serious impact on the health and safety of those members of the public directly affected by the emergency event as well as those individuals aiding the relief efforts.

In 2005, in the wake of Hurricane Katrina, FRA published in the Federal Register temporary emergency procedures for handling petitions for waiver of the Federal railroad safety regulations that were directly related to the effects of the hurricane or were necessary to support or carry out the relief efforts being undertaken in the area. 70 Fed. Reg. 53413 (Sept. 8, 2005). FRA recognized that this type of waiver petition must be afforded special consideration and must be handled expeditiously in order to ensure that the safety of the public and the safety of those individuals and businesses providing aid to the region were immediately addressed. Under these temporary procedures, FRA has used a temporary Emergency Relief Docket to provide interested parties with notice of the filing of petitions for waiver directly related to the effects of

the hurricane and has employed special arrangements for submitting and responding to such petitions for waiver.

On August 30, 2006, FRA published an interim final rule establishing, on an interim basis and pending receipt and consideration of comments, expedited procedures for resolving safety waiver petitions that are directly related to an emergency or the imminent threat of an emergency. 71 Fed. Reg. 51517, 51521. These interim regulations, to be codified at 49 C.F.R. 211.45, provide for the establishment, on an annual basis, of an Emergency Relief Docket with a specific docket number in DOT's electronic Docket Management System (http://dms.dot.gov). A petition seeking an emergency waiver would be filed by e-mail, fax, or regular mail, would be reviewed by FRA to ascertain that it meets the regulatory criteria for handling under the interim procedures, and would be added by FRA to the Emergency Relief Docket. Comments and requests for hearing, which would be filed by the e-mail, fax, or regular mail, would be due within 72 hours after the petition is available on the Docket Management System. An opportunity for oral comment would be provided by means of a telephone conference arranged by FRA between all interested parties. If a public hearing is requested, the hearing would be arranged as soon as practicable. FRA would "grant a petition prior to conducting a public hearing if such action is in the public interest and consistent with safety or in situations where a hearing request is received subsequent to the 72-hour comment period." Id. Any relief granted would be for a period not to exceed a total of nine months, including any period of any relief provided under a renewal of an emergency waiver, and FRA explicitly retains the right to reopen any docket and reconsider a decision made under these procedures.

Section 302 of the bill would bolster FRA's regulations governing the issuance of waivers directly related to an emergency event. As provided in proposed 49 U.S.C. 20103(g)(3), the types of emergency events intended to be covered by this proposed legislation could be local, regional, or national in scope and would include natural and manmade disasters, such as hurricanes, floods, earthquakes, mudslides, forest fires, snowstorms, terrorist acts, biological outbreaks, releases of dangerous radiological, chemical, explosive, or biological material, or war-related activities if they pose a risk of death, serious illness, severe injury, or substantial property damage. Not only will our Nation's railroads be directly affected by many emergency events, they will also play a key role in the aftermath of those events, such as by providing necessary supplies and by moving displaced families and relief personnel to and from an affected area. Although the type of relief that might be granted under this provision would vary greatly based on the type of emergency event involved, it is expected that the relief would generally involve such things as temporary postponement of required maintenance, repair, or inspection related to railroad equipment, track, and signals; temporary relief from certain record keeping or reporting requirements; or short-term relief from various operational requirements.

Section 302 of the bill would give the Secretary of Transportation a means to quickly address requests for waiver directly related to an emergency event for a short period of time following the occurrence of such an event. This authority is necessary to ensure the rapid deployment of relief supplies and personnel and may be necessary to swiftly deal with emergency situations that develop without notice during an emergency event. The authority to institute temporary emergency procedures for addressing requests for waivers of the rail safety regulatory requirements would provide DOT with the legal foundation for deciding waiver

requests directly related to the emergency event both promptly and effectively, while ensuring that the general public and all interested parties would be afforded proper notice of any such request, pursuant to procedures authorized in the proposed section, and a sufficient opportunity to comment on any such request. Any relief granted under the proposed new authority would be temporary, and in no case would the emergency relief be allowed to extend for more than nine months.

The proposed legislation includes language identifying the need to consult and coordinate with the Department of Homeland Security as soon as practicable on matters that may impact the missions of the Department of Homeland Security. This language indicates the need to engage in such activity in instances where the involved emergency event is related to such causes as a terrorist act, a war or insurrection, a biological outbreak, or the use of a weapon of mass destruction.

Section 303, "Railroad Radio Monitoring Authority and General Inspection Authority," would, most importantly, add new subsection (c) to section 20701, "Inspection and Investigation," of title 49, U.S. Code, so as to permit the Secretary 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.[3] Railroads permit employees to use the company radio exclusively for railroad

[3] See, e.g., FRA's Railroad Communications rules (49 C.F.R. part 220), roadway worker protection rules at

operations and prohibit them from using the company radio for any unnecessary or irrelevant communications, such as personal, non-business conversations.[4]

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 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 railroad 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 alert wayside employees to crews or dispatchers regarding defects on passing trains. Sixth, radio provides a way for trains in distress to summon help

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49 C.F.R. 214.319-214.325, and Railroad Operating Rules (49 C.F.R. part 217).

[4] 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.

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 how well railroad employees' normal behavior complies with the regulations in FRA's absence. 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 303(a) would cover only a communication by radio over a frequency that the Federal Communications Commission (FCC) authorizes to one or more railroads.[5] It would not apply to communications by railroad personnel by such means as cellular or cordless telephones. It would also require that the monitoring of railroad radio communications be conducted "in

[5] 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).

circumstances determined by the Secretary in the Secretary's discretion to be reasonable." This formulation is used in lieu of the standard in existing section 20107(b), which is "at reasonable times" because "circumstances" incorporates "times", and reasonableness should apply to both. In addition, the formulation vests authority to determine reasonableness in the Secretary and takes the determination of reasonableness outside the scope of judicial review under the Administrative Procedure Act. Subsection (c) of section 303 of the bill would also change 49 U.S.C. 20107(b) in that respect.

Section 303(a) 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 hazardous materials transportation laws.[6] 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, with two exceptions. First, the provision would not bar admission in evidence of the intercepted communication in a judicial proceeding for the prosecution of a felony under Federal or State law. Second, the provision would not bar admission of the intercepted communication for impeachment purposes in the seven enumerated types of railroad safety proceedings.[7] In

[6] 49 U.S.C. subtitle V, part A (49 U.S.C. ch. 201-213), and 49 U.S.C. ch. 51.

[7] Briefly summarized, the railroad safety proceedings are as follows: (1) actions by the Secretary or the Attorney General under 49 U.S.C. 5123 for civil penalties for violation of the hazardous materials transportation laws; (2) actions by the Attorney General under 49 U.S.C. 5122 in an appropriate district court to enforce the hazardous materials laws or by the Secretary in an appropriate district court to address in imminent hazard; (3)

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 impeachment evidence. It would also protect the intercepted communications from disclosure under FOIA, thereby effectuating the agency's intent to assure that it does not release the communications to railroad carriers. In addition, the proposed legislation would preserve unaffected other statutory authorities for interception of communications.

Further, since the proposal would permit the authorized government employees to intercept railroad company radio communications without making their presence known, proposed 49 U.S.C. 20107(c)(4) would make chapter 119 of title 18, U.S. Code (which covers wire, electronic, and oral interceptions) not applicable to such interceptions.

Section 303(b) of the bill would amend chapter 119, at 18 U.S.C. 2511(2), by adding a new paragraph (j) containing a cross-reference to proposed section 20107(c)(4). This would

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actions by the Secretary under 49 U.S.C. 20702(b) to take defective locomotives out of service; (4) actions by the Secretary under 49 U.S.C. 20111 to issue a compliance order or a disqualification order; (5) actions, under 49 U.S.C. 5123, by the Attorney General at the request of the Secretary to obtain an injunction, collect a civil penalty or settlement amount for a civil penalty, or enforce a subpena; (6) actions, under 49 U.S.C. 20113, by the States for an injunction or a civil penalty; or (7) actions, under 49 U.S.C. 20114, involving criminal contempt.

prevent confusion as to the lawfulness of the interception. Similar exceptions are found in 18 U.S.C. 2511(2).

Finally, as alluded to earlier, section 303(c) of the bill would slightly revise subsection (b) of 49 U.S.C. 20107, which describes the general authority of the Secretary's rail safety employees to enter upon and inspect railroad facilities to carry out the rail safety laws. Currently, the statute says that the entry and inspection must be done "at reasonable times and in a reasonable way." The phrase "at reasonable times" would be replaced with the following: "in circumstances determined by the Secretary in the Secretary's discretion to be reasonable", for the reasons stated previously.

Section 304 would broaden the provision at 49 U.S.C. 20111(c) to allow the existing enforcement tool of disqualification to be directed against violations of the Hazardous Materials Regulations (HMR) and hazardous materials transportation law (49 U.S.C. ch. 51). Under existing 49 U.S.C. 20111(c), the Secretary may, after providing an individual with notice and an opportunity for a hearing, issue a disqualification order barring the individual from performing safety-sensitive functions in the railroad industry for a stated period of time or until stated conditions are satisfied, if a certain kind of violation by the individual demonstrates the person's unfitness for safety-sensitive service. The Secretary has delegated this authority to FRA. FRA's regulations implementing that statutory authority apply to various categories of individuals, such as railroad employees covered by the hours of service laws (49 U.S.C. ch. 211).[8] Unfortunately, the kind of violation on which FRA may predicate a finding of unfitness is

[8] See 49 C.F.R. 209.303. The following other categories of individuals are subject to disqualification: (1) railroad employees or agents who inspect or repair track or rolling equipment or conduct training or testing of employees that is required by FRA safety regulations; and (2) railroad managers, supervisors, and agents when they

limited to a violation of a rail safety statute (49 U.S.C. chapters 201-211) or an implementing regulation or order ("a rail safety violation") and not a violation of the hazardous materials transportation law or an implementing regulation or order (a "hazardous materials violation"). For example, FRA may disqualify a locomotive engineer who tampers with a safety device such as a deadman pedal on a locomotive, in violation of FRA's Railroad Operating Practices Regulations at 49 C.F.R. 218.55, but FRA may not disqualify a humpmaster who allows a placarded tank car loaded with poison gas to be cut off in motion, in violation of the HMR at 49 C.F.R. 174.83(b), or a conductor who allows his or her train to be hauled with a car placarded "RADIOACTIVE" next to a locomotive, in violation of 49 C.F.R. 174.85(b).

Section 304 of the bill would expand the basis for issuing disqualification orders to allow not only a rail safety violation, but also a hazardous materials violation, to be used to establish unfitness for safety-sensitive service in the railroad industry. By extending the reach of the disqualification sanction to cover hazardous materials violations, the bill will discourage noncompliance by individuals working in the railroad industry. Indeed, the risk of becoming subject to a disqualification order based on a hazardous materials violation should greatly deter violations of the hazardous materials transportation laws and the HMR in the railroad industry.

Finally, the proposed amendment would restructure existing 49 U.S.C. 20111(c) by dividing it into two numbered paragraphs and eliminating excess verbiage by making the current language of the subsection more concise and more reflective of the 1994 recodification of many transportation safety laws. For example, the following language–

an individual's violation of this chapter or any of the laws transferred to the jurisdiction

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perform certain specified safety functions, supervise and otherwise direct the performance of these functions, or are in a position to direct the commission of violations of certain rail safety regulations. Id.

of the Secretary of Transportation by subsection (e)(1), (2), and (6)(A) of section 6 of the Department of Transportation Act, as in effect on June 1, 1994

–would become "an individual's violation of this part". More than 30 words would be reduced to six.

Section 305, "Technical Amendments Regarding Enforcement by the Attorney General," would amend section 20112(a) of title 49, U.S. Code, to 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. First, the proposal would explicitly authorize the Attorney General to seek an injunction against violation of a rail safety statute.[9] The Attorney General is already authorized to sue in Federal district court to enjoin a violation of rail safety regulations, but not a violation of 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, the proposal would clarify the availability of another enforcement tool by stating that the Attorney General may enforce the Secretary's requests for admission, 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 administrative discovery devices. Finally, the proposal would conform the Attorney General's enforcement powers under the pre-1970 rail safety statutes to those under the 1970 rail safety statute with respect to collection of civil penalty settlements and the enforcement of administrative

[9] 49 U.S.C. ch. 201-213.

subpenas.[10]

Section 306 of the bill, "Unified Treatment of Families of Railroad Carriers Providing Integrated Railroad Operations," would update the rail safety laws to reflect the increased concentration of the railroad industry that has occurred over the last several decades, by giving the Secretary limited authority to redefine the term used in those laws to describe the primary regulated entity, the "railroad carrier." 49 U.S.C. 20102(2). Some of the consolidation in the industry has taken place by merger, in which the merged railroad carrier loses its corporate identity and ceases to exist as a separate legal entity. However, in other cases the mega-railroad has been effected not by merger, but by acquisition of control: the acquired railroad carrier remains a separate legal entity, but is under the control of another railroad carrier or holding company that owns multiple railroad carriers. If railroad carriers are acquired but not merged, they retain their individual legal identities. Along with increased concentration has come a greater reliance on brand names or trade names in lieu of the legal names of the company or companies.

The proposal would give FRA, as the Secretary's delegate for rail safety matters, more flexibility in administering and enforcing the rail safety laws to accommodate these new economic realities. Currently, the term "railroad carrier" is defined as "a person providing railroad transportation." The term is used in various ways in the rail safety laws; for example, a "railroad carrier" has a duty to file accident reports and various other types of reports. The proposed amendment would create an exception to the general meaning of the term, which

[10] 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 most of the provisions of the now repealed Federal Railroad Safety Act of 1970 have been recodified.

would confer on the Secretary the authority to allow a family of commonly controlled railroad carriers that operate in the United States as a single, integrated railroad system to be treated not as separate railroad carriers for purposes of the railroad safety laws, but as a single railroad carrier. In particular, the section would allow the Secretary, if petitioned, to issue an order deeming such a group of railroad carriers to be a single railroad carrier for purposes of one or more provisions of the railroad safety laws at 49 U.S.C. chapters 201-213, subject to appropriate conditions set by the Secretary, such as entering into enforceable agreements not to require that the Government provide proof of the identity of the particular defendant railroad carrier in litigation. Before issuing the order, the Secretary would have to provide notice and an opportunity for comment, as required under 49 U.S.C. 20103(e).

A group of railroad carriers not commonly controlled would not be eligible for unified treatment. Even if commonly controlled, a group of railroad carriers whose operations are not directly connected with one another would not be eligible for unified treatment. In determining whether a group of railroad carriers is commonly controlled and whether it operates in the United States as an integrated system, FRA, as the Secretary's delegate, would make itself aware of the determinations and practice of the Surface Transportation Board and decide whether they were a sufficiently relevant basis for FRA's threshold decisions regarding eligibility for unified treatment.

The proposal would have various benefits. For example, it would allow the Secretary to require a qualified group of railroad carriers to submit the reports with respect to the group as a whole, rather than carrier by carrier, without disaggregating the data. If the provision were adopted and used to allow consolidated reporting, it would also save railroads paperwork and

reduce reporting errors from double-counting. The proposal would simplify enforcement work for the Secretary's delegate, FRA, by eliminating the need to identify the individual railroads behind the trade names and by eliminating violations based on the interchange of locomotives and cars with safety appliance or power brake defects between carriers in the same family. Such arrangements would allow FRA to focus on more important safety issues.

Section 307 of the bill, "Hours of Service Reform," would amend the railroad safety statutes to address the problem of railroad operating employee fatigue. Fatigue, or lack of alertness, can cause not only outright sleep, but also loss of situational awareness, lapses, or narrowing of attention, slips of memory, poor decision-making, changes in reaction time, and other performance impairments that can precipitate a risky situation into an accident.

To address the problem of fatigue in the railroad industry, section 307 of the bill would permit the Secretary to replace the hours of service laws (49 U.S.C. chapter 211 ("Chapter 211")) with rules that reflect modern research, after first seeking consensus recommendations on the problem of fatigue from the Railroad Safety Advisory Committee (RSAC). The proposal would also require the FRA Administrator to conduct a thorough review of the problem, to consider any RSAC consensus recommendations carefully, and to place much importance on voluntary initiatives before prescribing any changes in the existing, statutorily-defined system of prohibitions and requirements.

The proposed legislation would allow FRA to take modern research on fatigue into account and adjust the regulatory scheme accordingly. Instead of having to fight the fatigue of operating employees using a rigid, demonstrably inadequate and unscientific statutory arsenal, FRA would be permitted to act upon the scientific findings that exist and wage a war against

fatigue with a range of state-of-the-art weapons. Under the proposed legislation, which would add new section 20158 to chapter 201 of title 49, U.S. Code, these adjustments to the regulatory scheme would occur in an orderly manner in three specified stages.

First, FRA would be required to issue regulations embodying the substantive statutory provisions of the hours of service laws. These initial regulations ("status quo regulations"), which would merely restate in regulatory format the existing statutory requirements, would not be subject to judicial review. Repeal of the hours of service laws would occur on the effective date of these status quo regulations. A conforming revision of section 20103(a) of title 49 would also become effective 18 months after the date of enactment of the Act.

Second, FRA would be authorized to revise the mandated initial regulations using the agency's general rulemaking authority under 49 U.S.C. 20103(a) as revised by the Act, but subject to special additional procedures set forth in the proposed section 20158(c). Before proposing any amendments to the mandated initial regulations, FRA would have to request that the Railroad Safety Advisory Committee (RSAC) accept the job of coming up with consensus recommendations on the problem of work-related fatigue for one or more of the categories of employees whose hours of service have been governed by Chapter 211, including individuals who are not directly employed by railroad carriers, i.e., train employees, signal employees, or dispatching service employees or any combination of such groups of employees in the railroad industry. FRA would be permitted to proceed one category at a time with respect to employees whose functions are safety-critical. (Of course, FRA is already authorized by 49 U.S.C. 20103(a) to prescribe regulations and issue orders governing the hours of service of persons whose functions are not covered by Chapter 211 but whose work is safety-sensitive.)

If RSAC received FRA's request to take up this task and conveyed in writing its acceptance of the task, then FRA would be required to conduct a review of fatigue issues with the assistance of RSAC. If RSAC did not accept the task or did not accept it timely, FRA would be permitted to conduct its review and proceed with either prescribing (or not prescribing) initial regulatory amendments without RSAC's assistance.

Under the proposed legislation, aided by RSAC if RSAC accepted the task, FRA would have to review comprehensively the problem of fatigue experienced by train employees, signal employees, and dispatching service employees and consider ways to reduce the likelihood of accidents and injuries caused by fatigue. The required review would involve the study of existing and evolving scientific knowledge and literature concerning fatigue, and include the evaluation of the different kinds of circumstances involved in railroad operations and different kinds of measures necessary to reduce or eliminate fatigue or compensate for fatigue in those differing circumstances. In addition, FRA would have to determine the economic advantages and disadvantages of a new regulatory scheme, to look at the cost of the reform as well as the benefit of the reform. Further, as part of FRA's determination as to which regulatory changes may be necessary to address issues related to fatigue, FRA would be expected to consider whether the voluntarily-adopted fatigue countermeasure initiatives that are already under way by railroads and labor organizations have been successful in reducing the likelihood of fatigue-caused accidents and injuries. For example, the BNSF Railway Company has a policy of uninterrupted rest, under which train crewmembers are entitled to 14 hours of undisturbed rest after working for 8 hours, and CSX Transportation, Inc., provides undisturbed rest of up to 10 hours and fixed work-rest cycles at some locations.

FRA would also have to examine how much railroads are using valid fatigue risk assessment tools and other methods to help the companies make good decisions on appropriate fatigue countermeasures. Whenever FRA would determine that voluntary activities are adequately addressing a particular topic of concern, FRA would be expected to refrain from adopting new regulations.

RSAC would have 24 months after accepting the offered task from FRA to develop a written consensus recommendation on any one or more categories of railroad employees, including individuals who do not work directly for a railroad. If timely presented with the recommendation, FRA would be required to consider it. If FRA agreed with the recommendation, it would be required to prescribe initial amendments to the mandated regulations in accord with the recommendation and any additional amendments the agency thought necessary. If RSAC failed to timely provide a consensus recommendation, FRA would be authorized to proceed on its own. Any amendments to the initially mandated regulations would be subject to the notice-and-comment procedures specified in section 20103; however, the final rule amendments to the initially mandated regulations would not be subject to judicial review, but rather would be subject to review under the Congressional Review Act (5 U.S.C. 801) as the sole and exclusive means of review.

As to the substance of the amendments to the regulations mandated by proposed 49 U.S.C. 20158(a), the Secretary would be required to prescribe the maximum hours of service for the group of individuals performing safety-critical duties and any further requirements that the Secretary believed to be needed to afford a reasonable degree of fatigue prevention or mitigation or both. In view of the wide range of working conditions in the railroad industry, e.g., from

scheduled passenger service to unscheduled freight road train service, the measures necessary to achieve that reasonable degree of fatigue prevention and mitigation will necessarily vary a great deal. The Secretary would be allowed to include in the regulations promulgated under proposed 49 U.S.C. 20158(b) a provision for railroads and other applicable employers to submit for approval fatigue management plans covering any group of individuals who perform service covered by the regulations. The Secretary would also be permitted to enforce compliance with an approved plan instead of compliance with the regulations.

The third and final stage of rulemakings on fatigue would be conducted under FRA's broadened rail safety rulemaking authority of 49 U.S.C. 20103(a), as amended by section 307(b) of the bill. In particular, after the Secretary conducted the special rulemaking with respect to a particular category of employees (e.g., train employees), pursuant to the procedures required by proposed 49 U.S.C. 20158(b) and (c), the Secretary would be free to amend the regulations applicable to the category of employees that were prescribed under that special rulemaking procedure, as necessary, subject to the requirements of the ordinary rulemaking process of 49 U.S.C. 20103, as amended by section 307 of the bill, to reflect any relevant matters, including new research, new technology, and practical experience implementing the new regulatory regime. The Secretary's amendments to the regulations would not be subject to judicial review, but would be subject to Congressional review under the Congressional Review Act (5 U.S.C. 801).

Finally, section 307(d) of the bill would recodify a provision that happens to be part of Chapter 211, but that primarily relates not to railroad safety but to railroad labor law. That provision is 49 U.S.C. 21107, which reads as follows:

21107. Maximum duty hours and subjects of collective bargaining

> The number of hours established by this chapter that an employee may be required or allowed to be on duty is the maximum number of hours consistent with safety. Shorter hours of service and time on duty of an employee are proper subjects for collective bargaining between a railroad carrier and its employees.

The quoted section would not be converted to FRA regulations. Rather, on the effective date of the status quo regulations, the section would be simultaneously repealed and reenacted in revised and recodified form at 49 U.S.C. 20159.

Section 308, "Amendments to the Movement-for-Repair Provision," would clarify and slightly relax an antiquated statutory provision that governs whether and how a railroad may move a car or locomotive with a safety appliance defect or insecurity under 49 U.S.C. chapter 203, in order to make repairs, without becoming liable for a civil penalty. It should be emphasized that the statutory provision protects a railroad from civil penalty liability for hauling a defective or insecure vehicle but does not insulate the railroad from any other kind of liability, e.g., in tort for money damages at common law or under the Federal Employers' Liability Act.

The proposed changes would make this statutory movement-for-repair provision more consistent with current regulatory provisions that govern the movement for repair of the same rolling equipment when it has a different type of defect or insecurity, such as one under the Freight Car Safety Standards (49 C.F.R. Part 215) or Locomotive Safety Standards (49 C.F.R. Part 229). The objectives of the proposal are (1) to create a greater certainty in the interpretation of the statutory provision by adding general statutory definitions of statutory terms and by giving the Secretary authority to prescribe more specific regulatory definitions and (2) to enhance safety and allow railroads to realize greater efficiencies by fostering the use of mobile repair trucks at locations on an occasional basis, by eliminating the need for back hauls of defective vehicles for

repairs, and by explicitly authorizing the prescription of additional regulatory conditions for hauling defective vehicles for repair.

Specifically, section 308 would revise 49 U.S.C. 20303, the section of the safety appliance laws (49 U.S.C. ch. 203) that prescribes a series of strict conditions that a railroad must satisfy in order to move a car or locomotive with a defective or insecure safety appliance ("defective vehicle") for purposes of repair without being subject to civil penalty liability. Currently, a vehicle with a defect or insecurity prohibited by the safety appliance laws may be hauled from the place where the defect or insecurity was first discovered only if–

- the vehicle was originally equipped in compliance with the safety appliance laws,
- the movement is necessary for repair of the vehicle, and
- either the movement is to the nearest available repair point on the line of the railroad that discovered the defect or insecurity or, if the connecting carrier chooses to accept the vehicle in interchange, the movement is to a repair point on the connecting railroad that is at least as close to the point of interchange as the repair point on the delivering railroad.

The movement-for-repair provision in section 20303 was originally enacted in 1910 and was last amended substantively in 1983. Pub. L. No. 97-468. Over the almost 100 years since it has become law, it has been interpreted by the courts in numerous decisions, and FRA has also provided guidance (but not regulations) on its meaning, including some incorporated in recent amendments at 49 C.F.R. 232.15.

Section 308 of the bill would make three major changes in this statutory provision. First, the proposal would define the statutory term "place at which the repairs can be made," clarify the statutory term "necessary for repairs," and authorize rulemakings to further clarify related terms

so as to encourage the use of mobile repair trucks at points that they service regularly and to reduce the existing provision's perverse incentive against railroads' acquisition and use of such trucks. Second, the proposal would define the statutory term "nearest" so as to obviate "back hauls," or reverse movements, to a "backward" repair point if the repair point is geographically closer than the nearest forward repair point to avoid civil penalty liability. If the first and second changes are read together, the proposal would allow a railroad to repair a defective vehicle by hauling it from the place where the railroad first discovers the defect to the nearest available location on its line in the forward direction of travel that has a fixed repair facility or that is served regularly (as defined in regulations to be promulgated the Secretary) by a mobile repair truck capable of repairing the defect, without running the risk of being cited for a civil penalty. Currently, a civil penalty might be assessed against the railroad for hauling the defective vehicle to the proposed legitimate repair point, on the grounds that the haul did not meet the statutory hauling-for-repair conditions, either because the haul was unnecessary for repairs because a mobile repair truck could have been summoned to the point of discovery of the defect or, even if some kind of haul from the point of discovery was necessary for repairs, because the haul was not to the nearest available repair point. The third change that the proposal would make would be to clarify the Secretary's authority to supplement the statutory conditions for hauling certain defective equipment with additional regulatory conditions if needed for safety.

As to the proposed amendments relating to mobile repair trucks in particular, a factual description of these trucks may be helpful. A mobile repair truck is a motor vehicle operated on a street or highway (not on railroad tracks), ordinarily a pick-up or utility truck, that is equipped with tools, supplies, and spare parts and used by a railroad's mechanical personnel to travel to

various locations on the railroad's property for purposes of making certain types of repairs to on-track equipment. Typically, a mobile repair truck is assigned to cover a number of different locations within a certain geographic area on the railroad's property. Mobile repair trucks make it possible for railroads to conduct most types of repairs at virtually any siding or along any trackage that is accessible by road. To require defective vehicles to be immediately stopped and repaired at all such locations would be both unsafe and unrealistic today. As previously mentioned, the original version of the statutory provision at 49 U.S.C. 20303 was put into place in 1910. This was long before the emergence and extensive use of mobile repair trucks.

The proposed amendment would eliminate the statute's threat of a civil penalty for moving a defective vehicle from a location because of the railroad's having the mere capability to use (as opposed to the regular practice of using) a mobile repair truck to accomplish the repairs at the same location. The statute's perverse incentive against using mobile repair trucks is more than theoretical; FRA has frequently cited railroads for civil penalties based on scenarios involving such a mobile repair truck. These civil penalties discourage railroads from acquiring or fully utilizing mobile repair trucks. Refraining from buying or using mobile repair trucks in turn means that the railroad must haul defective or insecure vehicles only to fixed, stationary repair facilities, which tend to be farther away than locations that could served by trucks. The result is that defective vehicles are hauled for longer distances than they would be hauled if another means of effecting the repairs were available to the railroad, namely, mobile repair trucks. Enactment of these amendments would, therefore, tend to enhance safety by fostering the use of mobile repair trucks at points that they do not normally service.

As to the amendment in section 308 relating to back hauls, because the existing statutory

provision also requires that the movement for repair must be to the nearest available repair point, the existing statutory provision also potentially requires the movement of defective equipment in a direction or to a location not intended by the operating railroad (i.e., back hauling). Such movements could be both unsafe, because of the safety hazards associated with switching a car out of one train and into another, and inefficient, because the equipment would be diverted from its planned destination in order to be repaired at a location which may be physically closer to the point where the defect was originally discovered. In this day of on-time delivery, the need to foster efficiencies while maintaining the highest degree of safety is paramount.

The present statutory provision creates an atmosphere of uncertainty for both Federal regulators and the regulated community when determining whether a particular location is the nearest available location capable of making necessary repairs. The mobile-repair-truck and back-hauling amendments would clarify which locations are capable of making repairs and would specifically acknowledge that in determining the nearest available repair point one should consider only points in the forward direction of travel for the defective vehicle (i.e., places en route to the destination of the vehicle).

Moreover, enactment of these amendments would not raise safety issues, given the existence of other legal safeguards and the consistency of the proposed approach with that of existing regulatory provisions governing the movement of equipment with other types of defects. Allowing a vehicle with a safety appliance defect or insecurity (e.g., with excessive piston travel on a car's power brake or with a broken handhold) to be hauled past places occasionally served by mobile repair trucks is not unsafe if the railroad meets the proposed statutory conditions as well as additional existing regulatory provisions. Many additional regulatory conditions (such as

placing tags or cards on both sides of a defective vehicle or using automatic defect tracking) have already been established under FRA's general rulemaking authority at 49 U.S.C. 20103(a) for hauling cars with power brake and other safety appliance defects. See 49 C.F.R. 232.15 and 238.15-238.17. Furthermore, existing statutory and regulatory provisions ensure the prompt and safe handling of equipment with defective power brakes. These include the requirement to have 100-percent operative power brakes on all equipment before departing a train's initial terminal and the prohibition on the continued operation of any freight train with less than 85 percent of its units with operative brakes. See 49 U.S.C. 20302(a)(5), 49 C.F.R. 232.103(d) and (e).

As to the consistency of the proposal with existing regulatory movement-for-repair provisions applicable to other types of defects, FRA safety regulations permit the movement of vehicles with defects and insecurities that are equally or more safety-critical under the provision at 49 C.F.R. 215.9 to whatever location the railroad chooses if the railroad's mechanical inspector verifies the safety of the move, imposes appropriate operating restrictions, the train crew is notified of the presence of the vehicle in the train, and the vehicle is properly tagged. For example, a freight car with a cracked bolster or a wheel with a 2½-inch flat spot may lawfully remain in use, provided the conditions noted above are met. Similarly, the provisions contained in 49 C.F.R. 229.9 of FRA safety regulations permit a locomotive with a non-complying condition to continue in use to the next forward point where the necessary repair can be made or to its next calendar day inspection, whichever occurs first. Thus, the revised movement-for-repair provision proposed in this amendment would be more consistent with other Federal requirements related to the handling of defective equipment than the existing statutory provision.

To effect the changes discussed, section 308 of the bill would add new subsections (d)

and (e) to 49 U.S.C. 20303. In new subsection (d), paragraph (1) would define the statutory term "place at which the repairs can be made" to mean, on the one hand, a site with a fixed facility for making the repairs needed to remedy the vehicle's safety appliance defects or insecurities and to achieve conformity with the safety appliance laws or, on the other hand, a site at which a mobile repair truck capable of being used to make the repairs to the vehicle provides service regularly as specified under regulations to be prescribed by the Secretary. New paragraph (2) would define the statutory term "nearest" to mean the closest in the direction in which the defective vehicle is being moved. Read together, new subsection (d) would interpret the nearest repair point for purposes of 49 U.S.C. 20303(a) as a location with a fixed repair facility or serviced regularly by a mobile repair truck capable of being used to repair the defective vehicle that is the closest in the forward direction of travel of the vehicle. These changes would remove the uncertainties involved with considering locations where mobile repair trucks are used on an occasional basis and would eliminate the safety hazards related to the back-hauling of equipment. Paragraph (3) would make clear that a haul of a vehicle from the place where it was first discovered to be defective or insecure does not become unnecessary under subsection (a) simply because a mobile repair truck is capable of traveling to the place and repairing the vehicle or has done so in the past on an irregular basis as defined by regulations issued by the Secretary. New subsection (d) would promote the use of mobile repair trucks, which would expedite repairs, would clarify the statutory movement-for-repair provisions, and would make the statutory provisions more consistent with other Federal requirements related to the use and movement of defective equipment without compromising safety.

Finally, new subsection (e) in 49 U.S.C. 20303 would explicitly authorize the Secretary

to prescribe, by regulation or order, conditions for hauling a car or locomotive with a safety appliance defect for repair, in addition to the movement-for-repair conditions established by the statute. As previously indicated, many conditions for hauling cars with power brake and other safety appliance defects have already been established through regulations prescribed under FRA's general rulemaking authority at 49 U.S.C. 20103(a). New subsection (e) would support the validity of these regulations and allow FRA to prescribe new regulations concerning the conditions under which a railroad may move a defective vehicle to make repairs without civil penalty liability, if necessary for safety.

TITLE IV–MISCELLANEOUS PROVISIONS

Section 401 of the bill would eliminate 18 provisions of the rail safety laws that are not necessary any longer. One of the sections proposed for repeal, section 20115, which mandates a user fee program, was implemented as required and then expired by its explicit terms on September 30, 1995. Another provision proposed to be deleted is an authorization at section 20146 to fund a research institute during certain fiscal years in the past, for which appropriations have not been enacted. The remaining 16 provisions proposed for repeal are mandates for either a report to Congress, a rulemaking, or a model State law, all of which mandates have now been executed.

In particular, the proposal would strike as executed the following three provisions that require the Secretary to submit reports to Congress: the second sentence of section 20103(f) (a report on tourist railroads); section 20145 (a report on detection of bridge displacement); and section 20150 (a report on the development, deployment, and demonstration of positive train control systems). The Secretary has submitted each of these reports already.

The proposal would also repeal as executed the following 12 provisions that mandate rulemakings by the Secretary: section 20131 (rules on restricted access to rolling equipment to protect certain railroad employees working on, under, or between that equipment); section 20133 (rules on passenger cars); section 20134(b) (rules on maintenance, inspection, and testing of highway-rail grade crossing signals); section 20136 (rules on certification of tests of automatic train control and related systems); section 20137 (rules on locomotive event recorders); section 20138 (rules on tampering with safety and operational monitoring devices); section 20139 (rules for the safety of maintenance-of-way employees on railroad bridges); section 20141 (rules on power brake safety and dynamic braking equipment), section 20142 (rules on track safety); section 20143 (rules on locomotive visibility); section 20144 (rules providing blue signal protection for on-track vehicles where rest is provided); and section 20148 (rules on the visibility of railroad cars). Each of these rulemakings has been completed.

Finally, the proposal would strike portions of section 20151 that require FRA, as the Secretary's delegate, to develop and make available a model State law against trespassing on railroad property and against vandalism affecting railroad safety. The model State law was written and provided to State and local governments in 1997.

Section 402 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.[11] For example, 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 what was the Federal Railroad Safety Act of 1970. This is unfortunate primarily because decades, if not more than 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 used to identify the pre-recodification statute, the process is fairly cumbersome and dependent on material not as readily available as the U.S.

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

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, the proposal 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 302 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 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, the proposal 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 402, 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 403 of the bill would add a new section 28104 to title 49, U.S. Code, to address the access of certain FRA employees to certain criminal history and other law enforcement records, systems, and communications. In particular, subsection (a) of proposed section 28104 would provide statutory authority for FRA's Administrator to have access to systems of documented criminal justice information kept by the Department of Justice or a State that contain criminal history information (e.g., arrests, convictions, warrants) in order to carry out the Administrator's civil and administrative duties to promote the safety, including security, of

railroad operations and for other purposes authorized by law, including the National Crime Prevention and Privacy Compact, 42 U.S.C. 14611-14616. The proposal explicitly states that the authority that would be conferred by the provision may not be used to conduct criminal investigations.

Proposed subsection (b) of proposed section 28104 would provide that the Administrator may designate, by order, FRA employees whose primary responsibility is rail security to carry out the Administrator's authority under proposed subsection (a). Proposed subsection (b) also provides that designated FRA employees may use various State government systems and equipment, and receive various State police communications, "in the same manner" as the police officers of the State in question "*insofar as authorized or permitted by the National Crime Prevention and Privacy Compact or other law or agreement governing an affected State with respect to such a State*". [Emphasis added.] The italicized language is included in order to make clear that the provision should be construed not as a directive to States to take measures to provide such access and use, but rather merely as an authorization for the designated Federal employees to have such access and use to the extent authorized and permitted under existing law and agreements, such as the Compact. Without the italicized language, the provision would raise constitutional concerns under the Tenth Amendment and principles of constitutional federalism prohibiting Federal legislation that commandeers the States or State facilities to administer or enforce a Federal regulatory program. See New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

Proposed subsection (c) of proposed section 28104 would define the term "system of documented criminal justice information" to mean any law enforcement database, systems, or

communications with information about identification, criminal history, arrests, convictions, arrest warrants, and wanted or missing persons, including the National Crime Information Center (NCIC) and its incorporated criminal history databases and the National Law Enforcement Telecommunications System.

This proposed authority would help an FRA rail security employee perform his or her civil and administrative duties more efficiently. For example, the authority would allow the employee to expedite the completion of criminal background checks of persons applying for security clearances; to provide support of Presidential security initiatives and the Railway Alert Network; and to refer information to the Federal Bureau of Investigation's National Joint Terrorism Task Force, the U.S. Attorneys' Terrorism Task Force, or railroad police officers for a criminal investigation. Use of these databases would be a major step towards opening channels of communication and furthering information sharing to enhance rail security. Connectivity, communications, and information sharing among government agencies and affected industries have proven to be critical to preventing or responding to events such as 9/11, Hurricane Katrina, the March 2004 Madrid commuter train bombings, and the July 2005 London transit bombings. There are currently no networks in place by which FRA can efficiently receive and pass on important security, threat, and suspicious activity information to and from rail carriers (especially short line railroads that do not have NCIC access), the FBI, railroad police, local police, and other parties who use these databases.

FRA recognizes that criminal investigations should be performed only by individuals with law enforcement authority and does not intend to use the proposed access (which is for civil and administrative purposes and other purposes authorized by law), in order to conduct criminal

investigations. Access to the databases would be strictly limited by the Administrator to persons with security responsibilities and appropriate security clearances.