date of publication. It relates to departmental management, organization, procedure, and practice. For this reason, the Secretary for good cause finds, under 5 U.S.C. 553(b)(B) and (d)(3), that notice, and public procedure on the notice, before the effective date of this rule are unnecessary and that this rule should be made effective in less than 30 days after publication.

List of Subjects in 49 CFR Part 1

Authority delegations (Government agencies), Organization and functions (Government agencies).

In consideration of the foregoing, part 1 of title 49, Code of Federal Regulations, is amended to read as follows:

PART 1—[AMENDED]

1. The authority citation for part 1 continues to read as follows:

Authority: 49 U.S.C. 322; Pub. L. 101–552, 28 U.S.C. 2672, 31 U.S.C. 3711(a)(2).

§ 1.46 [Amended]

2. In § 1.46, paragraph (eee) is added to read as follows:

§ 1.46 Delegations to Commandant of the Coast Guard.

* * * * *

(eee) Carry out the functions vested in the Secretary by 46 U.S.C. 14104 to prescribe alternate tonnages for vessels.

Issued in Washington, DC this 12th day of December, 1996.

Federico Peña,

Secretary of Transportation.

[FR Doc. 96–32542 Filed 12–20–96; 8:45 am]

BILLING CODE 4910–62–P

Federal Railroad Administration

49 CFR Parts 219 and 225

[FRA Docket No. RAR–4, Notice No. 16]

RIN 2130–AB13

Railroad Accident Reporting

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

ACTION: Final rule; response to remaining issues in petitions for reconsideration; and miscellaneous amendments.

SUMMARY: On June 18, November 22, and November 29, 1996, FRA published final rules amending the railroad accident reporting regulations at 49 CFR Part 225. 61 FR 30940, 61 FR 59368, 61 FR 60632, respectively. These final rules aim to minimize underreporting and inaccurate reporting of those railroad injuries, illnesses, and accidents meeting FRA reportability requirements; respond to some of the issues raised in petitions for reconsideration of the final rule published June 18; and also increase from $6,300 to $6,500 the monetary threshold for reporting rail equipment accidents/incidents involving property damage that occur on or after January 1, 1997.

FRA now responds to the remaining issues raised in the petitions for reconsideration, issues amendments addressing some of those concerns, and makes minor technical amendments. The primary changes involve the granting of partial relief to small railroads. In particular, railroads that operate or own track on the general railroad system of transportation but that have 15 or fewer employees covered by the hours of service law and tourist railroads that operate or own track only off the general system are excepted from the requirements to record ''accountable'' injuries, illnesses, and rail equipment accident/incidents and to adopt and comply with a complete Internal Control Plan. (The excepted railroads must, however, have a harassment and intimidation policy.) In addition, tourist railroads that operate or own track only off the general system are excepted from part 225 requirements regarding most ''non-train incidents.''

EFFECTIVE DATE: January 1, 1997.

FOR FURTHER INFORMATION CONTACT: Robert L. Finkelstein, Staff Director, Office of Safety Analysis, Office of Safety, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202–632–3386); or Nancy L. Goldman, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, DC 20590 (telephone 202–632–3167).

SUPPLEMENTARY INFORMATION: On June 18, November 22, and November 29, 1996, FRA published final rules amending the railroad accident reporting regulations at 49 CFR Part 225. 61 FR 30940, 61 FR 59368, 61 FR 60632, respectively. In response to the final rule published June 18, 1996, several railroads and railroad associations filed petitions for reconsideration raising various concerns with its contents and its implementation date of January 1, 1997.

The final rule published on November 22, 1996, 61 FR 59368, responded to certain issues raised in the petitions for reconsideration and amended the requirements in §§ 225.25(c) and 225.35 regarding access by railroad employees and FRA representatives, respectively, to certain railroad accident records and reports. This document responds to the remaining issues and concerns stated in the petitions for reconsideration.

A. Summary of Remaining Concerns Raised in the Petitions for Reconsideration and FRA's Responses to those Concerns

FRA received petitions for reconsideration and requests to change the effective date of the final rule from the Association of American Railroads (AAR), The American Short Line Railroad Association (ASLRA), Union Pacific Railroad Company (UP), CSX Transportation, Inc., Canadian Pacific Railway, Burlington Northern Santa Fe Corporation (BNSF), Norfolk Southern Corporation, Consolidated Rail Corporation, Southern Pacific Lines, the Association of Railway Museums, Inc. (ARM), the Tourist Railroad Association (TRAIN), Maryland Midway Railway, Inc., Delaware Otsego Corporation, The Everett Railroad Company, Crab Orchard and Egyptian Railroad, Minnesota Commercial Railway Company, Angelina & Neches River Railroad Company, and the City of Prineville Railway.

Section 211.31 of FRA's rules of practice states that FRA must decide to grant or deny, in whole or in part, each petition for reconsideration not later than four months after receipt by FRA's Docket Clerk. 49 CFR 211.31. In this case, FRA's decision on the petitions for reconsideration is due no later than December 19, 1996. If FRA grants a petition for reconsideration, a notice of this decision must appear in the Federal Register. *Id.* To provide a fuller explanation of the issues, this document addresses both grants and denials of the petitions for reconsideration. Accordingly, a copy of this document is being mailed to all petitioners.

1. Section 225.33—Internal Control Plans

a. Section 225.33—Implementation of an Internal Control Plan

Section 225.33 mandates that each railroad ''adopt and comply with a written Internal Control Plan (ICP) [to be] maintained at the office where the railroad's reporting officer conducts his or her official business.'' The ICP is to include, at a minimum, ten identified components as outlined in § 225.33 (a)(1) through (a)(10). Further, the ICP must be amended, ''as necessary, to reflect any significant changes to the railroad's internal reporting procedures.'' 49 CFR 225.33(a).

ASLRA and most of its members, as well as ARM and TRAIN, request relief from implementing an ICP. These

petitioners mainly assert that the final rule, as written, lacks flexibility as to what must be contained in the railroad's ICP and how the ICP must be structured. They also state that the rule fails to take into account the vast differences between the requirements of large and small railroads and thus request that they be allowed to develop their own ICP appropriate to their specific reporting and recordkeeping needs.

Final Rule

FRA has concluded that an ICP, while helpful to ensure that the lines of communication between the various railroad departments are maintained, is not essential in the case of extremely small railroads. These railroads have very few personnel, and the recording and reporting of accidents/incidents is usually done by one or two individuals.

Therefore, the applicability section of the final rule, § 225.3, is amended by adding § 225.3(b) to except from the ICP requirements outlined in § 225.33(a) (3)—(10) the following: (i) railroads that operate or own track on the general railroad system of transportation that have 15 or fewer employees covered by the hours of service laws (49 U.S.C. 21101–21107) and (ii) railroads that operate or own track exclusively off the general railroad system of transportation. See 49 CFR Part 228, App. A for a discussion of covered employees. In addition, since the introductory text of § 225.33(a) states that each ICP must contain ''each of the following ten components'' (referring to paragraphs (a) (1) through (10)), the quoted text is amended by removing the word ''ten,'' to avoid a contradiction between §§ 225.3(b) and 225.33(a).

The excepted railroads must, however, adopt and comply with the intimidation and harassment policies outlined in § 225.33(a) (1) and (2).

FRA encourages these excepted railroads to review their current accident reporting process to ensure that they are obtaining complete and accurate data.

b. Appendix A to Part 225—Civil Penalties Associated with the ICP

The final rule published June 18, 1996, specifies three separate civil penalties for violation of § 225.33. 61 FR 30973; 49 CFR Part 225, Appendix A. If a railroad fails to adopt an ICP, then the railroad is subject to the assessment of a civil monetary penalty in the amount of $2,500 or, if the failure is willful, $5,000. (Appendix A to Part 225, applicable computer code: 225.33(1)). Also each railroad's reporting error or omission arising from noncompliance with the ICP subjects that railroad to the assessment of a civil monetary penalty in the amount of $2,500 or, if willful, $5,000. (Appendix A to Part 225, applicable computer code: 225.33(2)). Consequently, if a reporting violation is found, then the railroad may be fined for both the reporting violation and any departure from the ICP which resulted in the reporting violation. However, if there is a reporting violation, but FRA determines that the ICP was in fact followed by the railroad, then just one violation may be written. Additionally, FRA may assess a civil monetary penalty against any railroad employee, manager, or supervisor who willfully causes a violation of any requirement of Part 225, including § 225.33(a) (1) and (2), requiring adherence to the railroad's intimidation and harassment policy and noninterference with that policy. (Appendix A to Part 225, applicable computer code: 225.33(3)).

ASLRA and its members oppose the multiple penalties associated with the ICP and ask that FRA reconsider imposing these fines on small railroads. The rationale for this objection seemingly stems from the fact that FRA already may impose a civil penalty on the railroad for inaccurate reporting. ASLRA states that a separate cumulative civil penalty for failure to adopt the ICP and failure to comply with the intimidation and harassment policy in the ICP is not necessary should FRA grant its request to allow small railroads flexibility in writing their ICPs.

Final Rule

The penalty provisions contained in 49 CFR 225.33, as specified in Appendix A to Part 225, are not withdrawn. FRA believes that the multiple penalties are important and necessary so that railroads take the ICP seriously and follow the ICP to ensure accurate reporting. FRA also believes that the availability of a monetary civil penalty is necessary in order to compel the railroads to correct procedural deficiencies and weaknesses in their ICPs. FRA may issue these civil penalties pursuant to 49 U.S.C. 21301, 21302, and 21304.

The General Accounting Office (GAO) studied FRA's railroad injury and accident reporting data and issued a report in April 1989 (GAO/RCED–89–109) (hereinafter, ''GAO Audit'') that raised important questions about the quality of railroad compliance with FRA's accident reporting regulations. GAO found underreporting and inaccurate reporting of injury and accident data for 1987 by the railroads it audited. GAO recommended that railroads develop and comply with an ICP and that FRA use its authority to cite those railroads for inaccurate reporting arising from noncompliance with an ICP. GAO Audit at 29. Civil monetary penalties will ensure that railroads are extremely careful in drafting the ICP and in complying with the ICP. It is also unlikely that all railroads, given the various pressures and structural changes in the industry, would adhere to their ICPs consistently and over an extended period of time without steady pressure from FRA.

c. Section 225.33(a) (1) and (2)—Intimidation and Harassment Policy in the ICP

Section 225.33(a)(1) of the ICP requires that each railroad adopt a policy statement which affirms that intimidation or harassment by any officer, manager, supervisor, or employee of the railroad that aims to undermine or negatively influence the treatment of persons with an injury or illness or that adversely affects the reporting of such injuries and illnesses will not be tolerated nor permitted and that appropriate prescribed disciplinary action may be taken by the railroad against such person committing the harassment or intimidation.

Section 225.33(a)(2) requires each railroad to disseminate the policy statement addressing intimidation and harassment to all employees and supervisors and to all levels of railroad management. Further, the railroad must have procedures in place to process complaints that the railroad's intimidation and harassment policy has been violated, and such procedures also be disseminated to all employees and management or supervisory personnel. The railroad also must provide ''whistle blower'' protection to any person subject to this policy, and such policy must be disclosed to all railroad employees, supervisors, and management.

AAR asserts that intimidation and harassment policies outlined in the ICP are invalid and unlawful because FRA did not give public notice of such policies and provide the public the opportunity to comment. AAR states that FRA should provide information supporting its belief that intimidation and harassment are widespread and further request that FRA use its civil penalty and disqualification powers to punish the bad actors and not condemn the entire industry under general rulemaking.

Final Rule

AAR's argument that FRA failed to give notice is without merit. The Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*) sets out three

procedural requirements: the notice of the proposed rulemaking; the opportunity for all interested persons to comment on the proposed rule; and a concise general statement of the basis and purpose of the rule ultimately adopted. 5 U.S.C. 553 (b),(c).

Those requirements were served adequately here. The Notice of Proposed Rulemaking made clear that the principal purpose of the rulemaking was to enhance the accuracy of accident/incident reporting. 59 FR 42880 (Aug. 19, 1994). While the NPRM did not expressly discuss intimidation and harassment, the NPRM did include a provision, § 225.33(a)(6), requiring:

> A description of the method by which all pertinent officers and workers * * * are apprised of their responsibilities, including any training necessary to make such officers and workers aware of the duty of the railroad to report the information in question.
>
> 59 FR 42897 (Aug. 19, 1994).

Witnesses testifying in the proceeding addressed intimidation and harassment because, to the degree such tactics succeed, they have an obvious effect on the accuracy of reported data. That testimony clearly relates to the purposes of proposed § 225.33(a)(6) because it may be fruitless for a worker to be aware of his or her responsibilities if he or she is afraid to carry them out. FRA responded in the final rule by acting to protect the accuracy and completeness of the data reported to it and said so clearly in the final rule.

Both intimidation and harassment were discussed at the rulemaking hearings and at the public regulatory conference. Labor representatives stated that intimidation and harassment of railroad employees exist and that they manifest themselves in many different ways. First, due to the railroads' desire to reduce the number of reportable injuries and illnesses, many railroad employees are reluctant to seek needed medical attention for fear of possible discipline or retaliation by their employer. Second, many employees who are injured on the job fail to report their injury to the railroad within the prescribed time period because, at the time the injury was incurred, they believed it was minor or insignificant. If and when the injury worsens, the employee is reluctant to report the injury because he or she may be subject to investigation or discipline, or both, for reporting late. Third, other employees request medical treatment that would render the injury or illness nonreportable to FRA, such as requesting that they be given nonprescription medication, because of intimidation or harassment by the employer. (Transcript (Tr.) November 2, 1994 at 154–156; Tr. January 30, 1995 at 159, 161, 164, and 171. All accident reporting hearing transcripts are referenced as ''Tr.'' with the date of the hearing.)

As is plainly evident, these comments expressly raise the employee intimidation and harassment issue. Petitioners were represented at the hearings in which testimony on these subjects was offered and had ample opportunity to present evidence and reasoning of their own on these subjects. Given the record in this proceeding, the logic was compelling for FRA to act to prevent the frustration of the educational and training purposes of § 225.33(a)(6) and of the overall purpose of obtaining complete and accurate data. The final rule's requirement for an intimidation and harassment policy in the ICP is a ''logical outgrowth'' of discussions and oral and written comments presented to FRA. *See AFL–CIO* v. *Donovan,* 244 U.S. App. D.C. 255, 757 F.2d 330, 338 (D.C. Cir. 1985) (quoting *United Steelworkers* v. *Marshall,* 208 U.S. App. D.C. 60, 647 F.2d 1189, 1221 (D.C. Cir. 1980). That FRA enunciated the intimidation and harassment policy in the final rule is consistent with the tenor of these discussions and comments at the proposal stage and further indicates that FRA treated the notice and comment process seriously.

d. Request To Adopt AAR's Proposed Performance Standard in Lieu of the ICP Requirement in § 225.33

Throughout the rulemaking process, AAR and its member railroads suggested that FRA adopt a performance standard for determining and measuring a railroad's compliance with reporting requirements instead of the ICP mandated by FRA. The performance standard proposed by AAR was based on methods selected from a set of statistical procedures developed for use by the U.S. Military (MIL–STD–105E, 1989) as means of statistically controlling process quality in a stable environment.

AAR and its members repeatedly claim that the 1989 GAO audit report on accident/incident reporting is outdated and that, therefore, the GAO findings should not have been considered for this rulemaking. AAR also asserts that FRA failed to give a reasoned explanation for its rejection of AAR's proposed performance standard, and that the APA requires FRA to do more than unquestioningly accept FRA's consultant's conclusions criticizing AAR's proposal. AAR thus requests elimination of the ICP and adoption of AAR's proposed performance standard.

Final Rule

FRA rejects use of AAR's proposed performance standard and retains the mandatory requirement that railroads adopt and comply with an ICP as delineated in § 225.33. At base, AAR's complaint is that FRA did not adopt the standard AAR prefers. The record, however, demonstrates the superiority of the standard adopted for the purposes of this rule. For a performance standard to be meaningful, it must be specific about outcomes to be produced. FRA's ICP does this without imposing a detailed standard plan on everyone. Moreover, the requirements related to the ICP are performance standards, simply meaningful ones that the railroads dislike.

In FRA's initial review of the AAR's performance standard, FRA had general doubts about the standard. In addition, FRA had already noticed the problem of the dilution of the denominator and questioned whether the standard would, in fact, achieve a 99-percent compliance rate. Concerned about these problems, FRA hired an independent statistical firm to review AAR's proposed performance standard. See firm's report, appended to final rule published June 18, 1996, 61 FR 30973–30976. FRA's independent evaluation of this firm's analysis and of AAR's proposal shows that AAR's performance standard will not improve the accuracy of the safety data.

Among other things, AAR's proposed standard would draw no distinction between a failure to report a minor accident and a failure to report a major one or to report it accurately. Under that proposal, so long as a railroad met the standard of accuracy in reporting the *number* of accidents and incidents it had, the railroad could inaccurately report the *seriousness* of its accidents and incidents with impunity. That could introduce very serious distortions into FRA's safety data, potentially making them far less accurate than they now are. FRA concluded that AAR's proposed performance standard would erode the integrity of FRA's safety data.

Mr. Thomas Guins, Senior Program Manager, Engineering Economics, in the Research & Test Department of AAR, provided a statement attached to the AAR's petition for reconsideration which, among other things, evaluates FRA's rejection of AAR's proposed performance standard. Mr. Guins notes that FRA's consultant's objection to the sample-inclusion process is justified. Mr. Guins offers a remedy where he suggests use of a denominator that

would change from year to year based upon the previous year's nonreportable cases. Guins at 3–4. The failure to include a denominator is a serious omission. Furthermore, the base year Mr. Guins uses in his example, 1995, could never be tested for the development of a denominator the following year. The more that Mr. Guins tries to fix the performance standard as proposed, the more complex it gets. This is directly contrary to Mr. Guins' characterization of AAR's performance standard as ''uncomplicated.'' Guins at 7.

AAR also states that FRA's consultant raised an invalid objection in that the sampling plan achieves only a 97-percent compliance rate. AAR's proposed performance standard was based on a 99-percent compliance rate. However, AAR admits that its plan would not provide the 99-percent compliance level. AAR Petition at 20. The important consideration is that a random sample of a large population has a statistical error in predicting the actual number of defects in the group from which the sample is taken; the answer could be plus or minus two percent. When the desired outcome is 99 percent, by definition the actual outcome could be below 99 percent. Mr. Guins' ''uncomplicated performance standard'' gets more complex as he changes the sampling plan to alter the shape of the Operating Characteristic Curve.

In the preamble to the June 18 final rule, FRA stated that even if AAR's proposed performance standard were to deal with some of FRA's criticisms of it, the performance standard would still fail to meet the main objective of the ICP—to improve the accuracy of the submitted accident and injury reports. AAR's response to this is its admission that the accuracy of the reports would still be in question. But, for the sake of simplicity and to prove that its proposed performance standard would work, AAR is willing to forgo the accuracy of the submitted reports. AAR Petition at 21–22. AAR's approach does not resolve the problem identified in the initial GAO report, *i.e.*, how to improve the accuracy of submitted reports. Throughout the rulemaking hearings, public regulatory conference, and in written testimony, there was no statement by AAR and member railroads that an independent audit was conducted by any railroad to determine that proper and accurate accident and incident reporting was being performed, nor did any railroad state that even an internal audit was performed to determine whether or not the GAO audit was in fact outdated. Based on subsequent instances of inaccurate reporting identified during FRA inspection activity, the GAO audit, and the absence of compelling evidence that GAO erred, FRA concludes that the GAO audit is not outdated as claimed by AAR and that it truly reflects that inaccurate reporting remains a problem in the industry or could easily recur in the future.

AAR also claimed that most of its members already had some sort of ICP in place (Tr. January 30, 1995 at 100–101, 104–105). Yet, when FRA asked these members to produce these plans, not a single railroad could produce an ICP. Some railroads stated that they had memoranda or loose instructions, or both, that were similar to an ICP, but these also were not available for FRA review. Consequently, in order to assist the industry, FRA developed criteria for a model ICP which ultimately incorporated many of AAR's recommendations.

FRA does agree with the statements of AAR and its member railroads, that these railroads have ICPs in the form of memoranda and directives which would satisfy most of the mandated ICP requirements in § 225.33. That is one more reason why AAR's insistence on the use of a different performance standard, which would also require development of an ICP, is unpersuasive, since the AAR performance standard audit would consume considerable FRA inspector resources and would most likely use additional railroad resources without improving the accuracy of FRA's accident/incident data.

e. Section 225.33(a)(9)—Annual Railroad Audit

Section 225.33(a)(9) requires each railroad to provide a statement that specifies the name and title of the railroad officer responsible for auditing the performance of the reporting function; a statement of the frequency (not less than once per calendar year) with which audits are conducted; and identification of the site where the most recent audit report may be found for inspection.

AAR claims this provision has not been justified and that FRA never responded to the railroads' concerns about this provision's rejection of the self-critical analysis privilege. AAR cites a law review article (96 Harv. L. Rev. 1083)(1983)), which notes that railroads regularly investigate accidents involving their employees. After these internal investigations are completed, outsiders may seek discovery of the resulting analyses and, as a result, a privilege of self-critical analysis has developed to shield certain self-analyses from discovery. AAR analogizes this privilege to the self-audit requirement of the ICP, *i.e.*, that since each railroad must conduct at a minimum, one yearly audit, the results of this audit should be privileged and not subject to FRA review.

Final Rule

AAR's argument is without merit. The self-critical analysis privilege is not recognized by many courts and, if recognized, it is in the context of tort litigation, not administrative law. FRA believes that it is necessary that railroads perform the required audit as a means to ensure that the ICP delivers the desired outcome, *i.e.*, accurate reporting through effective communication amongst the various railroad departments, and no public purpose would be served by affording railroads a ''self-critical analysis'' privilege. The audit allows railroads to identify problem areas and make the appropriate changes or corrections to their internal control procedures.

2. Definition of ''Establishment'' in § 225.5 and Scope of the Posting Requirement in § 225.25(h)

Section 225.5 defines an ''establishment'' as ''a single physical location where workers report to work, where business is conducted or where services or operations are performed, for example, an operating division, general office, and major installation, such as a locomotive or car repair or construction facility.''

AAR and individual railroads state the importance of limiting the definition of an ''establishment'' to the examples FRA used above and to omit from the definition the terminology ''where workers report to work.'' They state that the current definition is unlawful because railroads will be vulnerable to ''second guessing'' by FRA inspectors as to its meaning.

Large railroads also criticized the description in § 225.25(h) of the requirement to post injury and illness lists at and for each ''establishment.'' Here, the ''establishment'' where posting is required is one that has been in continual operation for a minimum of 90 calendar days. Since large railroads could have numerous locations where employees report to work or where business is conducted, these railroads believe that the burden associated with posting injury and illness data monthly at numerous small establishments would be great and not justified by any safety benefit.

Final Rule

Clarification of Definition of ''Establishment''

Requests to limit the definition of an ''establishment'' to only those examples in the definition are denied. However, the definition of ''establishment'' in § 225.5 is amended for clarification purposes. As amended,

Establishment means a single physical location where workers report to work, where railroad business is conducted, or where services or operations are performed. Examples are: a division office, general office, repair or maintenance facility, major switching yard or terminal. For employees who are engaged in dispersed operations, such as signal or track maintenance workers, an ''establishment'' is typically a location where work assignments are initially made and oversight responsibility exists, *e.g.*, the establishment where the signal supervisor or roadmaster is located.

Clarification of ''Establishment'' for Purposes of Posting the List of Reportable Injuries and Illnesses

FRA is also amending § 225.25(h) in order to clarify its scope and assist the industry in comprehending the scope of what types of facilities qualify as an ''establishment'' for purposes of posting the list of reportable injuries and illnesses.

FRA realizes that it is not practical for railroads to physically post the list of injuries and illnesses at and for all of the diverse locations and centers where employees may report for assignments on a monthly basis. Many of these facilities are only utilized for limited periods of time, do not have a permanent staff assigned to them, or are simply locations where workers go to pick up, or meet, an assignment. At a minimum, listings must be posted at locations where railroad employees who suffered reportable injures or illnesses could reasonably expect to report sometime during a 12-month period and have the opportunity to observe the posted list containing their reportable injuries or illnesses. FRA does expect to find the required posting of the reportable injuries and illnesses at and for each establishment on bulletin boards or bulletin book locations where the railroad posts company policies, *e.g.*, the policy statement concerning harassment and intimidation as required by the ICP; notices of changes to its operating, general, or safety rules; and where informational notices, such as job advertisements or local special instructions, are posted; near or adjacent to postings required by other government agencies, such as the federal minimum wage notice; or where the time-clock for the establishment is located.

The establishment at which the list of reportable injuries and illnesses is posted may be a higher organizational facility, such as an operating division headquarters; a major classification yard or terminal headquarters; a major equipment maintenance or repair installation, *e.g.*, a locomotive or rail car repair or construction facility; a railroad signal and maintenance-of-way division headquarters; or a central location where track or signal maintenance employees are assigned as a headquarters or where they receive work assignments. These examples include facilities that are generally major facilities of a permanent nature.

There are endless examples of the types of locations that may qualify as an establishment for purposes of § 225.25(h). Some illustrations: for a railroad without divisions or diverse departmental headquarters, an ''establishment'' may be the system headquarters or general office which is accessible to all employees; for train service employees and crews, an ''establishment'' is a home terminal (as commonly defined in collective bargaining agreements), but is not a layover terminal, outlying support yard, or their away-from-home terminal; for employees who are engaged in dispersed operations, such as signal or track maintenance workers, the ''establishment'' is the location where these employees regularly report for work assignments; for railroad system track or signal maintenance or construction work groups, who perform duties at various locations throughout a railroad system, the ''establishment'' may be at the transient group's mobile headquarters or it may be the location where job assignments and postings are made (if the location is reasonably accessible to employees).

An ''establishment,'' for purposes of § 225.25(h), would not include remote locations where temporary construction or maintenance work is in progress; outlying support or switching yards; or tie-up points for road switch trains or work trains away from a home terminal.

3. Section 225.25(h)—Monthly Posting of Reportable Injuries and Illnesses

As previously discussed under the definition of ''establishment,'' § 225.25(h) requires that each railroad post at each railroad establishment a list of all injuries and illnesses reported for that establishment in a conspicuous location, within 30 days after expiration of the month during which the injuries/illnesses occurred, if the establishment has been in continual operation for a minimum of 90 calendar days. If the establishment has not been in continual operation for a minimum of 90 calendar days, the listing of all injuries and occupational illnesses reported to FRA as having occurred at the establishment shall be posted, within 30 days after the expiration of the month during which the injuries and illnesses occurred, at the next higher organizational level establishment.

Most railroads assert that there is no safety justification for this provision and that this requirement is therefore not necessary. Many state that posting the list will reveal the identity of the individuals involved, thereby invading their privacy rights. Some railroads request that they should be allowed to ''electronically'' post this information. ASLRA states that the monthly posting requirement is superfluous and that the added paperwork burden is significant.

Final Rule

The requirement to post the monthly list of reportable injuries and illnesses at and for each defined establishment poses a minimal burden, even for small railroads, which have few incidents which will fall into this category. Although some railroads requested that they be allowed to post this list ''electronically,'' many more railroads claimed that they did not have the means or capability to post this information electronically at and for each establishment.

Since the monthly list of reportable injuries and illnesses does not include the name of the injured or ill employee and since the list will improve the accuracy of FRA's injury and illness data base, thereby improving FRA's ability to shape the federal railroad safety program so as to prevent and mitigate future injuries and illnesses, the argument that privacy rights of the employee are invaded is without merit. However, FRA is revising § 225.25(h), by adding § 225.25(h)(15), to address any possible concerns with privacy rights of the employee. Paragraph (15) provides that the railroad is permitted to not post information on a reported injury or illness, if the employee who incurred the injury or illness makes a request in writing to the railroad's reporting officer that his or her particular injury or illness not be posted.

Some railroads reported to FRA that they have multiple locations qualifying as an establishment that are in continual operation for a minimum of 90 calendar days. These railroads requested some sort of relief in § 225.25(h)(12), which requires the signature of the preparer on

the monthly list of reportable injuries and illnesses.

In order to minimize the burden of requiring the preparer's signature on each and every list for the railroad, FRA amends § 225.25(h)(12) so as to provide railroads with an alternative to signing each establishment's monthly list. A railroad is provided the option of not having the preparer's signature on the posted list of reportable injuries and illnesses at any location away from the reporting office. However, if the railroad chooses this option, then a complete duplicate copy of the list of reportable injuries and illnesses, by establishment, must be available for review at the preparer's office. This duplicate copy must have a cover letter or memorandum indicating the month to which the reportable injuries and illnesses apply, and must have the name, title, and signature of the preparing official. The preparer must mail or send by facsimile each establishment's list of reportable injuries and illnesses in the time frame prescribed in § 225.25(h). This option will help alleviate the time burden associated with signing each establishment's list while ensuring that the preparer of all the lists accounts for the information contained in the lists by providing his or her signature on the cover memorandum. This list must contain all the information required under § 225.25(h) (1) through (14).

4. Miscellaneous Other Concerns of Tourist and Museum Railroads

Section 225.3 describes those railroads that must conform to and comply with Part 225. Specifically, § 225.3 states that Part 225

applies to all railroads except—

(a) A railroad that operates freight trains only on track inside an installation which is not part of the general railroad system of transportation or that owns no track except for track that is inside an installation that is not part of the general railroad system of transportation and used for freight operations.

(b) Rail mass transit operations in an urban area that are not connected with the general railroad system of transportation.

(c) A railroad that exclusively hauls passengers inside an installation that is insular or that owns no track except for track used exclusively for the hauling of passengers inside an installation that is insular. An operation is not considered insular if one or more of the following exists on its line:

(1) A public highway-rail grade crossing that is in use;

(2) An at-grade rail crossing that is in use;

(3) A bridge over a public road or waters used for commercial navigation; or

(4) A common corridor with a railroad, *i.e.*, its operations are within 30 feet of those of any railroad.

In general, ARM and TRAIN request that the accident reporting regulations should apply only to those railroads that are part of the general railroad system of transportation. Further, they request a separate rulemaking to define the limits of FRA authority over non-insular operations and within that limit, establish regulations that are directed at substantive safety concerns, not paperwork requirements like those found in Part 225.

TRAIN questions, in general, FRA's legal authority to regulate non-general system railroads. TRAIN cites to case law and concludes that ''before there can be any regulation of any private entity there must be, at a minimum, some impact that entity has or is having on interstate commerce. For the most part, that is not the case here,'' ''here'' implying the tourist railroad industry. TRAIN Petition at 7.

Further, TRAIN states that the safety record of its operations does not justify increased FRA regulations and that FRA did not comply with the provisions of the Regulatory Flexibility Act (RFA) because the costs of implementing the regulations far outweigh any safety benefits. TRAIN also disputes the estimated time burden and claims that the regulatory impact analysis reflects an unclear understanding of the requirements of the RFA.

ARM alleges that FRA has excepted amusement park railroads *per se* from Part 225 and that this exception is without merit because there is no rational basis for differing treatment between museum or tourist railroads, on the one hand, and amusement park railroads, on the other. ARM claims that amusement park railroads actually pose a greater safety risk and that FRA does not even know whether amusement park railroads are dangerous.

In general, TRAIN, ARM, and various small railroad petitioners request elimination of all ''nonreporting'' requirements. For example, in addition to ICP requirement discussed earlier in Section 1.a. of this summary and the requirements to record ''accountables,'' to be discussed in Section 5 of this summary, these petitioners seek to be excepted from the following requirements for the following stated reasons: (i) the requirement in § 225.25(h) to post monthly a list of all reportable injuries and illnesses at and for each establishment since such reportable injuries and illnesses and accidents/incidents are extremely rare for this industry; and (ii) the requirement to report the number of miles operated (Item #7 on Form FRA F 6180.99—the ''Batch Control Form for Magnetic Media'') since the apparent purpose of this information is to allow comparisons to be made with numbers of accidents and, since there are so few accidents amongst the historic and tourist railroads, the information would be meaningless.

Final Rule

Initially, FRA wants to make it clear that the accident reporting regulations set forth in Part 225 have always applied to non-general system, non-insular railroad operations, *e.g.*, a tourist railroad that has a public highway-rail grade crossing and that confines its operations to an installation that is not part of the general system. Further, FRA has legal authority to issue rules, as necessary, under its general rulemaking authority at 49 U.S.C. 20103. FRA's conclusion that the accident reporting rules are ''necessary'' for railroad safety is based upon a careful analysis of applicable law and policy considerations, and fully complies with the requirements of 49 U.S.C. 20103(a) and the APA.

Partial Relief From Part 225 Reporting and Recordkeeping Requirements

FRA recognizes that small tourist operations are concerned with the burdens, both in terms of time and expense, that are associated with full implementation of the final rule. Based on additional analysis, FRA concludes that it can grant some relief to certain small operations without compromising the accuracy of its accident reporting data base. Consequently, FRA amends § 225.3, by adding § 225.3(d), to except all railroads that operate exclusively off the general system (including off-the-general-system museum and tourist railroads) from all Part 225 requirements to report or record injuries and illnesses incurred by any classification of person, as defined on the ''Railroad Injury and Illness (Continuation Sheet)'' (Form FRA F 6180.55a), that result from a ''non-train incident,'' unless the non-train incident involves in-service on-track railroad equipment. See definition of ''non-train incident'' in § 225.5.

Railroads that are subject to Part 225 in the first place and that operate exclusively off the general system must, however, continue to comply with Part 225 requirements regarding reporting and recording injuries and illnesses incurred by all classifications of persons that are incurred as a result of a ''train accident,'' ''train incident,'' or a small subset of ''non-train incidents'' that involve railroad equipment in operation but not moving.

Example 1: a visitor or an employee of a non-insular, off-the-general-system museum railroad falls off a railroad car that is on fixed display in the museum building and breaks his or her ankle. This injury is classified as an injury from a ''non-train incident'' with equipment not in railroad service and would, therefore, not be reported to FRA.

Example 2: a volunteer, while collecting tickets on a railroad car for an excursion ride on a non-insular, off-the-general-system tourist railroad, cuts his or her leg. This injury requires stitches even though the car is not moving. This injury is classified as an injury from a ''non-train incident'' with equipment that is in railroad service and would, therefore, be reported to FRA.

Tourist Railroads Required To Post Monthly List of Reportable Injuries and Illnesses for Each Establishment

Apart from railroads already excepted from Part 225 as a whole by § 225.3 (*e.g.,* (i) plant railroads whose operations are confined to their industrial installation and (ii) insular, off-the-general-system tourist railroads), FRA does not believe that any railroad should be excepted from the requirement to post the monthly list of reportable injuries and illnesses at and for each establishment (§ 225.25(h)). The requirements of § 225.25(h) are discussed previously in great detail in this preamble under the definition of ''establishment.''

As explained in the preamble to the June 18 final rule, FRA wanted railroad employees to have some opportunity to be involved in the reporting process and to provide employees the chance to get a one-year picture of reportable injuries and illnesses for the establishment where they report to work. FRA is convinced that posting of this monthly list of injuries and illnesses will improve the overall quality of illness and injury data. Further, since small railroads and the historic and museum rail industry stated they had few reportable injuries and illnesses to report anyway, the burden to list such reportable injuries and illnesses for each establishment will be negligible.

''Batch Control Form for Magnetic Media'' (Form FRA F 6180.99)

As to the tourist and museum railroads' concern with reporting the ''number of miles operated'' on the ''Batch Control Form for Magnetic Media'' (Form FRA F 6180.99), FRA reiterates that the Batch Control Form is used only for those railroads who opt to report using magnetic media or electronic submission. The information contained on the Batch Control Form verifies the completeness and accuracy of the submittals. Moreover, the data on the Batch Control Form is not used in any of FRA's analyses or statistics.

TRAIN's Constitutional Argument

Turning to TRAIN's argument that FRA lacks the legal authority to regulate non-general system, non-insular railroads, TRAIN alleges that FRA's regulation of such railroads is in excess of its delegated statutory authority under the Constitution. For the reasons briefly stated in this preamble, FRA believes that non-general system, non-insular railroads are ''railroad carriers'' covered by the federal railroad safety statutes under which the accident reporting rules were promulgated and that to regulate non-general system, non-insular railroads is permissible under the United States Constitution. FRA will not address the relevant statutory language, legislative history, or delegations since they are never raised by TRAIN, but will focus solely on the TRAIN's Constitutional argument, that because of Constitutional limits on the commerce powers of the Congress, FRA lacks the authority under the Constitution to regulate non-general system, non-insular railroads. TRAIN Petition at 3.

The Commerce Clause of the United States Constitution provides: ''The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. * * *'' U.S. Const. Art. I, § 8, cl. 3. Supreme Court decisions have broadened the notion of interstate commerce to include those actions, however local, which merely affect interstate commerce. The Court has interpreted the Commerce Clause to include those entities whose activities are strictly local but who are members of a class that affect interstate commerce (*Katzenbach* v. *McClung*, 379 U.S. 294 (1964)) or who are members of a class Congress seeks to regulate (*Perez* v. *United States*, 402 U.S. 146 (1970)). Moreover, in *Wickard* v. *Filburn*, 317 U.S. 110 (1942), and in *United States* v. *Darby*, 312 U.S. 100 (1940), the Court said that Congress could reach those entities who are representative of many others similarly situated even if their individual activities do not particularly affect interstate commerce.

Recent estimates show that American tourist railroads transport some five million passengers each year. Some such railroads are interstate lines; many are not. Some tourist railroads share trackage rights with other passenger or freight railroads, while others are stand-alone railroads with their own track. Some of them provide excursions over scores, if not hundreds, of miles; others operate only a few miles. Some travel at relatively high speeds, while others lumber along at very leisurely rates. All comprise that class of railroad, the tourist railroad, whose purpose is to provide recreational train trips and whose very name (''tourist'') indicates that railroads in this class hope to attract passengers from far and near, including those from other states. Accordingly, FRA is authorized to regulate non-general system, non-insular railroads, including those that do not particularly affect interstate commerce, because they are members of a class of railroads that affect interstate commerce or are representative of other similarly situated railroads.

To support the position that FRA is empowered to regulate non-general system, non-insular railroads, FRA cites a case on point, *Historic Reader Foundation, Inc., Reader Industries, Inc., and Reader Railroad* v. *Skinner*, Civ. No. 91–1109 (W.D. Ark. Jan. 16, 1992) (*Reader*). In that case, the plaintiffs asserted that Congress did not intend to empower the FRA with the authority to regulate an intrastate tourist railroad. Like many tourist railroads generally, the Reader Railroad was a standard gage railroad line that provided excursion service for passengers. The railroad consisted of the track right-of-way, concession pavilion and building, maintenance terminal, and railroad machinery and equipment. Equipment included two steam locomotives, three antiquated passenger cars, and one caboose. The Reader offered round-trip excursions over 3.2 miles of track, and had about one mile of side tracks. The route crossed one public highway. A switch that allowed interchange with the Missouri Pacific Railroad and provided a connection with the national railroad system was dismantled, *i.e.*, the Reader was a non-general system, non-insular railroad. Some of the Reader's passengers came from outside of Arkansas, and Reader published an advertisement brochure which was distributed both locally as well as outside of Arkansas. Reader purchased supplies from outside of the State in order to operate the railroad, including lubricating oil, nuts, bolts, and paint.

The District Court held that FRA was empowered to monitor such operations to ensure the safety of the public and that Reader was subject to regulation by FRA. In support of this holding the Court noted,

> [i]t has long been settled that Congress' authority under the Commerce Clause extends to intrastate economic activities that affect interstate commerce. *Garcia* v. *San*

Antonio Metro. Transit Auth., 469 U.S. 528, 537 (1984); *Hodel* v. *Virginia Surface Mining & Recl. Assn*, 452 U.S. 264, 276–277 (1981); *Heart of Atlanta Motel, Inc.* v. *United States*, 370 U.S. 241, 258 (1964) * * *.

Reader, p. 3. In sum, the Court found that the Reader Railroad affected interstate commerce. Similarly, FRA is still empowered to regulate non-general-system, non-insular railroads as a class, since like the Reader, they affect interstate commerce.

To rebut this position, TRAIN relies primarily on the holding in *United States* v. *Lopez*, __ U.S. __ (1995), 115 S.Ct. 1624 (1995), 131 L.Ed 2d 626 (1995) to support the proposition that FRA lacks Constitutional authority to regulate non-general system railroad operations. TRAIN Petition at 4. In *Lopez*, a local student, from a local high school, carried a concealed handgun into his high school and was subsequently charged with violating the Gun-Free School Zones Act of 1990 (the Act), which forbade ''any individual knowingly to possess a firearm at a place that [he] knows * * * is a school zone.'' 18 U.S.C. 922(q)(1)(A). TRAIN argues that the Court used a stricter standard in its reasoning to determine whether the Act exceeded Congress' commerce authority, that Congress may regulate under its commerce power ''those activities having a *substantial relation* [emphasis added] to interstate commerce, *NLRB* v. *Jones & Laughlin Steel Corp*, 301 U.S. 1 at 37 (1937).'' TRAIN Petition at 6. Based upon this stricter standard of the enterprise having to have a substantial effect, rather than just an effect, on interstate commerce, TRAIN argues, the Supreme Court concluded in *Lopez* that the Act exceeded Congress' Commerce Clause authority. The Court reasoned that Section 922(q) was ''a criminal statute that by its terms had nothing to do with ''commerce'' or any sort of any economic enterprise * * *. 115 S.Ct. 1630–1631.

Even if ''substantial effect'' rather than ''effect'' is the appropriate standard, the facts in *Lopez* are easily distinguished from the facts whereby FRA regulates, as authorized by the federal railroad safety statutes, non-general system, non-insular railroads. First, non-general system, non-insular railroads are generally commercial enterprises, unlike a school playground, which is not an economic enterprise. Second, the statute in question in *Lopez* was a criminal law, an area traditionally left to the province of local and State governments. Here, the relevant statutes are civil and deal with a subject, railroad safety, that has traditionally been covered by federal law. Third and most importantly, non-general system, non-insular railroads can, if not regulated, substantially affect interstate commerce. FRA's criteria for insularity indicate the ways in which non-insular railroads substantially affect interstate commerce. *See* 49 CFR 225.3. For example, if the tracks of the non-general system railroad cross a public road that is in use, the operation of the railroad substantially affects interstate commerce in that a commercial truck using the road could collide with one of the trains that operate over the grade crossing. To give another illustration, if the tracks of the non-general system railroad cross a river used for commercial navigation, a derailment of one of the railroad's trains while it was traversing the river could easily interfere with the free flow of barge or other commercial traffic on the river. Accordingly, FRA believes that TRAIN's Constitutional challenge to the validity of FRA's authority to regulate non-general system, non-insular railroads is without merit.

ARM's Concerns About Amusement Park Railroads Excepted From Part 225

ARM, an association of railroad museums, complains that FRA has excluded amusement park railroads from Part 225 requirements without sufficient reason. FRA addressed this issue at some length in the preamble to the June 18 final rule. *See* 61 FR 30959–30960. Of course, FRA's exclusion is not of amusement park railroads as such, but of railroads with less than 24-inch track gage, which FRA considers miniature or imitation railroads, and of insular tourist and museum railroads that operate (or own track) exclusively off the general system, regardless whether they operate in an amusement park. See 61 FR 30960 (June 18, 1996) and § 225.3. Again, the excluded railroads are excepted on the basis of their track gage or their insularity. ''[A] tourist operation is insular if its operations were limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public (except a business guest, a licensee of the tourist operation or an affiliated entity, or a trespasser) would be affected by the operation.'' 61 FR 30960 (June 18, 1996). FRA recognizes, however, that in practice, when the insularity test is applied, many amusement park railroads are excluded. As indicated in the preamble, insular amusement park railroads are excepted on the additional basis of State and local regulation of these entities as amusements. *Id.*

5. Section 225.25 (a) Through (g)—Recording of ''Accountables''

Section 225.25(f) requires each railroad to log each reportable and each accountable rail equipment accident/incident as well as each reportable and each accountable injury or illness not later than seven working days after receiving information or acquiring knowledge that such an injury or illness or rail equipment accident/incident has occurred.

Section 225.5 defines an ''accountable injury or illness'' as encompassing ''any condition, not otherwise reportable, of a railroad worker that is associated with an event, exposure, or activity in the work environment that causes or requires the worker to be examined or treated by a qualified health care professional. Such treatment would usually occur at a location other than the work environment; however, it may be provided at any location, including the work site.''

Likewise, an ''accountable rail equipment accident/ incident'' is defined in § 225.5 as ''any event, not otherwise reportable, involving the operation of on-track equipment that causes physical damage to either the on-track equipment or the track upon which such equipment was operated and that requires the removal or repair of rail equipment from the track before any rail operations over the track can continue. * * *''

ASLRA and its members and the tourist and museum railroads request that the requirements to record accountable injuries, illnesses, and rail equipment accidents/incidents be eliminated because the information to be gained concerning these nonreportable events is not sufficient to outweigh the greatly increased recordkeeping and administrative burden. They also claim that the injuries or illnesses and rail equipment accidents/incidents that are not reportable to FRA are relatively minor and insignificant and are simply not the kind of data that can be expected to contribute in any meaningful way to improve rail safety. TRAIN, ARM, and various small railroad petitioners opposed the requirement in § 225.25(d) to maintain the ''Initial Rail Equipment Accident/Incident Record,'' indicating that too few such accountable incidents occurred to warrant completion of this record by this segment of the industry.

Final Rule

FRA amends the final rule by granting an exception to the ''accountable'' recordkeeping requirements in § 225.25(a) through (g) for (i) railroads

that operate or own track on the general railroad system of transportation that have 15 or fewer employees covered by 49 U.S.C. 21101–21107 (hours of service) and (ii) railroads that operate or own track exclusively off the general system. (These railroads are referred to as ''excepted railroads.'') This exception appears in the ''Applicability'' section of the rule, § 225.3(c). Railroads operating or owning track exclusively off the general system maintain routine records of casualties under the State workers compensation system, and such records may be obtained by FRA pursuant to statutory authority. Railroads operating or owning track on the general system (both tourist or historical and shortline freight railroads) that have 15 or fewer employees covered by 49 U.S.C. 21101–21107 currently have to make some type of record of injuries and illnesses in order to determine whether or not the injury or illness is reportable to FRA. Thus, these records should be adequate in lieu of a formal log pursuant to § 225.25(a) through(g).

Note, however, that the excepted railroads must continue to comply with the requirements in § 225.25(a) through (g) regarding reportable events. These railroads must complete and maintain the Railroad Employee Injury or Illness Record (Form FRA F 6180.98) as required under § 225.25(a), or the alternative railroad-designed record as described in § 225.25(b), of all *reportable* injuries and illnesses of its employees that arise from the operation of the railroad for each railroad establishment where such employees report to work.

Likewise, the excepted railroads must continue to comply with the requirement in § 225.25(d) to complete and maintain the Initial Rail Equipment Accident/Incident Record (Form FRA F 6180.97) or an alternative railroad-designed record, as described in § 225.25(e), of all *reportable* collisions, derailments, fires, explosions, acts of God, or other events involving the operation of railroad on-track equipment, signals, track, or track equipment (standing or moving) that result in damages to railroad on-track equipment, signals, tracks, track structures, or roadbed for each railroad establishment where workers report to work.

Consequently, the excepted railroads shall enter each reportable injury and illness and each reportable rail equipment accident/incident on the appropriate record, as required by § 225.25(a) through (e), as early as practicable but no later than seven working days after receiving information or acquiring knowledge that an injury or illness or rail equipment accident/incident has occurred. *See* § 225.25(f).

6. Requested Delay in Effective Date Due to Extensive Reprogramming of Computer Systems

AAR and most individual railroads request that the effective date of the rule, which is January 1, 1997, be delayed or changed to January 1, 1998. These petitioners claim that the data processing changes due to new circumstance codes and the addition of new blocks for information on the various forms will require at least six months to complete. FRA understands the six months to run approximately from the date that AAR's petition for reconsideration was received by FRA, *i.e.*, August 19, 1996. ASLRA requested that, due to the extensive amendments to the accident reporting regulations, FRA push the effective date back a year to January 1, 1998, and to phase or stagger implementation of the rule, with an implementation date of January 1, 1998 for Class I railroads; an implementation date of April 1, 1998 for Class II railroads; and an implementation date of July 1, 1998 for Class III railroads.

Some railroads state that the new circumstance codes and special study blocks will not improve safety data and that the new codes will make it impossible to make historical comparisons with the old occurrence codes.

Final Decision

FRA believes that reprogramming efforts can be accomplished in time to meet the January 1, 1997 implementation date. Therefore, the industry should plan to comply with the final rule on the original effective date of January 1, 1997. Railroads were also encouraged to comply by the original effective date in FRA's October 10, 1996, letter to AAR and in FRA's November 22, 1996, Federal Register document (61 FR 59368). In that document, FRA denied requests to stay the effective date of the final rule.

Railroads should have begun software reprogramming efforts shortly after publication of the final rule on June 18, 1996, in order to meet the original effective date. However, in order to assist the industry, FRA published a notice in the Federal Register on November 22, 1996 (61 FR 59485) which notified all concerned parties that FRA is in the process of preparing custom software for reporting railroad accidents and incidents. This software will be available to all reporting railroads at no cost on January 1, 1997, and will facilitate production of all the monthly reports and records required under the accident reporting regulations, as amended in 61 FR 30940 (June 18, 1996), 61 FR 59368 (November 22, 1996), 61 FR 60632 (November 29, 1996), and the present document. FRA will also have an electronic bulletin board for submission of reports.

In the NPRM, FRA expressed its concern to get more information about the circumstances of the injury which could not be described adequately by the data field ''occurrence code.'' The current FRA form (Form FRA F 6180.55(a)—Railroad Injury and Illness Summary (Continuation Sheet)), valid from 1975 to 1996) used the occurrence code to describe what the injured person was doing at the time of the injury. Instead of using the detailed occurrence codes, FRA found that a large portion of the injury records used the various ''miscellaneous'' occurrence codes to describe what the employee was doing at the time the injury was incurred. This made injury analysis and cost-benefit analysis very difficult because of incomplete information. In the NPRM, FRA proposed revisions to Form FRA F 6180.55(a) that contained both the old occurrence codes and the new ''circumstance codes.'' Initially FRA decided to keep both sets of codes to allow historical comparisons. However, throughout the rulemaking, AAR members objected to having both sets of codes as being redundant and an additional burden. Now AAR members complain that use of only the new circumstance codes is unacceptable because historical comparisons will be lost.

FRA made a conscious decision to retain the circumstance codes and to delete the occurrence codes, because of the burden claimed by AAR members. FRA is equally concerned that its decision to use only the new circumstance codes may cause some loss of historical information, but the occurrence codes were not providing the necessary information. Thus, FRA will develop a ''bridging system'' to convert the new circumstance codes to the old occurrence codes. FRA sought and will continue to seek the advice and assistance of labor and the industry in this effort. The new data base structure that FRA developed will still have a data field to store the ''bridged'' occurrence code in the same physical location as the old data base structure. This will allow analysis of the changes and provide historical comparisons.

Although railroads have had since June 18, 1996 to make changes to their computer software to accommodate the

changes in the forms required by FRA, some railroads have requested additional time for computer programming. For many of the reasons suggested already, FRA believes that if railroads had begun their programming efforts shortly after the rule was published, then there would have been sufficient time to accommodate the programming.

FRA is willing to make some accommodation for railroads that generate their own monthly reports using their own custom computer software. Railroads may continue to report using the ''old forms'' for the first three months of 1997. However, the new forms must be used for the April 1997 submissions. Railroads must refile the first three months (January through March 1997) of reports using the new forms by July 31, 1997. Failure to refile the forms would be treated as if no reports were filed at all with FRA and that may be subject to enforcement actions.

7. Definition of ''Qualified Health Care Professional''

Section 225.5 defines a ''qualified health care professional'' (QHCP) as ''a health care professional operating within the scope of his or her license, registration, or certification. For example, an otolaryngologist is qualified to diagnose a case of noise-induced hearing loss and identify potential causal factors, but may not be qualified to diagnose a case of repetitive motion injuries.''

AAR and individual railroads state that FRA has failed to give an explanation for maintaining its definition of a ''qualified health care professional.'' These railroads were troubled by the proposed definition, believing that railroad employees should be diagnosed and treated only by licensed physicians or by personnel under a licensed physician's direction.

Final Rule

Requests to limit the definition of a ''qualified health care professional'' to licensed physicians are denied. As stated in the preamble to the final rule, many reportable injuries and illnesses can be treated by a QHCP who is not a physician (one who holds an M.D.). Likewise, a physician (M.D.) may perform first aid treatment. Given the possibilities, FRA believed that limiting the definition of QHCP to encompass only physicians would result in underreporting of injuries and illnesses that require more than first aid treatment. Thus, the definition of a QHCP is retained; however, additional examples of a QHCP are added to the definition to assist the industry in comprehending the scope of what types of individuals qualify as QHCPs. In particular, the definition of a QHCP is amended to state that ''[i]n addition to physicians, the term 'qualified health care professional' includes members of other occupations associated with patient care and treatment * * *.'' Examples include chiropractors, podiatrists, physician's assistants, psychologists, and dentists.

8. Executive Order 12866

AAR asserts that FRA has not based the final rule on Executive Order (EO) 12866 in that FRA ignored its own analysis of the GAO audit; that FRA stated during the rulemaking process that the accident/incident data base is already accurate; that the E.O. directs agencies to use performance standards; that the benefits of the final rule do not justify the costs and burdens associated with its implementation; and finally, that FRA failed to restrict promulgation of rules to those ''made necessary by compelling public need, such as, material failures of private markets to protect or improve the health and safety of the public.''

FRA Response

FRA complied with E.O. 12866. The final rule was considered ''nonsignificant'' under the E.O. FRA stated in the preamble to the final rule published in June 18, 1996, that the qualitative benefits as a result of the final rule, *i.e.*, the collection of consistent and uniform data and the value of well focused regulatory decisions and properly targeted compliance activities, far exceed the costs associated with the rule. 61 FR 30965–30966.

The Federal Government, private organizations, and individuals make decisions on the basis of the ''perceived risks.'' The statistics produced by the requirements of this rule are used to communicate the risks involved (i) in transporting goods and services, and passengers on rail, (ii) with working on a railroad, and (iii) with living or commuting near rail lines or crossings. Thus, these statistics are used to form ''perceptions'' of related risks. With increased accuracy of accident and injury data, effective risk-based decisions can be made by FRA. FRA intends to increase the accuracy of these statistics and to provide the public the most accurate information through issuance of the final rules on railroad accident reporting. Hence, FRA has found promulgation of this rule to be necessary in order to continue protecting the public's health and safety.

As discussed in the preamble to the final rule published on June 18, 1996, and in this preamble, FRA noted that the industry conducted no independent audits to determine the accuracy of railroad reporting. 61 FR 30965. Nor did any railroad do an independent internal audit to determine whether or not the GAO audit was in fact outdated. *Id.* FRA's reasoning for rejection of AAR's proposed performance standard has been previously discussed in this preamble.

Below is a discussion of AAR's economics-related criticisms.

9. Regulatory Impact Analysis

AAR provided numerous criticisms concerning FRA's regulatory impact analysis (RIA) for the railroad accident reporting final rule. Initially, FRA wishes to emphasize that Executive Order 12866 does not create any rights and that FRA's RIA and its response to AAR's criticisms of the RIA do not constitute a final agency action subject to review. Nevertheless, FRA chooses to expound on many of AAR's invalid criticisms.

AAR states that FRA's RIA ''does not even attempt to assess the serious damage to a railroad's treasury resulting from the rule's attempt to favor railroad adversaries in litigation.'' AAR Petition at 28. There was no attempt to favor any private litigants, and the portion of the rule on which AAR based its concern has already been addressed. 61 FR 59368 (Nov. 22, 1996).

AAR also noted that ''the Analysis fails to account for the significant costs that arise from FRA's new definition of 'accountable' equipment accidents (section 225.5).'' AAR Petition at 28, footnote 22.

FRA's definition of ''accountable'' in § 225.5 clearly notes that although these rail equipment accidents/incidents are not reportable to FRA, there should be physical damage such that the equipment requires removal from the track or repair before any railroad operation over the track can continue. Thus, an ''accountable'' rail equipment accident/incident, if not tended to, would disrupt railroad service. 61 FR 30968. FRA's RIA for the final rule noted that railroads claimed that they currently collect this information in order to determine whether a rail equipment accident/incident is reportable to FRA. Therefore, this is, or should be, a practice of the industry prior to this rulemaking. If railroads do not collect such information, then it would be very difficult to determine whether an accident/incident is

reportable. FRA needs such records to ensure that all of the rail equipment accidents/incidents that meet reportability requirements are in fact reported to FRA. Further, FRA granted the railroads' request that they be allowed the option to design their own ''Initial Rail Equipment Accident/Incident Record'' (Form FRA F 6180.97) and ''Railroad Employee Injury and/or Illness Record'' (Form FRA F 6180.98). *See* § 225.25 (b) and (e).

Mr. Guins notes that ''[b]ecause of the additional, extensive detail FRA adds to its ICP mandate over and above railroads' existing plans, one Class 1 road has estimated the one-time cost to comply with the ICP section of this rule will require a minimum of 217 hours to write the plan. (Tr. October 5, 1994, at 99).'' Guins at 9. When this comment was made at the October 5th public hearing, FRA also requested details on how these estimates were developed. FRA again requested further details on such estimates at the Portland, Oregon hearing held on November 2, 1994 (Tr. November 2, 1994, at 98). However, the railroad providing these comments never submitted any details on this calculation. If the railroad industry and its representative organizations are going to provide such criticisms of FRA analyses, then they should respond to such requests for details on how such industry estimates are calculated. FRA's RIA provides sufficient detail in its estimates and calculations so that readers can recreate the final numbers. The industry should extend the same courtesy to FRA.

Mr. Guins also notes that AAR estimates the cost to create an ICP meeting FRA requirements for the Class I railroads at $54,684, compared to FRA's figured cost of $14,500. Guins at 9. This is not correct. FRA's estimate for the Class I railroads is actually $21,940. FRA estimated $14,850 for the ICP, and $7,440 for the ''Procedure to Process Complaints'' which is part of the ICP. RIA at 13 and Exhibit 4. Thus, the estimates provided by Mr. Guins for the development of an ICP are severely inflated.

AAR and its member railroads claimed that they already had an ICP for accident/incident reporting. Some claimed that it was not formal, but instead consisted of a series of memoranda and directives held by the railroad's reporting officer. Mr. Guins' response begs the question: what is the quality of the railroad's ICP? Beyond the requirements to develop the intimidation and harassment policy, the ICP requires the railroads to have an effective communication system between the various offices and the reporting officer; a system to audit the process annually; and an organization chart. Mr. Guins notes that one railroad would require a minimum of 217 hours to write an ICP. Guins at 9. That is almost 5½ weeks of effort for that which the railroads said they already had or would have to do in order to be in compliance with the AAR's proposed performance standard. If the member railroads already have a system in place to accomplish this, why would it take more than a week to consolidate the information into one document?

Mr. Guins also addresses software programming costs associated with the special study blocks (SSB). Guins at 9–10. Nearly all the reporting forms were modified, and any railroad that uses a computer to store accident/incident data, will have to modify its data bases, even without the SSBs. FRA estimates that railroads need to add only two additional fields for storing the SSBs in the rail equipment and highway-rail accident/incident data bases. The annual storage costs for these data elements are less than ten cents. To illustrate this cost, FRA provides the following: BNSF had 1478 rail equipment and highway-rail accident/incident reports in 1995. This equates to 59,120 characters of storage for the SSBs. Current costs for a two-gigabyte (2,000,000,000) disk drive is approximately $300. The cost of storing the additional information for BNSF for calendar year 1995 would have been $0.09.

With any change in a computer data base there must be a corresponding change in computer software. If the only change was the addition of the SSBs, then some of the estimates for reprogramming the system would be accurate. However, reprogramming the computer systems would still be required because of various changes to other required forms. Adding two fixed-length character fields that have no editing requirements for the SSBs will barely affect the cost of the reprogramming effort.

Mr. Guins also finds fault with FRA's estimate of $15,000 per Class I railroad for modifications to railroad software programming related to the changes in the various FRA forms. Guins at 11. AAR's estimates vary between $80,000 and $125,000. FRA believes that these estimates for reprogramming are unfounded. For three of the four monthly forms, the changes are minor. FRA acknowledges that one form, the ''Railroad Injury and Illness Summary (Continuation Sheet)'' (Form FRA F 6180.55a), will require a major change. However, this is not a complex form. As discussed earlier, FRA has developed a complete software system for railroads to use at no charge to the railroad. This software is far more extensive in features than the software railroads were going to develop. Given current software technology, it is difficult to imagine the estimated expense and time that large railroads are alleging it would take to accomplish these changes. FRA's software will include ''lookup'' tables (with ''wildcard'' searches); edits and cross-field edits; multiform cross-references; ''help'' screens; a built-in facsimile (FAX) transfer; a bulletin board for electronic transfer; backup and recovery utilities; and a report generator. It even includes the *FRA Guide for Preparing Accidents/Incidents Reports,* by section, when the help key is activated.

In general, AAR criticizes FRA cost-burden estimates associated with the amendments to the final rule. In response, FRA points out that it only estimates the costs for the amendments to the rule and not the total burden for performing a function. This is noted in the RIA's ''Assumptions'' section. RIA at 5. Thus, when the industry is already performing a function, whether it is customary practice or an FRA requirement, and there is a regulatory change that causes this impact to go up or down, then FRA credits or debits only the change in the burden.

Mr. Guins further finds fault with FRA's data-entry costs savings associated with electronic submission of reports where he states that ''this rule is not needed to permit electronic reporting, at least not to the extent proposed. It is my understanding that at least one railroad is currently reporting accident data electronically to the FRA.'' Guins at 12. The final rule, for the first time, *permits* the option of submitting the reports and updates and amendments to the reports by way of magnetic media, or by means of electronic submission over telephone lines or other means, in lieu of submitting the required information on paper. FRA's benefits for this option are based on cost estimates for data entry that will be electronically submitted by those railroads opting to submit data electronically for other reasons. In other words, the benefit, *i.e.*, the reduction in data entry costs, assumes that any railroad that chooses to submit data electronically will do so for its own reasons, and thus will make the decision on its own without a government mandate. If FRA were to mandate that railroads submit data via magnetic media, then almost all of the costs would be added to the total costs, and all of the estimated benefits would be added to the total benefits.

In addition, when FRA first estimated this savings, it did not even take into account its own efforts to create and provide software for the industry. As stated previously in this preamble, FRA has contracted to develop a personal computer (PC) based software program for smaller railroads to use for collecting and reporting accident and injury statistics to FRA. This software, Accident/Incident Report Generator (AIRG), will produce all the monthly reports and records required by the final rule and will be ready for general use as of January 1, 1997. FRA will provide this software free of charge to any railroad choosing the magnetic media/ electronic transfer option. Therefore, the savings from reduced data entry for FRA will probably be larger and realized sooner than estimated in the final rule's RIA. This cost is also FRA's and not the Class I railroads'.

Mr. Guins also criticizes FRA's estimated savings from the reduction in FRA Operating Practices Inspector's time where he states ''[t]he Analysis provides no insight as how this savings was calculated nor what activities currently performed by the inspectors will no longer be required.'' Guins at 13. The final rule requires ICPs, and FRA inspectors have access to review the railroad's ICP. 49 CFR 225.35. FRA's RIA notes that the savings associated with development of an ICP are based on an estimated savings of about five percent of the time inspectors now spend on Part 225 audits. RIA at 27 and Exhibit 11. Access to a written ICP will provide FRA inspectors with a road map of where to look for information and will save these inspectors considerable time in deciphering the unwritten ways of how each railroad functions in the accident reporting arena. FRA additionally provided a detailed exhibit in the RIA detailing the calculation of this benefit. RIA at Exhibit 11.

FRA's experience with Part 225 audits and assessments more than confirms the need for ICPs. It also confirms that FRA inspectors will save time conducting future audits because of better and quicker access to needed information.

10. Necessity of the Rule; Other Miscellaneous Criticisms

AAR asserts that the final rule is ''unlawful because there has been no threshold finding—and none can be made—that a significant risk justifies the rule.'' AAR Petition at 29. Further, AAR contends that FRA has authority to issue only those rules that are ''necessary'' to railroad safety, *i.e.*, necessary to require a finding that a significant risk to safe operations exists. *Id.* AAR claims that FRA has not made any threshold finding that a significant risk exists. AAR Petition at 30–31. AAR specifically cites the following FRA findings and statements to support this conclusion:

(1) The industry is already ''performing at high safety levels'' (60 Fed. Reg. 59637) and the rule has ''minimal safety implications'' (61 Fed. Reg. 23441).

(2) The last four years (1992–95) have been the safest in railroad history. [No citation is offered by AAR].

(3) The 1989 GAO report to which FRA's rule responds is based on accident data that is almost a decade old and ''most of the missing accident reports [found by GAO] were 'fender-benders' and * * * the unreported injuries were minor.'' (59 Fed. Reg. 42881). The report did not involve ''major occurrences, either in terms of injuries or accidents.'' (Tr. January 30, 1995 at 77–78.)

(4) Even though the GAO criticisms were not significant, FRA did act to improve reporting [by issuing the proposed rule (59 FR 42881)]. * * *

(5) FRA reported in 1994 that, based on its own review of all major railroads and a sampling of smaller roads, railroads ''have generally improved their internal control procedures and their accident/incident reporting.'' (59 Fed. Reg. 42882).

(6) The result is a reporting system already in place with an ''accurate data base'' [Tr. January 30, 1995 at 78] that produces reports that ''fairly reflect the true pattern of accident causation'' [Statement of FRA Administrator before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation, June 14, 1994 at 4].

(7) GAO recommended that railroads have internal control procedures for reporting. [I]n 1994, * * * FRA [stated that it] found that all Class I's and 95 percent of other railroads utilize an internal control plan (FRA 1994 Regulatory Impact Analysis at 10).

AAR Petition at 31–32.

Finally, AAR states that FRA never acknowledged the railroads' recommendation that the final rule include language that an employee's failure to provide employers sufficient access to medical information, that is reasonably necessary for the railroads to make reportability decisions, be made a defense to the assessment of a civil penalty for failing to report the injury or illness. AAR Petition at 16–17.

FRA Response

FRA has discussed many of the foregoing criticisms earlier in this preamble. FRA offers and reiterates that the 1989 GAO report specifically found problems with the quality of railroads' accident/incident and injury/illness reports and with the fact that many accidents and injuries were not being reported to FRA. FRA investigations since that time have disclosed additional problems on individual railroads, and recurrence of those problems should be expected absent effective countermeasures. FRA needs the best available safety data so that it can integrate accident and injury data to target problem areas and locations. Moreover, railroads may utilize these same safety data to better define where its resources, both monetary and personnel, should be distributed.

The limitation on FRA's power to issue rules is found in its general rulemaking authority at 49 U.S.C. 20103. This section limits FRA to issue rules that are ''necessary,'' considering relevant safety information. Complete and accurate safety data are necessary for effective safety regulations. That is so obvious, that it is puzzling why anyone would question it. Executive Order 12866 provided that costs and benefits of a rule shall be understood to include both quantifiable costs and qualitative measures of costs that are difficult to quantify, but nevertheless essential to consider. FRA's rule maximizes net benefits and imposes the least burden on the industry.

It has always been FRA's policy to forgo assessing a civil penalty in instances where an employee fails to cooperate with railroad management to provide requested medical documentation to assist the railroad in rendering its decision on the reportability of the injury or illness. This policy is also elucidated in the *FRA Guide for Preparing Accidents/ Incidents Reports.*

11. Data Elements on FRA Accident/ Incident Forms

UP's petition highlighted two issues of particular concern. First, UP sees no reason behind the ''narrative'' block of information, block ''5a'' on the ''Railroad Injury and Illness Summary (Continuation Sheet)'' (Form FRA F 6180.55a). UP claims that ''FRA will not be able to perform any analysis using the narrative information, and neither will the carriers. The requirement merely requires unnecessary manual intervention in the reporting process and reams of additional paper.'' UP Petition at 8.

UP also sees no reason for the special study blocks (SSBs), two entries on block ''49'' on the ''Rail Equipment Accident/ Incident Report'' (Form FRA F 6180.54). UP fails ''to see how any meaningful data can be reported on only two lines. Moreover, even if usable data would be drawn from the block, it would not be of assistance for current safety issues.'' *Id.* UP asserts that instead of the SSBs, FRA should request special study data ''from individual railroads outside of the formal accident/

incident reporting system, as FRA does today.'' *Id.*

ASLRA's petition has attached to it Exhibit A, which contains a short statement from Mr. Dean McAllister, Director of Safety and Quality with Rail Management & Consulting Corporation. Most of Mr. McAllister's issues have already been addressed in this preamble. However, he recommends that the ''Highway-Rail Grade Crossing Accident/Incident Report'' (Form FRA F 6180.57) should provide space for a sketch of the crossing. ''Unless a sketch area is provided, it will be necessary for us to fill out two forms as this information is required by ourselves and insurance underwriters.'' McAllister at 2.

FRA Response

In response to UP, the block for a narrative on the ''Rail Equipment Accident/Incident Report'' (Form FRA F 6180.54) has been on this form since 1975. The information in the ''narrative'' block is keyed in and becomes part of FRA's data base. The narrative is printed, and FRA conducts ''key word'' searches on the narrative to select records for subsequent analysis. For example, a key word search could be ''diesel fuel.'' It should also be noted that the new narrative block on ''Railroad Injury and Illness Summary (Continuation Sheet)'' (Form FRA F 6180.55a) and on the ''Highway-Rail Grade Crossing Accident/Incident Report'' (Form FRA F 6180.57) are required to be completed only when the codes on the forms do not adequately describe the injury or accident, respectively. 61 FR 30948,30952 (June 18, 1996). The information on the narratives should not be summary, but should contain specific detail on the accident or injury so as to provide FRA and railroads using these fields better information.

The SSBs on the ''Rail Equipment Accident/Incident Report'' (Form FRA F 6180.54) and on the ''Highway-Rail Grade Crossing Accident/Incident Report'' (Form FRA F 6180.57) will provide FRA with valuable information. To this end, FRA has redesigned its data bases such that all the new information requests are found at the end or bottom of the existing records, so as to minimize the reprogramming of existing programs. Railroads that use computers already have to redesign their data bases to accommodate the new data elements. Further, railroads may want to collect injury and accident information utilizing the SSBs. The 40 characters of data also could be in a series of codes. This much is certain: it is easier to include the SSBs now, when the data bases have to be redesigned, than in the future, as a separate item.

As to Mr. McAllister's request to include a sketch on the ''Highway-Rail Grade Crossing Accident/Incident Report'' (Form FRA F 6180.57), he asserts that inclusion of a sketch would reduce the number of forms he is obligated to complete for insurance underwriters. First, this request was never made during the proposal stage of the rulemaking, although this form and others were discussed in detail in the NPRM and public hearings. Second, storing pictorial data on a computer would be very expensive and would prohibit individuals without advanced software from retrieving the information. Finally, expanding the current form would be a major expense to railroads both in terms of paperwork burden and in retraining of personnel, both of which Mr. McAllister complained about in his statement.

B. Technical Amendments

Section 225.19(c) is amended to reflect that the reporting threshold for calendar year 1991–1996 is $6,300 and for calendar year 1997 is $6,500. This revision was inadvertently omitted from the final rule published November 22, 1996,and is necessary to provide a proper cross-reference for the definition of ''Train accident'' in FRA's alcohol and drug regulations (49 CFR 219.5). 61 FR 60632, 60634. In addition, the definition of ''Reporting threshold'' in 49 CFR 219.5 is revised to reflect that the primary source of the reporting threshold is § 225.19(e), rather than § 225.19(c). 61 FR 60634 (Nov. 29, 1996).

Further, paragraph (4) of the definition of ''Accident/ incident'' is corrected by removing the words ''of a railroad employee'' from the phrase ''Occupational illness of a railroad employee.'' 49 CFR 225.5. This change eliminates an inadvertent inconsistency between that paragraph and the definition of ''Occupational illness'' in the same section, which includes ''any person who falls under the definition for the classifications of Worker on Duty—Employee, Worker on Duty—Contractor, and Worker on Duty—Volunteer * * *.'' Finally, a pronoun reference in § 225.27(a) is corrected.

C. Regulatory Impact

Executive Order 12866 and DOT Regulatory Policies and Procedures

The amendments to the final rule have been evaluated in accordance with existing regulatory policies and procedures and are considered to be a nonsignificant regulatory action under DOT policies and procedures (44 FR 11034; Feb. 26, 1979). The amendments to the final rule also have been reviewed under Executive Order 12866 and are also considered ''nonsignificant'' under that Order.

The amendments to the final rule will decrease some of the impacts from that in the final rules published on June 18, November 22, and November 29, 1996. 61 FR 30940, 61 FR 59368, 61 FR 60632, respectively. This is especially true for the paperwork related burdens on some small entities. In addition, FRA's decision to produce its own personal computer (PC)-based software and provide it free of charge to any railroad will effectively increase the quantity of accident/incident reporting that will be performed through electronic means. Thus, the savings, that FRA expects to receive from a decrease in its dataentry costs, are also expected to increase above the original estimates that FRA provided in its Regulatory Impact Analysis for the final rule published on June 18, 1996.

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of rules to assess their impact on small entities, unless the Secretary certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The amendments to Part 225 in this document will effectively reduce the impact on some small entities. Railroads that operate off the general railroad system of transportation have been excepted from some requirements. Thus, the economic impact on tourist or excursion railroads that do not operate on the general system is reduced from that expected from the final rules published on June 18, November 22, and November 29, 1996. 61 FR 30940, 61 FR 59368, 61 FR 60632, respectively. In addition, railroads that operate on the general system that have 15 or fewer employees covered by the hours of service law, have also been excepted from some requirements. This will reduce the expected burden on a large number of small entities.

FRA has concluded that the amendments to the final rule will decrease the economic impact from that estimated in the final rules published on June 18, November 22, and November 29, 1996. 61 FR 30940, 61 FR 59368, 61 FR 60632, respectively. Therefore, the amendments to the final rule in this document will have a positive economic impact on these small entities since the final rule, as amended in this document, effectively excepts a large number of

small entities from some paperwork requirements.

Paperwork Reduction Act

The information collection requirements contained in the June 18, 1996 final rule, entitled Railroad Accident Reporting (61 FR 30940), were approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (Pub. L. 104–13) under control number 2130–0500 and are enforceable as approved. The approval will expire on August 31, 1999. Four of the several rules to amend 49 CFR Part 225 published together in this issue of the Federal Register, contain amendments to the approved information collections, while one adds a new information collection requirement. These revisions are subject to review by OMB under the Paperwork Reduction Act of 1995.

Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 (44 U.S.C. 3506(c)(2)(A)) requires Federal agencies to provide a 60-day notice in the Federal Register concerning each collection of information. To comply with this requirement, FRA is contemporaneously publishing a notice in the Federal Register. A description of the information collection requirements is shown in this notice along with an estimate of the annual reporting and recordkeeping burden. Should any respondents have comments on these information collection requirements, they should respond to the addresses located in that notice.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new or revised information collection requirements resulting from this rulemaking action. Once OMB approval is received, the OMB control number will be announced by separate notice in the Federal Register.

Environmental Impact

The amendments will not have any identifiable environmental impact.

Federalism Implications

The amendments to the final rule will not have a substantial effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Thus, in accordance with Executive Order 12612, preparation of a Federalism Assessment is not warranted.

List of Subjects

49 CFR Part 219

Alcohol abuse, Drug abuse, Railroad safety.

49 CFR Part 225

Railroad safety, Reporting and recordkeeping requirements.

The Final Rule

In consideration of the foregoing, FRA amends Parts 219 and 225, Title 49, Code of Federal Regulations to read as follows:

PART 219—[AMENDED]

1. The authority citation for Part 219 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20111, 20112, 20113, 20140, 21301, 21304; and 49 CFR 1.49(m).

2. In § 219.5, the definition of *Reporting threshold* is amended by removing ''§ 225.19(c)'' in the first sentence and by adding, in its place, ''§ 225.19(e)''.

PART 225—[AMENDED]

1. The authority citation for Part 225 continues to read as follows:

Authority: 49 U.S.C. 20103, 20107, 20901, 20902, 21302, 21311; 49 U.S.C. 103; 49 CFR 1.49 (c), (g), and (m).

2. Section 225.3 is amended by redesignating the introductory text as paragraph (a) introductory text and revising it to read as set forth below: by redesignating paragraphs (a), (b), and (c) introductory text as paragraphs (a) (1), (2), and (3), respectively; by redesignating paragraphs (c) (1), (2), (3), and (4) as paragraphs (a)(3) (i), (ii), (iii), nad (iv), respectively; and by adding new paragraphs (b), (c), and (d) to read as follows:

§ 225.3 Applicability.

(a) Except as provided in paragraphs (b), (c), and (d), this part applies to all railroads except—

* * * * *

(b) The Internal Control Plan requirements in § 225.33(a)(3) through (10) do not apply to—

(1) Railroads that operate or own track on the general railroad system of transportation that have 15 or fewer employees covered by the hours of service law (49 U.S.C. 21101–21107) and

(2) Railroads that operate or own track exclusively off the general system.

(c) The recordkeeping requirements regarding accountable injuries and illnesses and accountable rail equipment accidents/incidents found in § 225.25(a) through (g) do not apply to—

(1) Railroads that operate or own track on the general railroad system of transportation that have 15 or fewer employees covered by the hours of service law (49 U.S.C. 21101–21107) and

(2) Railroads that operate or own track exclusively off the general system.

(d) All requirements in this part to record or report an injury or illness incurred by any classification of person that results from a non-train incident do not apply to railroads that operate or own track exclusively off the general railroad system of transportation, unless the non-train incident involves in-service on-track equipment.

3. Section 225.5 is amended by revising paragraph (4) in the definition of Accident/incident, by revising the definition of *Establishment,* and by adding one sentence to the end of the definition of *Qualified health care professional* to read as follows:

§ 225.5 Definitions.

* * * * *

Accident/incident means:

* * * * *

(4) Occupational illness.

* * * * *

Establishment means a single physical location where workers report to work, where railroad business is conducted, or where services or operations are performed. Examples are: a division office, general office, repair or maintenance facility, major switching yard or terminal. For employees who are engaged in dispersed operations, such as signal or track maintenance workers, an ''establishment'' is typically a location where work assignments are initially made and oversight responsibility exists, *e.g.,* the establishment where the signal supervisor or roadmaster is located.

* * * * *

Qualified health care professional * * * In addition to licensed physicians, the term ''qualified health care professional'' includes members of other occupations associated with patient care and treatment such as chiropractors, podiatrists, physician's assistants, psychologists, and dentists.

* * * * *

§ 225.19 [Amended]

4. Section 225.19(c) is amended by adding after the phrase ''that result in damages greater than the current reporting threshold'' the following: *''(i.e.,* $6,300 for calendar years 1991 through 1996 and $6,500 for calendar year 1997)''.

5. The introductory text of § 225.25(h) is amended by removing the first and

second sentences and adding, in their place, the following:

§ 225.25 Recordkeeping.

* * * * *

(h) Except as provided in paragraph(h)(15) of this section, a listing of all injuries and occupational illnesses reported to FRA as having occurred at an establishment shall be posted in a conspicuous location at that establishment, within 30 days after the expiration of the month during which the injuries and illnesses occurred, if the establishment has been in continual operation for a minimum of 90 calendar days. If the establishment has not been in continual operation for a minimum of 90 calendar days, the listing of all injuries and occupational illnesses reported to FRA as having occurred at the establishment shall be posted, within 30 days after the expiration of the month during which the injuries and illnesses occurred, in a conspicuous location at the next higher organizational level establishment, such as one of the following: an operating division headquarters; a major classification yard or terminal headquarters; a major equipment maintenance or repair installation, *e.g.*, a locomotive or rail car repair or construction facility; a railroad signal and maintenance-of-way division headquarters; or a central location where track or signal maintenance employees are assigned as a headquarters or receive work assignments. These examples include facilities that are generally major facilities of a permanent nature where the railroad generally posts or disseminates company informational notices and policies, *e.g.*, the policy statement in the internal control plan required by § 225.33 concerning harassment and intimidation. At a minimum, ''establishment'' posting is required and shall include locations where a railroad reasonably expects its employees to report during a 12-month period and to have the opportunity to observe the posted list containing any reportable injuries or illnesses they have suffered during the applicable period.

* * *

* * * * *

6. The introductory text of § 225.25(h) is further amended by removing the last sentence and adding, in its place, the following:

§ 225.25 Recordkeeping.

* * * * *

(h) * * * The listing shall contain, at a minimum, the information specified in paragraphs(h)(1) through (14) of this section.

* * * * *

7. In § 225.25, paragraphs(h)(12) and (13) are revised and new paragraph(h)(15) is added to read as follows:

§ 225.25 Recordkeeping.

* * * * *

(h) * * *

(12) Preparer's name, title, telephone number with area code, and signature (or, in lieu of signing each establishment's list of reportable injuries and illnesses, the railroad's preparer of this monthly list may sign a cover sheet or memorandum which contains a list of each railroad establishment for which a monthly list of reportable injuries and illnesses has been prepared. This cover memorandum shall be signed by the preparer and shall have attached to it a duplicate copy of each establishment's list of monthly reportable injuries and illnesses. The preparer of the monthly lists of reportable injuries and illnesses shall mail or send by facsimile each establishment's list to the establishment in the time frame prescribed in paragraph (h) of this section.); and

(13) Date the record was completed.

* * * * *

(15) The railroad is permitted not to post information on an injury or illness only if the employee who incurred the injury or illness makes a request in writing to the railroad's reporting officer that his or her particular injury or illness not be posted.

§ 225.27 [Amended]

8. The second sentence of § 225.27(a) is amended by removing the words ''they relate'' and adding, in their place, ''it relates''.

§ 225.33 [Amended]

9. The third sentence of the introductory text of § 225.33(a) is amended by removing the word ''ten''.

Issued in Washington, D.C., on December 16, 1996.

Jolene M. Molitoris,

Federal Railroad Administrator.

[FR Doc. 96–32420 Filed 12–20–96; 8:45 am]

BILLING CODE 4910–06–P

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket No. 96–067; Notice 2]

Passenger Automobile Average Fuel Economy Standards; Final Decision to Grant Exemption

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Final decision.

SUMMARY: This final decision responds to a joint petition filed by Vector Aeromotive Corporation (Vector) and Automobili Lamborghini S.p.A. (Lamborghini) requesting that each company be exempted from the generally applicable average fuel economy standard of 27.5 miles per gallon (mpg) for model years (MYs) 1995 through 1997, and that lower alternative standards be established. In this document, NHTSA is establishing alternative standards of 12.8 mpg for MY 1995, 12.6 mpg for MY 1996, and 12.5 mpg for MY 1997, for Lamborghini and Vector.

DATES: *Effective date:* February 6, 1997. *Applicability dates:* This exemption and the alternative standards apply to Lamborghini and Vector for MYs 1995, 1996 and 1997.

Petitions for reconsideration: Petitions for reconsideration must be received no later than February 6, 1997.

ADDRESSES: Petitions for reconsideration of this rule should refer to the docket number and notice number cited in the heading of this notice and must be submitted to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street, SW, Washington DC 20590.

FOR FURTHER INFORMATION CONTACT: Ms. Henrietta Spinner, Office of Planning and Consumer Programs, NHTSA, 400 Seventh Street, SW, Washington DC 20590. Ms. Spinner's telephone number is: (202) 366–4802.

SUPPLEMENTARY INFORMATION:

Background

NHTSA is exempting Lamborghini and Vector from the generally applicable average fuel economy standard for 1995, 1996 and 1997 model year passenger automobiles and establishing alternative standards applicable to Lamborghini and Vector for each of these model years. This exemption is issued under the authority of section 32902(d) of Chapter 329 of Title 49 of the United States Code (formerly section 502(c) of the Motor Vehicle Information and Cost Savings