

by reference as specified in § 63.14 as described in paragraph (a)(46)(i)(A) of this section:

(A) The material incorporated into the Vermont Air Pollution Regulations at Chapter 5, Air Pollution Control, section 5–253.11, Perchloroethylene Dry Cleaning (effective as of December 15, 2016) pertaining to area source dry cleaning facilities in the State of Vermont jurisdiction, and approved under the procedures in § 63.93 to be implemented and enforced in place of the requirements for area source dry cleaning facilities in the Federal NESHAP for Perchloroethylene Dry Cleaning Facilities (subpart M of this part), effective as of July 11, 2008. For purposes of this paragraph (a)(46) the term “area source dry cleaning facilities” means any source that qualifies as an area source under § 63.320(h).

(1) *Authorities not delegated.* (i) Vermont is not delegated the Administrator’s authority to implement and enforce Vermont Air Pollution Control Regulations, Chapter 5, Air Pollution Control, section 5–253.11, in lieu of those provisions of subpart M of this part which apply to major sources, as defined in § 63.320(g).

- (i) [Reserved]
- (2) [Reserved]
- (B) [Reserved]
- (ii) [Reserved]

* * * * *

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DEPARTMENT OF TRANSPORTATION
Federal Railroad Administration

49 CFR Part 225
[FRA–2008–0136, Notice No. 10]
RIN 2130–ZA16

Monetary Threshold for Reporting Rail Equipment Accidents/Incidents for Calendar Year 2018

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

ACTION: Final rule.

SUMMARY: FRA’s accident/incident reporting regulations require railroads to report to the agency all rail equipment accidents/incidents above the monetary reporting threshold (reporting threshold) for that calendar year (CY). There is no change to the CY 2017 reporting threshold (\$10,700) for CY 2018 as the overall increase in wages and equipment costs were not great enough to cause the threshold to change when rounded to the nearest \$100.

DATES: This final rule is effective March 5, 2018. This final rule is applicable January 1, 2018.

FOR FURTHER INFORMATION CONTACT: Kebo Chen, Staff Director, U.S. Department of Transportation, Federal Railroad Administration, Office of Safety Analysis, RRS–22, Mail Stop 25, West Building 3rd Floor, Room W33–314, 1200 New Jersey Ave. SE, Washington, DC 20590 (telephone 202–493–6079); or Senya Waas, Trial Attorney, U.S. Department of Transportation, Federal Railroad Administration, Office of Chief Counsel, RCC–10, West Building 3rd Floor, Room W31–223, 1200 New Jersey Ave. SE,

Washington, DC 20590 (telephone 202–493–0665).

SUPPLEMENTARY INFORMATION:

Background

A “rail equipment accident/incident” is a collision, derailment, fire, explosion, act of God, or other event involving the operation of railroad on-track equipment (standing or moving) that results in damages to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material, greater than the reporting threshold for the year in which the event occurs. See 49 CFR 225.19(c). A railroad must report each rail equipment accident/incident to FRA using the Rail Equipment Accident/ Incident Report (Form FRA F 6180.54). See 49 CFR 225.19(b), (c), 225.21(a). Paragraphs (c) and (e) of 49 CFR 225.19 further provide that FRA will adjust the dollar figure constituting the reporting threshold, if necessary, every year under the procedures in 49 CFR part 225 Appendix B to reflect any cost increases or decreases.

Approximately one year has passed since FRA reviewed the reporting threshold. See 81 FR 94271, Dec. 23, 2016. Consequently, FRA has recalculated the reporting threshold under 49 CFR 225.19(c), using updated costs for labor and equipment. FRA has determined the current reporting threshold of \$10,700, which applies to rail equipment accidents/incidents that occur during CY 2017, should remain the same for rail equipment accidents/incidents that occur during CY 2018. The specific inputs to the equation set forth in Appendix B ($T_{new} = T_{prior} * [1 + 0.4(W_{new} - W_{prior})/W_{prior} + 0.6(E_{new} - E_{prior})/100]$) are:

| <i>T_{prior}</i> | <i>W_{new}</i> | <i>W_{prior}</i> | <i>E_{new}</i> | <i>E_{prior}</i> |
|--------------------------|------------------------|--------------------------|------------------------|--------------------------|
| \$10,700 | \$29.77918 | \$29.99942 | 203.83333 | 203.33333 |

Where:

- T_{new}* = New threshold;
- T_{prior}* = Prior threshold (with reference to the threshold, “prior” refers to the previous threshold rounded to the nearest \$100, as reported in the **Federal Register**);
- W_{new}* = New average hourly wage rate, in dollars;
- W_{prior}* = Prior average hourly wage rate, in dollars;
- E_{new}* = New equipment average Producer Price Index (PPI) value;
- E_{prior}* = Prior equipment average PPI value.

See 49 CFR part 225 Appendix B. Using the above figures, the calculated new threshold, represented as *T_{new}*, is

\$10,700.64, which is rounded to the nearest \$100 for a final reporting threshold of \$10,700 for CY 2018.¹

¹ Wage statistics are available from the Surface Transportation Board (STB), “Quarterly Wage Form A&B,” at https://www.stb.gov/stb/industry/econ_reports.html (visited December 5, 2017). The average hourly wage rate is determined by dividing the compensation for time worked at straight time rates by the service hours worked at straight time rates (yielding dollars per hour). FRA averages the second-quarter data reported for the Group No. 300 Maintenance of Way and Structures employees, and the Group No. 400 Maintenance of Equipment and Stores employees.

The equipment PPI is available at the Bureau of Labor Statistics (BLS), U.S. Department of Labor, “PPI Databases: Commodity Data,” at <https://www.bls.gov/ppi/> (visited December 5, 2017). Select Group 14 Transportation Equipment, then Item 144 Railroad Equipment, followed by checking Not Seasonally Adjusted. The complete Series ID is WPU144, base date 1982.

FRA intends to publish a rulemaking (RIN 2130–AC49) to reexamine its method for calculating the reporting threshold in 2018 because more accurate methodologies for calculating the threshold are available. FRA believes updating its methodology will ensure the reporting threshold reflects changes in equipment and labor costs as accurately as possible.

www.bls.gov/ppi/ (visited December 5, 2017). Select Group 14 Transportation Equipment, then Item 144 Railroad Equipment, followed by checking Not Seasonally Adjusted. The complete Series ID is WPU144, base date 1982.

Notice and Comment Procedures

FRA is proceeding directly to a final rule as it finds public notice and comment to be unnecessary per the “good cause” exemption in 5 U.S.C. 553(b)(3)(B). FRA made this finding because it: (1) Is required under current regulations to establish the monetary reporting threshold; (2) Is utilizing a formula developed after notice and comment in a final rule published in 2005 (70 FR 75414, Dec. 20, 2005); and (3) is not exercising any discretion in calculating and applying the monetary threshold for 2018.

Regulatory Evaluation

Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

FRA evaluated this final rule under existing policies and procedures, and determined it is non-significant under both Executive Orders 12866 and 13563, and DOT policies and procedures. See 44 FR 11034, Feb. 26, 1979. Furthermore, this final rule is exempt from the regulatory budgeting and two-for-one requirements of Executive Order 13771 as it has been determined to be non-significant.

Regulatory Flexibility Act

FRA developed this rule under Executive Order 13272, *Proper Consideration of Small Entities in Agency Rulemaking*, and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act (RFA) to ensure potential impacts of rules on small entities are properly considered. See E.O. 13272; 5 U.S.C. 601.

The RFA requires an agency to review regulations to assess their impact on small entities, unless the Secretary certifies the rule will not have a significant economic impact on a substantial number of small entities. Under Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104–121), Federal agencies may adopt their own size standards for small entities in consultation with both the Small Business Administration and public comment. Under that authority, FRA has published a final statement of agency policy formally establishing, for FRA’s regulatory purposes, that “small entities” are railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1–

1 (\$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less). See 49 CFR part 209 Appendix C. FRA used this definition for the current rulemaking.

About 748 of the approximately 799 railroads in the United States are considered small entities by FRA. FRA certifies this final rule will have no significant economic impact on a substantial number of small entities. To the extent this rule has any impact on small entities, the impact will be neutral or insignificant. The frequency of rail equipment accidents/incidents, and therefore also the frequency of required reporting, is generally proportional to the size of the railroad. A railroad employing thousands of employees and operating trains millions of miles is exposed to greater risks than one with a substantially smaller operation. Small railroads may go for months at a time without having a reportable occurrence of any type, and even longer without having a rail equipment accident/incident. Class III reported rail equipment accidents/incidents for a five-year period are shown below.

RAIL EQUIPMENT ACCIDENT/INCIDENTS (TRAIN ACCIDENTS) REPORTED BY SMALL RAILROADS

| Year | Class III train accidents | All railroad train accidents | Percent Class III train accidents/all railroad train accidents |
|------------|---------------------------|------------------------------|--|
| 2012 | 289 | 1,766 | 16 |
| 2013 | 307 | 1,853 | 17 |
| 2014 | 272 | 1,887 | 14 |
| 2015 | 288 | 1,936 | 15 |
| 2016 | 249 | 1,646 | 15 |

Source: FRA Safety Data website at <http://safetydata.fra.dot.gov/OfficeofSafety/Default.aspx> (visited December 8, 2017), Agency query.

On average over those five calendar years, small railroads reported about 15% (ranging from 14% to 17%) of the total number of rail equipment accidents/incidents. FRA notes that these data are subject to minor changes due to additional reporting.

The monetary reporting threshold, when rounded, did not increase for CY 2018. In general, however, absent this rulemaking (*i.e.*, absent increasing the reporting threshold in future years), the number of reportable accidents/incidents in future years would likely increase, as keeping the same threshold in place would not allow it to keep pace with the likely increases in wages and rail equipment repair costs. (Note that the calculated monetary threshold (before rounding) for CY 2017 was \$10,698 versus \$10,701 for CY 2018.)

Therefore, this rule will be neutral in effect (*i.e.*, accidents/incidents reportable by railroads in CY 2017 will be reportable in CY 2018). Any recordkeeping burden will not be significant, and will affect the large railroads more than the small railroads due to the higher proportion of reportable rail equipment accidents/incidents experienced by large entities.

Furthermore, FRA has determined the RFA does not apply to this rulemaking. As this rule updates the reporting threshold for CY 2018 using the formula developed through notice and comment rulemaking and published in Appendix B to 49 CFR part 225, FRA finds notice and public comment is unnecessary and would serve no public benefit. The Small Business Administration’s *A Guide for Government Agencies: How to*

Comply with the Regulatory Flexibility Act, p. 55 (2017) provides:

If, under the APA or any rule of general applicability governing federal grants to state and local governments, the agency is required to publish a general notice of proposed rulemaking (NPRM), the RFA must be considered [citing 5 U.S.C. 604(a)] If an NPRM is not required, the RFA does not apply.

As this rulemaking does not require a Notice of Proposed Rulemaking, the RFA does not apply.

Paperwork Reduction Act

There are no new or additional information collection requirements associated with this final rule. FRA’s collection of accident/incident reporting and recordkeeping information is currently approved under OMB No.

2130–0500. Therefore, FRA is not required to provide an estimate of a public reporting burden in this document.

Federalism Implications

Executive Order 13132 (64 FR 43255, Aug. 10, 1999) requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” See E.O. 13132. Policies that have federalism implications are defined in Executive Order 13132 to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” See E.O. 13132. Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. See E.O. 13132. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA analyzed this final rule under the principles and criteria in Executive Order 13132. This rule will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and the responsibilities among the various levels of government. See Executive Order 13132. In addition, FRA determined this rule does not impose substantial direct compliance costs on State and local governments. Accordingly, FRA concluded the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism assessment is not required.

Environmental Impact

FRA evaluated this final rule under its *Procedures for Considering Environmental Impacts* (FRA Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined this final rule is not a major

FRA action requiring the preparation of an environmental impact statement or environmental assessment because it is categorically excluded from detailed environmental review under FRA Procedures Section 4(c)(20), which addresses the promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation. See 64 FR 28547, May 26, 1999.

Consistent with FRA Procedures Section 4(c)(20), FRA concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds this rule is not a major Federal action that significantly affects the quality of the human environment.

Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform Act of 1995 (Reform Act) (Pub. L. 104–4, 2 U.S.C. 1531), each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law). See 2 U.S.C. 1531 Section 201. Section 202 of the Reform Act (2 U.S.C. 1532) further requires each agency to prepare a comprehensive written statement for any proposed or final rule that includes a Federal mandate that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year²

This final rule will not result in the expenditure of more than \$156,000,000 (the value equivalent of \$100,000,000 in 2015 dollars) by the public sector in any one year. Thus, preparation of such a statement is not required.

Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under Executive Order 13211, a “significant energy action” is defined as any action by an agency (normally

² See U.S. Department of Transportation, “Guidance—Threshold of Significant Regulatory Actions under the Unfunded Mandates Reform Act of 1995,” April 4, 2016, <https://www.transportation.gov/office-policy/transportation-policy/threshold-significant-regulatory-actions-under-unfunded-mandat-0>, as accessed December 12, 2017.

published in the **Federal Register**) that promulgates, or is expected to lead to the promulgation of, a final rule or regulation (including a notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking) that: (1)(i) Is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. See E.O. 13211. FRA has evaluated this rule under Executive Order 13211. FRA has determined this rule will not have a significant adverse effect on the supply, distribution, or use of energy, and, thus, is not a “significant energy action” under Executive Order 13211.

Privacy Act

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL–14 FDMS, accessible through www.dot.gov/privacy. In order to facilitate comment tracking and response, FRA encourages commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If one wishes to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

List of Subjects in 49 CFR Part 225

Investigations, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

In consideration of the foregoing, FRA amends part 225 of chapter II, subtitle B of title 49, Code of Federal Regulations, as follows:

PART 225—[AMENDED]

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

Authority: 49 U.S.C. 103, 322(a), 20103, 20107, 20901–02, 21301, 21302, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

- 2. In § 225.19, revise the first sentence of paragraph (c), and paragraph (e) to read as follows:

§ 225.19 Primary groups of accidents/incidents.

* * * * *

(c) *Group II—Rail equipment.* Rail equipment accidents/incidents are collisions, derailments, fires, explosions, acts of God, and other events involving the operation of on-track equipment (standing or moving) that result in damages higher than the current reporting threshold (*i.e.*, \$6,700 for calendar years 2002 through 2005, \$7,700 for calendar year 2006, \$8,200 for calendar year 2007, \$8,500 for calendar year 2008, \$8,900 for calendar year 2009, \$9,200 for calendar year 2010, \$9,400 for calendar year 2011, \$9,500 for calendar year 2012, \$9,900 for calendar year 2013, \$10,500 for calendar year 2014, \$10,500 for calendar year 2015, \$10,500 for calendar year 2016, and \$10,700 for calendar years 2017 and beyond, until revised) to railroad on-track equipment, signals, tracks, track structures, or roadbed, including labor costs and the costs for acquiring new equipment and material.

* * * * *

(e) The reporting threshold is \$6,700 for calendar years 2002 through 2005, \$7,700 for calendar year 2006, \$8,200 for calendar year 2007, \$8,500 for calendar year 2008, \$8,900 for calendar year 2009, \$9,200 for calendar year 2010, \$9,400 for calendar year 2011, \$9,500 for calendar year 2012, \$9,900 for calendar year 2013, \$10,500 for calendar year 2014, \$10,500 for calendar year 2015, \$10,500 for calendar year 2016, and \$10,700 for calendar years 2017 and beyond, until revised. The procedure for determining the reporting threshold for calendar years 2006 and beyond appears as paragraphs 1–8 of appendix B to part 225.

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Juan D. Reyes, III,
Chief Counsel.

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BILLING CODE 4910-06-P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1102

[Docket No. EP 739]

Ex Parte Communications in Informal Rulemaking Proceedings

AGENCY: Surface Transportation Board.
ACTION: Final rule.

SUMMARY: In this decision, the Surface Transportation Board (the Board) modifies its regulations to permit, subject to disclosure requirements, ex

parte communications in informal rulemaking proceedings. The Board also adopts other changes to its ex parte rules that would clarify and update when and how interested persons may communicate informally with the Board regarding pending proceedings other than rulemakings. The intent of the modified regulations is to enhance the Board's ability to make informed decisions through increased stakeholder communications while ensuring that the Board's record-building process in rulemaking proceedings remains transparent and fair.

DATES: This rule is effective on April 4, 2018.

ADDRESSES: Requests for information or questions regarding this final rule should reference Docket No. EP 739 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street SW, Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT:

Jonathon Binet at (202) 245-0368. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

SUPPLEMENTARY INFORMATION: The Board's current regulations at 49 CFR 1102.2 generally prohibit most informal communications between the Board and interested persons concerning the merits of pending Board proceedings. These regulations require that communications with the Board or Board staff regarding the merits of an "on-the-record" Board proceeding not be made on an ex parte basis (*i.e.*, without the knowledge or consent of the parties to the proceeding).¹ See 49 CFR 1102.2(a)(3), (c). The current regulations detail the procedures required in the event an impermissible communication occurs and the potential sanctions for violations. See 49 CFR 1102.2(e), (f).

In 1977, the Board's predecessor agency, the Interstate Commerce Commission (ICC), determined that the general prohibition on ex parte communications in proceedings should include the informal rulemaking proceedings the Board uses to promulgate regulations.² See *Revised*

¹ "On-the-record proceeding" means "any matter described in Sections 556-557 of the Administrative Procedure Act [(APA)] (5 U.S.C. 556-557) or any matter required by the Constitution, statute, Board rule, or by decision in the particular case, that is decided solely on the record made in a Board proceeding." 49 CFR 1102.2(a)(1).

² The APA, 5 U.S.C. 551-559, governs two categories of agency rulemaking: Formal and informal. Formal rulemaking is subject to specific procedural requirements, including hearings,

Rules of Practice, 358 I.C.C. 323, 345 (1977).³ At that time, several court decisions expressed the view that ex parte communications in informal rulemaking proceedings were inherently suspect.⁴ Accordingly, it has long been the agency's practice to prohibit meetings with individual stakeholders on issues that are the topic of pending informal rulemaking proceedings.

At the same time, however, other court decisions were more tolerant of ex parte communications in informal rulemaking proceedings, so long as the proceedings were not quasi-adjudicative in nature and the process remained fair.⁵ In 1981, in *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981), the U.S. Court of Appeals for the District of Columbia Circuit significantly clarified and liberalized treatment of this issue. In that case, the court considered the "timing, source, mode, content, and the extent of . . . disclosure" of numerous written and oral ex parte communications received after the close of the comment period to determine whether those communications violated the governing statute or due process. *Id.* at 391. The court held that, because the agency docketed most of the ex parte communications and none of the comments were docketed "so late as to

presiding officers, and a strict ex parte prohibition. See 5 U.S.C. 556-57. But most federal agency rulemakings, including the Board's, are informal rulemaking proceedings subject instead to the less restrictive "notice-and-comment" requirements of 5 U.S.C. 553.

³ In *Revised Rules of Practice*, the ICC stated "ex parte communication during a rulemaking is just as improper as it is during any other proceeding. The Commission's decisions should be influenced only by statements that are a matter of public record." 358 I.C.C. at 345.

⁴ See, e.g., *Home Box Office v. Fed. Comm'n's Comm'n*, 567 F.2d 9, 51-59 (D.C. Cir. 1977) (finding that ex parte communications that occurred after the notice of proposed rulemaking (NPRM) violated the due process rights of the parties who were not privy to the communications because the written administrative record would not reflect the possible "undue influence" exerted by those stakeholders who had engaged in ex parte communications); *Nat'l Small Shipments Traffic Conference v. ICC*, 590 F.2d 345, 351 (D.C. Cir. 1978) (finding ex parte communications "violate[d] the basic fairness of a hearing which ostensibly assures the public a right to participate in agency decision making," foreclosing effective judicial review); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959) (finding that undisclosed ex parte communications between agency commissioners and a stakeholder were unlawful because the informal rulemaking involved "resolution of conflicting private claims to a valuable privilege, and that basic fairness requires such a proceeding to be carried on in the open").

⁵ See, e.g., *Action for Children's Television v. Fed. Comm'n's Comm'n*, 564 F.2d 458 (D.C. Cir. 1977) (upholding the agency's decision not to issue proposed rules and finding no APA violation for ex parte discussions where the agency provided a meaningful opportunity for public participation and the proceeding did not involve competing claims for a valuable privilege).