



4910-06-P

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 272

[Docket No. FRA-2008-0131, Notice No. 2]

RIN 2130-AC00

Critical Incident Stress Plans

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

ACTION: Final rule.

SUMMARY: FRA issues this final rule in accordance with a statutory mandate that the Secretary of Transportation (Secretary) require certain major railroads to develop, and submit to the Secretary for approval, critical incident stress plans that provide for appropriate support services to be offered to their employees who are affected by a “critical incident” as defined by the Secretary. The final rule contains a definition of the term “critical incident,” the elements appropriate for the rail environment to be included in a railroad’s critical incident stress plan, the type of employees to be covered by the plan, a requirement that a covered railroad submit its plan to FRA for approval, and a requirement that a railroad adopt and comply with its FRA-approved plan.

DATES: This final rule is effective on [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Petitions for reconsideration must be

received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Petitions for reconsideration and comments on petitions for reconsideration: Any petitions for reconsideration or comments on petitions for reconsideration related to this Docket No. FRA-2008-0131, Notice No. 2 may be submitted by any of the following methods:

- Federal eRulemaking Portal: Go to www.Regulations.gov. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC 20590-0001.
- Hand Delivery: Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12-140, 1200 New Jersey Avenue, SE, Washington, DC, between 9 a.m. and 5 p.m. ET, Monday through Friday, except Federal holidays.
- Fax: 202-493-2251.

Instructions: All submissions must include the agency name and docket number or Regulatory Identification Number (RIN) for this rulemaking. Please note that all comments received will be posted without change to www.Regulations.gov, including any personal information provided. Please see the discussion under the Privacy Act heading in the Supplementary Information section of this document.

Docket: For access to the docket to read background documents or comments received, go to www.Regulations.gov at any time or visit the Docket Management Facility, U.S. Department of Transportation, West Building, Ground floor, Room W12-

140, 1200 New Jersey Avenue, SE, Washington, DC between 9 a.m. and 5 p.m. ET,
Monday through Friday, except Federal holidays.

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I. Executive Summary

This final rule requires each Class I railroad, intercity passenger railroad, and commuter railroad to establish and implement a critical incident stress plan for certain employees of the railroad who are directly involved in, witness, or respond to, a critical incident.

Although FRA has never regulated critical incident stress plans, many railroads have had some form of critical incident stress plan in place for many years. This

rulemaking responds to the Rail Safety Improvement Act of 2008 (Public Law 110-432, Div. A) (RSIA) mandate that the Secretary of Transportation establish regulations to define “critical incident” and to require certain railroads to develop and implement critical incident stress plans.

FRA received several public comments in response to FRA’s June 28, 2013, notice of proposed rulemaking on Critical Incident Stress Plans (NPRM), see 78 FR 38878. Comments include remarks on FRA’s proposals related to the definition of critical incident, the content of critical incident stress plans, the proposed process for submitting critical incident stress plans to FRA for approval and assuring all relevant railroad personnel are aware of the relief available pursuant to a railroad’s plan. After careful consideration of each comment received, in this final rule FRA is adopting the rule text substantially as proposed in the NPRM, except for clarifying changes to 49 CFR 272.101(a) and (f), and making electronic submission mandatory in 49 CFR 272.105.

As discussed in detail below, FRA reviewed the applicable science and information received through the Railroad Safety Advisory Committee (RSAC), and as required by Congress, in this final rule, FRA defines “critical incident” and requires a set of minimum standards for critical incident stress plans. This approach provides covered employees with options for relief following a critical incident, yet allows for substantial flexibility within the regulatory framework so that railroads may adapt their plans commensurate with their needs. The final rule defines a “critical incident” as either — (1) An accident/incident reportable to FRA under 49 CFR part 225 that results in a fatality, loss of limb, or a similarly serious bodily injury; or (2) A catastrophic accident/incident reportable to FRA under part 225 that could be reasonably expected to

impair a directly-involved employee's ability to perform his or her job duties safely. The required set of minimum standards for critical incident stress plans include allowing a directly-involved employee to obtain relief from the remainder of the tour of duty, providing for the directly-involved employee's transportation to the home terminal (if applicable), and offering a directly-involved employee appropriate support services following a critical incident. This final rule requires that each railroad subject to this rule submit its plan to FRA for approval.

FRA has analyzed the economic impacts of this final rule against a "status quo" baseline that reflects present conditions (i.e., primarily what applicable railroads are already doing with respect to critical incident policy). As done when preparing the NPRM and based on both RSAC meetings and discussions with the rail industry, FRA's analysis assumes that all railroads affected by the final rule currently have policies that include a critical incident stress plan, thereby reducing the costs of compliance associated with this final rule. In estimating these compliance costs, FRA included costs associated with training supervisors on how to interact with railroad employees who have been affected by a critical incident, employee training, counseling, and other support services, and costs associated with the submission of critical incident stress plans to FRA for approval. FRA estimates that the costs of the final rule for a 20-year period would total \$1,943,565. Using a 7 percent and a 3 percent discount rate, the total discounted costs will be \$1,337,830 and \$1,615,519, respectively.

The final rule contains minimum standards for leave, counseling, and other support services. These standards would help create benefits by providing employees with knowledge, coping skills, and services that would help them: (1) recognize and

cope with symptoms of normal stress reactions that commonly occur as a result of a critical incident; (2) reduce their chance of developing a disorder such as depression, Post-Traumatic Stress Disorder (PTSD), or Acute Stress Disorder (ASD) as a result of a critical incident; and (3) recognize symptoms of psychological disorders that sometimes occur as a result of a critical incident and know how to obtain prompt evaluation and treatment of any such disorder, if necessary. FRA anticipates that implementation of this final rule would yield benefits by reducing long-term healthcare costs associated with treating PTSD, ASD, and other stress reactions; and costs that accrue either when an employee is unable to return to work for a significant period of time or might leave railroad employment due to being affected by PTSD, ASD, or other stress reactions. In addition, safety risk posed by having a person who has just been involved in a critical incident performing safety critical functions is also reduced. The majority of the quantifiable benefits identified by FRA's analysis are associated with railroad employee retention and a reduction of long-term healthcare costs associated with PTSD cases that were not treated appropriately after a critical incident. FRA expects that this final rule would decrease the number of employees who leave the railroad industry due to PTSD, ASD, or other stress reactions, as early treatment for such conditions following exposure to a critical incident would reduce the likelihood of developing the conditions. In addition, if a railroad employee involved in a critical incident did develop PTSD, ASD, or other stress reaction despite the initial relief afforded by a railroad's critical incident stress plan, FRA expects that this final rule would decrease the duration of the condition as the chances for early identification of the condition would be increased and more immediate healthcare would be provided to the affected individuals. FRA estimates that

the present value of the quantifiable benefits for a 20-year period would total \$2,630,000. Using a 7 percent and a 3 percent discount rate, the total discounted benefits would be \$1,505,622 and \$2,023,548, respectively. Overall, FRA finds that the value of the anticipated benefits would justify the cost of implementing the final rule.

II. Overview of Critical Incidents and Critical Incident Stress Plans

A. Statutory Mandate and Authority to Conduct this Rulemaking

On October 16, 2008, Congress enacted the RSIA. Section 410 of the RSIA (Section 410) mandates that the Secretary of Transportation (Secretary) require “each Class I railroad carrier, each intercity passenger railroad carrier, and each commuter railroad carrier to develop and submit for approval to the Secretary a critical incident stress plan that provides for debriefing, counseling, guidance, and other appropriate support services to be offered to an employee affected by a critical incident.” See Section 410(a). Section 410 mandates that the plans include provisions for relieving employees who are involved in, or who witness, critical incidents from their tours of duty, and for providing leave for such employees from their normal duties as may be necessary and reasonable to receive preventive services and treatment related to the critical incident. See Section 410(b). Section 410 specifically requires the Secretary to define the term “critical incident” for purposes of this rulemaking. See Section 410(c). The Secretary has delegated his responsibilities under the RSIA to the Administrator of FRA. See 49 CFR 1.89(b). In the Section-by-Section Analysis below, FRA discusses how the regulatory text addresses each portion of the Section 410 mandates. This final rule is also issued pursuant to FRA’s general rulemaking authority at 49 U.S.C. 20103.

As required by Section 410(a), FRA consulted with the Department of Health and Human Services (HHS) and the Department of Labor (DOL) in preparing this final rule. Specifically, in addition to consulting with representatives of HHS and DOL, FRA provided those departments with an advance copy of the proposed regulation and requested input on FRA's approach. FRA has incorporated the suggestions provided by both HHS's Substance Abuse and Mental Health Services Administration (SAMHSA) and DOL's Wage and Hour Division.

B. Factual Background¹

As discussed thoroughly in the NPRM, highway-rail grade crossing accidents and trespasser incidents along the railroad right-of-way are an unfortunate reality for employees in the railroad industry. Railroad work carries the risk that certain employees will be directly involved in a critical incident, often outside the control of the employees, which can lead to severe emotional and psychological distress, including PTSD and the more immediate ASD.² There are concerns about the impact of exposure to traumatic incidents on employees in safety-sensitive jobs, most notably engineers and conductors.

Until this rulemaking proceeding, a national, uniform approach to critical incident response in the railroad industry did not exist, with only a handful of States taking action through statutes or regulations to aid critical incident response in the railroad industry.

¹ Much of this background information and review of the literature is derived from the independent final report prepared by FRA grantee, Dr. Richard Gist, in support of Grant FR-RRD-0024-11-01, titled, "Proposed Key Elements of Critical Incident Intervention Program For Reducing the Effects of Potentially Traumatic Exposure On Train Crews to Grade Crossing and Trespasser Incidents." See Docket No. FRA-2008-0131. Articles cited in this final rule are available for viewing at FRA upon request.

² ASD is "a mental disorder that can occur in the first month following a trauma. The symptoms that define ASD overlap with those for PTSD." ASD can lead to PTSD, but does not always. A "PTSD diagnosis cannot be given until symptoms have lasted for one month." U.S. Department of Veterans Affairs, National Center for PTSD, available at <http://www.ptsd.va.gov/public/pages/acute-stress-disorder.asp> (last accessed September 18, 2013).

With this final rule, FRA defines the term “critical incident” in the railroad setting, which if met, would trigger the requirement that appropriate support services be offered to railroad employees affected by such incidents.

PTSD and ASD can develop following any traumatic event that threatens one’s personal safety or the safety of others, or causes serious physical, cognitive or emotional harm. While such disorders are most often initiated by a threat to one’s life or the witnessing of brutal injury or traumatic death—in combat situations, for example, or during violent accidents or disasters—any overwhelming life experience can trigger the disorders, especially if the event is perceived as unpredictable and uncontrollable. Individuals exposed to traumatic events may experience alterations in their neurologic, endocrine, and immune systems, which have been linked to adverse changes in overall health.³ These changes and symptoms can be ameliorated if treated appropriately, usually with psychotherapy and/or medications. However, PTSD and ASD often go undiagnosed, as few primary care providers routinely assess for it and more often than not, attribute the symptoms to less serious forms of depression, anxiety, and general emotional distress.⁴

³ In a study of 830 train drivers in Norway, the 48 percent of participants who had experienced at least one on-the-track accident reported considerably more health problems than those who reported no such exposure. Their symptoms included musculoskeletal, gastrointestinal, and sleep pattern issues and continued from the incident to the time of the study (for some participants up to ten years). This study also revealed that the more pronounced initial reactions to on-the-track accidents, the more severe and persistent were the health complaints post-exposure. Vatshelle, A. & Moen, B. E. (1996). Serious on-the-track accidents experienced by train drivers: Psychological reactions and long-term health effects. Journal of Psychosomatic Research, 42(1), 43-52. See also Wignall, E. L., Dickson, J. M., Vaughan, P., Farrow, T. F. D., Wilkinson, I. D., Hunter, M. D., & Woodruff, P. W. R. (2004). Smaller hippocampal volume in patients with recent-onset posttraumatic stress disorder. Biological Psychiatry, 56(11), 832–836.

⁴ Gerrity M. S., Corson, K., & Dobscha S. K. (2007). Screening for posttraumatic stress disorder in Veterans’ Affairs primary care patients with depression symptoms. Journal of General Internal Medicine, 22(9), 1321–1324.

In 2011, there were approximately 2,000 highway-rail grade crossing accidents, and almost 800 casualties to persons trespassing on railroad property (trespassers). These incidents resulted in approximately 660 fatalities and over 1,400 non-fatal injuries. Each of these incidents, as well as other traumatic events such as railroad accidents or incidents resulting in serious injury or death to railroad employees, hold potential for causing ASD, PTSD, or other health and safety-related problems, in any railroad employee who is present. Some locomotive engineers and conductors have had the misfortune of experiencing multiple potential PTSD/ASD-invoking events over the course of their careers.⁵

Exposure of railroad employees, particularly locomotive engineers and conductors, to prototypical potentially traumatic exposures is well established. Incursion events, such as vehicular accidents at highway-rail grade crossings and pedestrian incursions onto the railroad right-of-way (frequently as a method of suicide) often involve fatalities and the injuries sustained may be gruesome. Locomotive engineers and conductors, because of their proximity to the accident scene, must often tend to the injured and secure the scene, compounding the extent and the duration of exposure. In particular, locomotive engineers may be alone in the cab when an on-the-track accident occurs. Further, train crews are required to report the incident, secure the train, and often leave the train and examine the victims. Crew members may even provide first aid if victims are alive, and wait, sometimes for long periods, for assistance or instructions.

⁵ The Associated Press, Fatal Collisions Traumatize Nation's Train Engineers, August 14, 2009. Saed Hindash, [The Star-Ledger](http://www.nj.com/insidejersey/index.ssf/2009/06/death_by_train.html). Death by Train. June 18, 2009. http://www.nj.com/insidejersey/index.ssf/2009/06/death_by_train.html (“Over a 40-year career, the average engineer will be involved in five to seven incidents, says Darcy, who has had seven fatalities.”).

Systematic empirical studies of the health impact on railroad personnel of this kind of experience are limited. The best designed studies have been European and show clinically diagnosed PTSD in 7 to 14 percent of those exposed. FRA has found no empirical studies of treatment efficacy and impact within the U.S. railroad population, presumably due to the relatively small population annually treated and the different locations and systems involved in railroad employees' identification and care.

If left untreated, mental health conditions carry significant costs for employers in the form of "presenteeism," when employees come to work, but have lowered productivity.⁶ Presenteeism can have catastrophic safety consequences for railroads. Symptoms such as sleep difficulties, trouble concentrating, hypervigilance and exaggerated sensory reactions—often leading sufferers to misuse alcohol to reduce the stress—compromise workers' safety at work and the safety of others, and lower employees' productivity on the job. One study revealed that employees are more likely to engage in workplace presenteeism than calling in sick (absenteeism).⁷

All major railroads have plans to provide their employees with assistance and intervention following traumatic events. Most of these programs have been in existence for a number of years, usually as part of a railroad's "Employee Assistance Program" (EAP). The descriptions of interventions, timing, and delivery in these programs are

⁶ Kessler, R.C. (2000). Posttraumatic stress disorder: The burden to the individual and society. *Journal of Clinical Psychiatry*, 61(suppl. 5), 4-12. Kessler, R.C., & Greenberg, P.E. (2002). The economic burden of anxiety and stress disorders. In K.L. Davis, D. Charney, J.T. Coyle, & C. Nemeroff (Eds.), *Neuropsychopharmacology: The Fifth Generation of Progress*. Philadelphia: Lippincott, Williams & Wilkins. Pilette, P. C. (2005). Presenteeism and productivity: Two reasons employee assistance programs make good business cents. *Annals of the American Psychotherapy Association*, 8(1), 12-14.

⁷ Caverley, N., Cunningham, J. B., & MacGregor, J. M. (2007). Sickness presenteeism, sickness absenteeism, and health following restructuring in a public service organization. *Journal of Management Studies*, 44(2), 304-319.

often “transplanted” from programs created for fire, rescue, and emergency services personnel in the 1980s and 1990s. These approaches, particularly those built around “critical incident stress debriefing” and related interventions, have come under increasing scrutiny as independent research has reported such interventions to not be helpful in certain situations and even to paradoxically inhibit the natural recovery of certain vulnerable participants. Accordingly, most authoritative guidelines now caution against the routine application of these approaches, particularly those built around “critical incident stress debriefing,” and some now list them as directly contraindicated.

While there are variations among railroads’ existing programs, there are also substantial similarities reflected with respect to critical elements mandated by statute.⁸ For example, many railroads provide assistance and intervention following critical incidents, often through the use of the railroad’s EAP. The majority of existing plans allow for immediate relief from duty upon request for the remainder of the tour of duty, as well as transportation to the home terminal for affected employees. Finally, many plans allow for additional leave following the tour of duty upon request, often involving contact with occupational medicine or EAP representatives.⁹ Therefore, several of these common elements are incorporated into this final rule.

III. Overview of the RSAC

⁸ The Association of American Railroads (AAR) provided a matrix to the RSAC Critical Incident Working Group (CIWG) summarizing key characteristics of programs as submitted by nine member railroads. Several railroads also submitted their current policies regarding critical incidents in the workplace.

⁹ Unpaid, job-protected leave under the Family and Medical Leave Act (FMLA) may be available to an employee involved in a critical incident. FMLA leave may be considered where an eligible employee of a covered employer suffers a serious health condition as a result of the incident. For additional guidance on the FMLA, please contact the United States Department of Labor or visit www.dol.gov.

In March 1996, FRA established RSAC, which provides a forum for developing consensus recommendations to the Administrator of FRA on rulemakings and other safety program issues. 61 FR 9740 (Mar. 11, 1996). RSAC's charter under the Federal Advisory Committee Act (Public Law 92-463) was most recently renewed in 2012. 77 FR 28421 (May 14, 2012).

RSAC includes representation from all of FRA's major stakeholders, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. An alphabetical list of RSAC members includes the following:

AAR;

American Association of Private Railroad Car Owners (AAPRCO);

American Association of State Highway and Transportation Officials (AASHTO);

American Chemistry Council (ACC);

American Petroleum Institute (API);

American Public Transportation Association (APTA);

American Short Line and Regional Railroad Association (ASLRRA);

American Train Dispatchers Association (ATDA);

Association of Railway Museums (ARM);

Association of State Rail Safety Managers (ASRSM);

Brotherhood of Locomotive Engineers and Trainmen (BLET);

Brotherhood of Maintenance of Way Employees Division (BMWED);

Brotherhood of Railroad Signalmen (BRS);

The Chlorine Institute, Inc.;

Federal Transit Administration (FTA);*

The Fertilizer Institute;

High Speed Ground Transportation Association;

Institute of Makers of Explosives;

International Association of Machinists and Aerospace Workers;

International Brotherhood of Electrical Workers (IBEW);

Labor Council for Latin American Advancement;*

League of Railway Industry Women;*

National Association of Railroad Passengers;

National Association of Railway Business Women;*

National Conference of Firemen & Oilers;

National Railroad Passenger Corporation (Amtrak);

National Railroad Construction and Maintenance Association (NRCMA);

National Transportation Safety Board (NTSB);*

Railway Passenger Car Alliance;

Railway Supply Institute;

Safe Travel America;

Secretaria de Comunicaciones y Transporte;*

Sheet Metal Workers International Association;

Tourist Railway Association Inc.;

Transport Canada;*

Transport Workers Union of America;

Transportation Communications International Union/BRC (TCIU);

Transportation Security Administration (TSA); and

United Transportation Union (UTU).

*Indicates associate, non-voting membership.

When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If the task is accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task. These recommendations are developed by consensus. A working group may establish one or more task forces to develop facts and options on a particular aspect of a given task. The task force then provides that information to the working group for consideration.

If a working group comes to a unanimous consensus on recommendations for action, the proposal is presented to the full RSAC for a vote. If the proposal is accepted by a simple majority of RSAC, the proposal is formally recommended to FRA. FRA then determines what action to take on the recommendation. Because FRA staff members play an active role at the working group level in discussing the issues and options and in drafting the language of the consensus proposal, FRA is often favorably inclined toward the RSAC recommendation.

However, FRA is in no way bound to follow the RSAC recommendation, and the agency exercises its independent judgment on whether the recommended rule achieves the agency's regulatory goal, is soundly supported, and is in accordance with policy and legal requirements. Often, FRA varies in some respects from the RSAC recommendation in developing the actual regulatory proposal or final rule. Any such variations are noted and explained in the rulemaking document issued by FRA. If the working group or

RSAC is unable to reach consensus on recommendations for action, FRA will proceed to resolve the issue through traditional rulemaking proceedings.

IV. RSAC Critical Incident Working Group

The Critical Incident Task Force (Task Force) was formed as part of the Medical Standards Working Group, and its task statement (Task No. 09-02) was accepted by RSAC on September 10, 2009. On July 2, 2010, FRA solicited bids for a grant to assess the current knowledge of post-traumatic stress interventions and to advance evidence-based recommendations for controlling the risks associated with traumatic exposures in the railroad setting. On March 11, 2011, FRA awarded the grant to the National Fallen Firefighters Foundation. On May 20, 2011, the Task Force was reformulated into an independent working group, the Critical Incident Working Group (CIWG). Task No. 09-02 (amended to reflect the new independent working group) specified that the purpose of the CIWG is to provide advice regarding the development of implementing regulations for Critical Incident Stress Plans as required by the RSIA. The Task Force further assigned the CIWG to do the following: (1) define what a “critical incident” is that requires a response; (2) review available data, literature, and standards of practice concerning critical incident programs to determine appropriate action when a railroad employee is involved in, or directly witnesses, a critical incident; (3) review any evaluation studies available for existing railroad critical incident programs; (4) describe program elements appropriate for the rail environment, including those requirements set forth in the RSIA; (5) provide an example of a suitable plan (template); and (6) assist in the preparation of a NPRM.

Throughout 2011, the CIWG met four times. At the conclusion of the last meeting, an informal task force was formed to consider the substantive agreements made by the CIWG and to draft regulatory language around those agreements for the CIWG's consideration and vote. The small task force presented the language to the full CIWG for an electronic vote on August 6, 2012. The CIWG reached a consensus on all but one item¹⁰ and forwarded a proposal to the full RSAC on August 21, 2012. RSAC voted to approve the CIWG's recommended text on September 27, 2012 and that recommended text provided the basis for this final rule. While the CIWG did discuss developing a general template flow chart of a suitable critical incident stress plan, as recommended by the Grantee's Final Report, a specific model plan that could be adapted and adopted by railroads was not developed by the CIWG. Instead, the CIWG focused its efforts on the definition of critical incident and the program elements essential for the regulatory text.

In addition to FRA staff, the members of the CIWG include the following:

AAR, including members from BNSF Railway Company (BNSF), Canadian National Railway (CN), Canadian Pacific Railway (CP), CSX Transportation, Inc. (CSX), The Kansas City Southern Railway Company (KCS), Norfolk Southern Railway Company (NS), Northeast Illinois Regional Commuter Railroad Corporation (Metra), and Union Pacific Railroad Company (UP);

Amtrak;

¹⁰ Consensus was not reached on the issue of whether a railroad should be required to provide labor organizations' general chairpersons (in addition to the international/national president of the labor organization) with a copy of a railroad's critical incident stress plan.

APTA, including members from Greater Cleveland Regional Transit Authority; Long Island Rail Road (LIRR); MTA - Metro-North Railroad; and Southern California Regional Rail Authority (SCRRA);

ASLRRA (representing short line and regional railroads);

ATDA;

BLET;

BMWED;

BRC/TCIU;

BRS;

NRCMA; and

UTU.

Staff from DOT's John A. Volpe National Transportation Systems Center attended all of the meetings of the CIWG and contributed to the technical discussions.

FRA has greatly benefited from the open, informed exchange of information during the meetings. In developing this final rule, FRA relied heavily upon the work of the CIWG.

V. FRA's Approach to Critical Incident Stress Plans

In this final rule, FRA defines the term "critical incident" and lists minimum criteria that must be addressed by each railroad's critical incident stress plan. The regulatory text would allow a railroad to utilize its existing critical incident stress plan as a base, making modifications as necessary to ensure compliance with the minimum standards contained in this final rule. The final rule would provide each railroad with the opportunity to conform its critical incident stress plan's screening and intervention

components to current best practices and standards for evidence-based care. This flexible, standards-based approach allows for innovation and plan modification in response to new scientific developments in this field.

VI. Discussion of Public Comments and Conclusions Regarding the Final Rule

FRA notified the public of its options to submit written comments on the NPRM and to request a public, oral hearing on the NPRM as well. No request for a public hearing was received. However, a number of interested parties submitted written comments to the docket, and FRA has considered all of these comments in preparing this final rule. Specifically, written comments were received from AAR; APTA; ATDA, BLET, BMWED, BRS, TCU, UTU-SMART (Labor); New York State Metropolitan Transportation Authority (Long Island Rail Road and Metro-North Railroad) (NYS MTA); the Southeastern Pennsylvania Transportation Authority (SEPTA); and a private citizen. FRA reviewed and analyzed each issue mentioned in the comments. The major points of the comments are addressed below, and individual points made are covered in more depth in the Section-by-Section Analysis.

A. Section 272.9, Definitions

As FRA requested in the NPRM, Labor, AAR, APTA, and NYS MTA submitted comments addressing whether FRA should include explicit language in the definition of “critical incident” to exclude “near miss” scenarios. The commenters agree that “near miss” scenarios did not need to be included in the definition of “critical incident.” Labor, NYS MTA, and APTA emphasize that while the definition need not include a single “near miss” scenario, railroads should retain the discretion to apply critical incident procedures to what might be classified as a “near miss” or other situations that are not

required by the regulation to be considered critical incidents. As such, in this final rule, FRA has kept the definition of “critical incident” the same as that proposed in the NPRM, and notes in the Section-by-Section Analysis of the definition of critical incident below that “near miss” scenarios are not required to be addressed in a railroad’s critical incident stress plan. FRA emphasizes, however, that railroads have the flexibility to determine on a case-by-case basis whether individual or multiple “near miss” scenarios should be considered a critical incident.

SEPTA recommends several changes to the definitions of “critical incident” and “directly-involved employee” which are discussed in detail in the Section-by-Section Analysis below. Specifically, SEPTA recommends clarifying the definition of “critical incident” to include “severe burns and readily visible gross trauma” as a type of “similarly serious bodily injury.” In the definition of “directly-involved employee,” SEPTA recommends adding language clarifying what is meant by the terms “closely connected” and “in person.” SEPTA also expresses the view that railroad police and accident investigators should not be excluded from the definition of “directly-involved employee.”

While FRA agrees in principal with the general substance of SEPTA’s comments, the agency does not believe that modifying the RSAC recommended language is necessary to address the comments. Instead, in response to SEPTA’s comments FRA has included a discussion clarifying these issues in the Section-by-Section Analysis.

B. Section 272.101, Content of a Critical Incident Stress Plan

As proposed, this section would require that a railroad’s critical incident stress plan (CISP) contain at least provisions for carrying out the objectives described in

paragraphs (a)-(g) of the section. FRA received comments in response to proposed paragraphs (a), (e), and (f) of this section, and regarding FRA's preamble discussion of what would constitute "appropriate support services" in accordance with proposed paragraph (d). After careful consideration of the comments received, FRA is adopting the regulatory language of this section as proposed, with the exception of clarifying amendments to paragraphs (a) and (f). A more detailed discussion of FRA's analysis of the comments received is found in the Section-by-Section Analysis below.

C. Section 272.103, Submission of a Critical Incident Stress Plan

As proposed, § 272.103(b) requires, in part, that each railroad serve a copy of its proposed CISP (or a material modification to an existing CISP) on the international president/national president of any non-profit employee labor organization representing a class or craft of the railroad's employees covered by its CISP. As FRA requested in the NPRM, several commenters discuss this service list requirement. Consistent with the views expressed by Labor representatives during CIWG meetings, Labor disagrees with FRA's proposal to limit service of a proposed CISP to only the international/national president of the relevant Labor organizations, while AAR supports the proposed service list requirement. For the reasons discussed in more detail in the Section-by-Section Analysis below, in this final rule FRA is maintaining the proposed regulatory language requiring railroads to provide copies of proposed CISPs to the international/national president of any relevant labor organization representing a class or craft of the railroad's employees covered by its CISP.

D. Section 272.105, Option to File Critical Incident Stress Plan Electronically

As proposed, § 272.105 provided for optional electronic submission of CISPs to FRA for approval. Responding to FRA's request for comments on whether the option to file critical incident stress plans electronically should be mandatory, Labor and AAR express support for electronic submission. FRA received no comments opposing mandatory electronic submission of CISPs. Accordingly, as discussed in the Section-by-Section Analysis below, in this final rule FRA has modified the regulatory language of proposed § 272.105 to require railroads to electronically submit CISPs to FRA for approval.

E. Comments on the Economic Analysis

AAR believes that FRA may have overstated the potential benefit of the proposed rule, because much of the estimated potential benefit is attributable to reduced employee healthcare costs, and such benefit is speculative. AAR reminds FRA that railroads already have critical incident stress programs that include some or all of the elements that would be required by the proposed rule. Despite this noted concern, AAR emphasizes that it generally supports the proposed rule. APTA suggests that FRA relied on insufficient data in structuring the proposed rule. APTA notes that the rule did not use data on the U.S. railroad worker experience with PTSD or acute stress. Because FRA referred to a Norwegian railroad study and used an exposure rate that does not cover all possible incidents that would be covered by the rule in its economic estimates, APTA questions how FRA's cost analysis can be valid. APTA also expresses concern with FRA's use of sources from veterans and military institutions, as these are not comparable to the railroad business environment.

FRA noted in the preamble to the NPRM that systematic empirical studies of the impact of these events on the health of exposed railroad personnel are limited.¹¹

However, FRA emphasizes that the data used in its economic analysis is the best available research data.

VII. Section-by-Section Analysis

Unless noted otherwise, please refer to the extensive discussion in the NPRM, as FRA has generally adopted the rule text as proposed in the NPRM.

Subpart A—General

Subpart A of the final rule contains the general provisions of the rule, including a statement of the rule’s purpose, an application section, a statement of general duty, the critical incident stress plan coverage section, a definitions section that includes the central definition of a “critical incident,” and a statement pertaining to penalties. As discussed further in the definitions section, § 272.9, this final rule defines a “critical incident” as either — (1) An accident/incident reportable to FRA under 49 CFR part 225 that results in a fatality, loss of limb, or a similarly serious bodily injury; or (2) A catastrophic accident/incident reportable to FRA under part 225 that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely.

As no comments were received in response to §§ 272.1 through 272.7 and 272.11, FRA is adopting the regulatory language for these sections as proposed in the NPRM.

Section 272.9

Definitions

¹¹ Some factors that hinder FRA’s ability to determine the rates of ASD and PTSD in exposed railroad employees are: (1) some exposed employees may be seeking care from their private mental health care practitioners and not through a railroad EAP; (2) some exposed employees who need evaluation and treatment for ASD and PTSD are not seeking it; and (3) Labor and EAP concerns about medical confidentiality may limit access to the data.

Section 272.9 defines a number of terms used in this part. FRA received comments regarding the proposed definitions of “critical incident” and “directly-involved employee.” After careful consideration of the comments received and for the reasons discussed generally in section VI.A above and in this Section-by-Section Analysis, in this final rule FRA is adopting both definitions as proposed in the NPRM.

In the NPRM, FRA proposed to define critical incident as (1) An accident/incident reportable to FRA under 49 CFR part 225 that results in a fatality, loss of limb, or a similarly serious bodily injury; or (2) A catastrophic accident/incident reportable to FRA under part 225 that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely. As noted in the NPRM, this definition reflects the recommendations made by the CIWG and by further limiting the definition of “critical incident” to accidents/incidents that are reportable under part 225, all accidents and incidents not arising from railroad operations are excluded from the definition.

While a reportable accident/incident could cover many incidents that relate to railroad operations, as proposed and as adopted in this final rule, the definition of “critical incident” includes only an accident/incident that results in a fatality, loss of limb, or a similarly serious bodily injury or a catastrophic accident/incident reportable to FRA under part 225 of this chapter that could be reasonably expected to impair a directly-involved employee’s ability to perform his or her job duties safely. Accordingly, minimal injuries in the railroad workplace are not included in the scope of this definition. Similarly, as explained in the analysis of the proposed definition of “critical incident” in

the NPRM, “near miss” scenarios (i.e., situations which when seen in hindsight could have resulted in an accident, but did not) are not included.

In its comments related to the proposed definition of “critical incident,” SEPTA recommends that the definition be modified to include “severe burns and readily visible gross trauma” as an example of a “similarly serious bodily injury.” Although FRA agrees with SEPTA that severe burns and readily visible gross trauma could be a “similarly serious bodily injury,” FRA does not believe it is necessary to revise the definition to include that specific phrase.

In the NPRM, FRA specifically requested comment as to whether the proposed definition of “critical incident” should contain explicit language excluding “near miss” scenarios. A “near miss” is an event, seen in hindsight, in which an accident could have occurred, but was narrowly avoided. For example, an automobile is rendered inoperable on the railroad tracks at a highway-rail grade crossing, but the automobile is able to get out of the way of the oncoming train, so that a collision is averted. In response to this request, FRA received comments from Labor, AAR, APTA, and NYS MTA.

Labor states that it “do[es] not believe there is any need to cover a single ‘near miss’ scenario, like a close call at a grade crossing that did not result in a collision, since the FRA chose to point to 49 CFR part 225 to clarify what would be considered an accident/incident.” But, Labor suggests that the rule should “allow for consideration of multiple ‘near miss’ scenarios as a ‘critical incident.’” AAR comments that “[t]he RSAC working group discussed near misses at length and concluded that the regulations should not encompass near misses.” AAR notes that there is no evidence that individuals generally suffer significant trauma from near misses. AAR raises the issue that

“including near misses would present significant compliance and enforcement issues,” as it would be difficult to define a “near miss” and it would be difficult for a railroad to know when a “near miss” occurs. AAR suggests that “[w]hether in the rule text or in the preamble, FRA needs to be clear that near misses are not critical incidents.” NYS MTA states that it “support[s] FRA’s position that the applicable science does not appear to support including ‘near miss’ scenarios in the rule and that ‘near miss’ issues should be handled by each railroad on an individual basis.” APTA agrees, saying that it “strongly supports FRA’s intention to not include Near Miss incidents in the regulatory definition.” At the same time, however, APTA notes that “passenger railroads need to have the discretionary authority within their critical incident plans to apply critical incident procedures to what might be classified a near miss or otherwise fall outside of the definitions proposed in the regulation.”

As discussed thoroughly in the NPRM, while a “near miss” event could cause a negative stress-reaction in a train crew, research demonstrates that such reaction would typically only occur in situations where, for example, an individual had been involved in a prior similar incident which had catastrophic consequences or there were other issues at play. FRA believes that such “near miss” scenarios should be handled by each railroad on an individual basis, as the applicable science does not appear to support including “near miss” scenarios in the rule generally. Additionally, FRA agrees with AAR’s comment that it would be difficult for railroads to comply with and for FRA to enforce the regulation regarding a “near miss,” as a railroad would not necessarily have evidence of such an occurrence. Accordingly, although FRA is not revising the definition of “critical incident” to specifically exclude “near miss” events, FRA notes that the

reference to part 225 in the definition makes clear that a single “near miss” event would not be considered a “critical incident” in accordance with this rule. FRA further notes that this final rule does not prohibit a railroad from implementing a critical incident stress plan that provides flexibility for a railroad to determine on a case-by-case basis whether individual or multiple “near miss” scenarios should be considered a critical incident.

In the NPRM, FRA proposed to define “directly-involved employee” to mean a railroad employee covered under proposed § 272.7 who falls into any of three stated subcategories: (1) whose actions are closely connected to the critical incident; (2) who witnesses the critical incident in person as it occurs or who witnesses the immediate effects of the critical incident in person; or (3) who is charged to directly intervene in, or respond to, the critical incident (excluding railroad police officers or investigators who routinely respond to and are specially trained to handle emergencies).

SEPTA comments that the phrase “closely connected” in subparagraph (1) of the definition is “vague” and “risks subjective interpretations.” SEPTA recommends replacing the term “closely connected” with “include an immediate presence at the covered critical incident or whose contemporaneous, co-incident participation contributed to the incident—limited to train and engine personnel; control and dispatch personnel; and employees who inspect, install, repair, or maintain the involved right-of-way, structures, rolling-stock, and communications and signals apparatus.”

FRA finds that SEPTA’s proposed modification would be unwieldy if included in the regulatory text. Additionally, the language that SEPTA recommends (“limited to train and engine personnel; control and dispatch personnel; and employees who inspect, install, repair, or maintain the involved right-of-way, structures, rolling-stock, and

communications and signals apparatus”) is unnecessary. This recommended limitation encompasses the “covered” employees listed under § 272.7, and such persons are already the types of railroad employees included in the definition of “directly-involved employee.” In response to SEPTA’s comment, FRA notes that an employee “closely connected” to a critical incident is intended to mean an employee whose actions directly contribute to the incident (those actions could be merely the actions of carrying out the individual’s job functions, e.g., by operating a train), or whose contemporaneous actions (or inaction) directly contribute to the incident. An example of when an employee may be “closely connected” to a critical incident, even though he or she is not at the incident scene and witnessing the incident in person, is a situation where an act or omission by that employee (such as a train dispatcher) causes or contributes to a critical incident (e.g., a dispatcher authorizes a movement in error which results in a collision).

The second subcategory is an employee covered under § 272.7 who “witnesses the critical incident in person as it occurs or who witnesses the immediate effects of the critical incident in person.” As noted in the preamble to the NPRM, this could include an employee who is working alongside the track when a highway-rail grade crossing collision occurs, and either sees the incident happen or comes upon the casualties of the incident. SEPTA comments that “the term ‘in person’ is too vague and could include a witness who views the occurrence from afar or remotely via a live video feed.” SEPTA recommends that FRA modify the text to say: “who was present on-site or immediately proximal to the critical incident locale and observed the immediate prelude, actual incident, and/or immediate effects therefrom.” SEPTA asserts that its suggested revision

“may also minimize possible exploitation of the regulation’s provision[s]” for relief from duty for directly-involved employees.

FRA does not intend the term “in person” to mean a witness who views the occurrence from afar or remotely via a live video feed. As explicitly explained in the NPRM preamble, the phrase “witnesses . . . in person” is intended to exclude employees who only hear about the accident/incident (such as over the radio) and are not otherwise directly involved in the accident/incident. See 78 FR 38885. The phrase “in person” was recommended by the CIWG small task force. FRA believes that the task force’s language is clear and that as a matter of plain English, the term “in person” is commonly understood to mean that an individual is “actually present.” Accordingly, FRA declines to adopt SEPTA’s proposed modification in the regulatory text. However, FRA reiterates that “in person” is intended to encompass persons who were present on-site or immediately proximal to the critical incident locale and observed the immediate prelude, actual incident, and/or immediate effects therefrom.

The third subcategory would include an employee covered under § 272.7 who is charged to directly intervene in, or respond to, the highway-rail grade crossing accident/incident, such as craft and supervisory employees who are called out to the scene. Consistent with the intent of the CIWG, the proposed language specifically excluded “railroad police officers or investigators who routinely respond to and are specially trained to handle emergencies.” During the RSAC process, members of the CIWG specifically indicated that the rule should not cover railroad police officers and railroad investigators who routinely respond to such incidents and are specially trained to handle such emergency matters.

As discussed above, SEPTA comments that “[t]he term ‘specially trained’ excludes railroad police and accident investigators from the provisions set forth in the critical stress regulation based on an assumption that this population is immune to the subject stressors.” SEPTA recommends that FRA “include both railroad police as well as accident investigators.” Contrary to SEPTA’s statement, however, FRA did not assume that railroad police and accident investigators were “immune to the subject stressors.” Rather, this exclusion was based on a practical concern. It would be unworkable if specially-trained personnel were to respond to a critical incident, but then seek immediate relief while on the job responding to the type of accident for which they are trained and required to respond. Consistent with the recommendations of the CIWG, FRA believes that such specially-trained response personnel should receive assistance and resources to help them cope with and handle such stressors, specifically tailored to their unique positions. FRA finds that this rule would not necessarily apply to such persons appropriately. However, FRA notes that nothing in this rule prohibits a railroad from applying its critical incident stress plan more broadly than what is required in this regulation to include railroad police and accident investigators as it sees fit.

Subpart B—Plan Components and Approval Process

This subpart contains the basic components of the critical incident stress plan required by this rule and the elements of the approval process. This rule affords railroads considerable discretion in the administration of their critical incident stress plans.

Section 272.101 Content of a critical incident stress plan

As discussed in section VI.B above, FRA is adopting the regulatory text for this section as proposed, with the exception of clarifying amendments to § 272.101(a) and (f).

As noted in the preamble to the NPRM, the objective of this regulation is to allow each railroad to utilize its existing critical incident stress plan as a base, making modifications as necessary to ensure compliance with minimum standards, and to enhance conformity of the plan's screening and intervention components to current best practices and standards for evidence-based care. A railroad's CISP should document that the railroad has taken sufficient steps to establish how each element of the plan can be satisfactorily executed in covered critical incidents.

Section 272.101 requires that a railroad's critical incident stress plan contain at least provisions for carrying out the objectives described in paragraphs (a)-(g) of the section. Among these designated objectives are allowing a directly-involved employee to obtain relief from the remainder of the tour of duty, providing for the directly-involved employee's transportation to the home terminal (if applicable), and offering a directly-involved employee appropriate support services following a critical incident. The specific details of each plan may vary, but the plans must be consistent with this section.

As proposed by paragraph (a) of the section, a railroad's CISP must provide for "[i]nforming each directly-involved employee as soon as practicable of the stress relief options that he or she may request[.]" AAR comments that it prefers the RSAC text ("an employee must be informed as soon as practicable that the employee may request relief"), asserting that it "does not understand what FRA means by the reference to "stress relief options." FRA declines to revert to the exact RSAC text in the final rule, but FRA does note that this provision means that a directly-involved employee needs to be reminded of the relief options available to him or her after a critical incident (i.e., that the employee may request relief from the remainder of the duty tour, may be provided transportation to

the employee's home terminal, may receive relief from the duty tour(s) subsequent to the critical incident, and may seek additional relief as necessary and reasonable to receive preventive services or treatment) as soon as practicable following a critical incident. Although all employees covered under § 272.7 should already be cognizant of the opportunity to request relief following a critical incident, directly-involved employees must be reminded of their options for relief as soon as it is practicable after the occurrence of a critical incident. FRA's intent with this provision is to emphasize that an employee's opportunity for relief from service must be effectively communicated to covered employees. Of course, if a covered employee has been seriously injured and has already been relieved from duty for the remainder of the tour, it is not necessary to notify the employee of the opportunity to be relieved.

FRA intended that the meaning of this provision, as modified, was to remain the same as the RSAC recommended text (that an employee must be informed as soon as practicable that the employee may request relief from the remainder of the duty tour, may be provided transportation to the employee's home terminal, may receive relief from the duty tour(s) subsequent to the critical incident, and may seek additional relief as necessary and reasonable to receive preventive services or treatment). However, FRA was concerned that the language as recommended by RSAC, "informing each directly-involved employee as soon as practicable that he or she may request relief," was too vague. As a result, in the NPRM, FRA proposed the regulatory text to state "informing each directly-involved employee as soon as practical of the stress relief options that he or she may request." To further clarify the intention of this provision and in response to AAR's request for clarification, FRA is modifying the rule text in § 272.101(a) to require

that a railroad's CISP contain a provision "informing each directly-involved employee as soon as practicable of the relief options available in accordance with the railroad's critical incident stress plan."

FRA recommends that a typical plan specify an appropriate time to notify affected employees of the option to seek relief, such as, "employees must be notified at the incident site of their opportunity to be relieved." This reminder of the option to seek relief must be made during the early communications between the employee and the dispatcher and/or railroad management, before the employee has already continued on with his or her tour of duty or much time has elapsed.

As proposed, paragraph (d) of the section would require that a railroad's CISP must provide for "offering counseling, guidance, and other appropriate support services to each directly-involved employee." FRA received several general comments with respect to the NPRM's preamble discussion of "appropriate support services" in this context. A private citizen, Ms. Jill Simons, comments that "EAP availability should be mandatory in light of [traumatic] events, not just in the railroad industry but across all industries." She believes that "[s]upervisors should receive training to recognize when an employee is suffering from [PTSD] and be able to recommend or refer that employee to a company sponsored [sic] EAP."

FRA appreciates Ms. Simons' comments. First, FRA notes that it does not regulate other industries, thus it cannot mandate EAP availability across all industries. This regulation puts into place requirements that help to prevent ASD, PTSD, and other psychiatric disorders (e.g., depression) following a critical incident related to railroad operations. FRA requires that a railroad's CISP include provision of counseling,

guidance, and other appropriate support services be offered to each directly-involved employee. A railroad may utilize an EAP to satisfy that requirement. FRA agrees with Ms. Simons' comments about training. As FRA noted in the NPRM, to implement a CISP, all relevant railroad employees, from managers at headquarters to employees at the local level, must be made aware of the railroad's plan and the specific requirements of the plan and must be trained on how to implement the requirements of the plan relevant to the employee. See 78 FR 38878, 38888. FRA intends that any training requirements, including the training of supervisors and other management officials responsible for implementing the plans, will be covered by FRA's proposed new training regulation. See 77 FR 6412 (Feb. 7, 2012). FRA expects all railroad plans to provide for training on how a supervisor or other railroad employee should interact with an employee who is directly-involved in a critical incident, and training about what every directly-involved employee should do following a critical incident.

To clarify, FRA does not expect a railroad supervisor or manager to be trained in diagnosing PTSD. PTSD is a clinical diagnosis. As such, the presence or absence of signs and symptoms of PTSD should be assessed and diagnosed only by licensed clinical mental health practitioners (i.e., psychiatrists, clinical psychologists, and licensed clinical social workers). FRA notes that supervisors and other non-mental health professionals responsible for implementing a railroad's CISP may benefit from training in "Psychological First Aid." Psychological First Aid is a recommended non-clinical technique that railroads and trained lay people can utilize to provide directly-involved employees "situational knowledge" that would help these employees gain ready access to counseling, guidance, and other required support services, and reduce the initial

psychological distress that employees involved in a critical incident may experience. In addition, FRA understands that providing “pre-incident” education and training to employees who may become directly-involved in a critical incident is an essential element of a CISP because it helps to protect the employee from psychological and emotional harm should a critical incident occur. Pre-incident education and training for employees should be structured to provide employees information about normal reactions to stress, ways to cope with stress, and options for leave, counseling, and other support services.

Both SEPTA and APTA express concern with FRA’s discussion in the NPRM preamble regarding the specific intervention element of “critical stress debriefing.” As a point of clarification, FRA understands that the term “debriefing” is sometimes used to mean different things. For example, the term “debriefing” may be used within the railroad community to mean a process of non-confrontational dialogue that is initiated after a railroad accident/incident by the railroad or investigators to elicit facts or statements from employees directly-involved in an accident/incident. The purpose of such fact-finding debriefings is to identify and analyze factors that may have contributed to the occurrence of an accident/incident and determine potential remedies that can be implemented to prevent the same accident/incident from happening again. Nothing in this part should be construed to prohibit such fact-finding debriefings. FRA also understands that the term “debriefing” is sometimes used in a very different way, to mean “critical incident stress debriefing” (CISD). CISD is a facilitator-led group process intended to support normal recovery processes and the restoration of adaptive functions in psychologically healthy people who are distressed after experiencing a traumatic event

such as a critical incident. In addition, participants can be screened during the process to identify participants who need additional support services or referral for treatment. Generally, each participant is encouraged to describe what he or she experienced at the time of the accident/incident and in its aftermath. In addition to describing what happened during a critical incident from his or her own perspective, each participant is encouraged to describe his or her personal thoughts and reactions to the incident; and any cognitive, physical, emotional, or behavioral symptoms the participant has experienced since the event. CISD participants are then presented information to help them understand normal stress reactions, their symptoms, things that they can do to cope with stress, and follow-up.¹² FRA noted in the preamble to the NPRM that the “specific intervention element of ‘critical stress debriefing’ in the scientific literature is contraindicated, as it has not been shown to be effective and may actually be harmful in some instances.” 78 FR 38886-38887. Examples of hypothetical explanations for findings that “critical incident stress debriefings” may cause harm in some instances include: (1) group participants have different levels of distress, symptoms, and vulnerability to ASD and PTSD, and may be further distressed by hearing each of the other participants describe their experience; (2) some participants may feel stigmatized by having more severe psychological and emotional reactions and symptoms than their peers; (3) some participants may, in certain instances, be rejected by certain participants

¹² See Mitchell, J. T., Critical incident stress debriefing (CISD) (2008) (Retrieved from <http://www.info-trauma.org/flash/media-e/mitchellCriticalIncidentStressDebriefing.pdf> on January 23, 2014); Mitchell J.T., Everly G.S. Jr., Critical Incident Stress Debriefing: An Operations Manual for CISD, Defusing and Other Group Crisis Intervention Services, 3rd ed., Chevron Publishing Corporation (2001); Mitchell J.T., Everly G.S., Critical Incident Stress Debriefing: (CISD). , Chevron Publishing Co (1993); Mitchell, J. T., When disaster strikes: the critical incident stress debriefing process. Journal of Emergency Medical Services, 8, 36 -39 (1983).

in the group for expressing their feelings; and (4) some participants who were not traumatized by the incident may react negatively to “critical incident stress debriefing.”¹³ FRA concluded that a specific element of “critical [incident] stress debriefing” would not be an “appropriate support service.” Accordingly, FRA indicated that the agency would not approve a CISP containing a specific program element of “critical [incident] stress debriefing.” *Id.* at 38887. “Psychological First Aid” (PFA), in contrast to “critical incident stress debriefing,” is a flexible, evidence-informed intervention which is tailored to the individual who has experienced a traumatic event. PFA emphasizes a nonintrusive and compassionate approach to providing an individual who has experienced a critical incident practical assistance with immediate needs, safety and comfort, and assistance in establishing connections with primary support networks and social resources, as well as information about common reactions to trauma, ways to cope with stress, follow-up, and how to access additional support services, including treatment (if needed). PFA does not encourage or require individuals to express their experience, including their emotional reactions and symptoms, to peers in a group setting. The goals of PFA are to decrease the initial distress associated with exposure to a traumatic event and to improve adaptive functioning.¹⁴ FRA notes that, in contrast to CISD, research has shown PFA to be effective in reducing the initial psychological distress that may normally occur in individuals who have experienced a traumatic event. It has not been shown to cause harm.

¹³ See Briere J., Can you give our staff some guidance on the appropriate use of critical incident stress debriefing and psychological first aid?, *Psychiatric Times*, (2006) (Retrieved from <http://www.psychiatrictimes.com/printpdf/162160>).

¹⁴ See National Child Traumatic Stress Network and National Center for PTSD. *Psychological First Aid: Field Operations Guide*, 2nd ed. Los Angeles, CA: National Child Traumatic Stress Network; 2006.

Both SEPTA and APTA express concern with FRA's expressed position in the NPRM pertaining to CISD. SEPTA states that the CISD technique "was never intended to be standalone treatment, but does have efficacy as a form of 'psychological first aid.'" Further, SEPTA explains that "the [CISD] technique may be effective when applied to the correct population by a properly trained practitioner" and that it is a technique "best applied to police, firefighters, and emergency medical personnel." While SEPTA agrees that CISD can be less effective and potentially harmful under certain circumstances, SEPTA argues that the technique "should not be banned as a component of a railroad's plan." APTA states that "[s]everal passenger railroads currently use CISD with positive results" and consistent with SEPTA's comment, asserts that FRA should not "summarily dismiss this treatment option without a more thorough review of its application in the railroad environment."

Additionally, in response to FRA's request for input on the NPRM, SAMHSA expressed agreement with FRA's proposal to limit or phase out "debriefings" and instead utilize "psychological first aid and other evidence informed approaches for assisting survivors of disasters or tragic incidences." SAMHSA further commented, however, that the agency "has learned that there are recent findings where the debriefing model is evolving and appears to be headed in the right direction" and that "the debriefing model is still regarded as relevant among both the law enforcement and fire fighter cultures."

FRA acknowledges that CISD has been used as an intervention for law enforcement, firefighter, and emergency medical personnel who have experienced traumatic events. However, as noted in the preamble to the NPRM, research studies have not clearly demonstrated that CISD is effective in preventing ASD or PTSD, and studies

have shown that it may be harmful in certain instances. See 78 FR at 38886-87.

Accordingly, because CISD has not been demonstrated as effective in preventing ASD or PTSD and may actually cause harm in certain instances, FRA cannot conclude that CISD is an “appropriate support service” to be included as a specific element of a railroad’s CISP. Further, in contrast to CISD, PFA does not encourage or require individuals to express their experience, including their emotional reactions and symptoms, to peers in a group setting. As such, FRA does not believe that “psychological first aid” has the same meaning as either “debriefing” or “critical incident stress debriefing.” For these reasons, if a railroad’s plan proposes to utilize CISD as a specific intervention element for the purposes of this part, FRA will not approve the plan.

FRA notes that “psychological first aid” has been shown to be effective in reducing the initial psychological distress that may normally occur in individuals who have experienced a traumatic event. It has not been shown to cause harm. The provision of PFA as a specific intervention element of a critical incident stress plan is strongly recommended. FRA recommends PFA be utilized by trained supervisors and EAP counselors and other mental health providers when responding to a critical incident to provide directly-involved employees information that is specified in a railroad’s FRA-approved CISP, including: information about the availability of timely options for relief and transportation to the employee’s home terminal; the availability of counseling, guidance, and other appropriate support services; options for relief from the duty tour(s) subsequent to the critical incident; and options for additional leave from normal duty.

Under proposed paragraph (e) of the section and as adopted in this final rule, a railroad’s CISP would be required to “permit[] relief from the duty tour(s) subsequent to

the critical incident, for an amount of time to be determined by each railroad.” As noted in the preamble to the NPRM, the language proposed was modified from the RSAC-approved language to include the qualifying phrase “for an amount of time to be determined by each railroad . . . as may be necessary and reasonable” in order to add context and clarity to the requirement. A few commenters express disagreement with the proposed language, while others support the modified language as proposed. First, Labor disagrees with FRA’s contention that the modification “adds clarity,” and suggests that “FRA should follow the example of the plans that are out there today and stipulate ‘three days.’” Labor argues that “railroads should not be allowed to continue to make a unilateral decision to deny any time off for an employee involved with a critical incident.” NYS MTA recommends that the language be revised back to the RSAC language. SEPTA recommends adding additional qualifying language to the paragraph requiring that the employee requesting relief be availing him or herself to the “proffered EAP counseling, guidance, and support services.” APTA, on the other hand, expresses support for the language proposed by FRA because it “strengthens the intent of the coping period as caring for the employee in each situation is different and tasks the railroad to make the determination rather than trying to make it a regulatory requirement.”

FRA intends this provision to require that railroads’ CISPs address how much additional time off an employee affected by a critical incident may receive and as Labor comments, FRA is attempting to guide the railroads to select an appropriate amount of time in their individual plans that an employee can request additional time off in order to cope with the critical incident. As FRA noted in the preamble to the NPRM, many

railroads currently offer employees involved in critical incidents relief from the immediate tour of duty along with transportation to the employee's home terminal, then provide up to three days off along with consultation with an EAP, if any, and/or occupational medicine staff. This provides directly-involved employees with an opportunity, away from the railroad environment, to cope with having experienced a critical incident. This is an amount of time to be determined by each railroad to allow for a reasonable amount of rest and time following a critical incident (without necessitating a clinical diagnosis). Because the particular amount of time off in this context is not necessarily tied to any particular scientific evidence, FRA believes the regulatory requirement should be neutral on the amount of additional time a railroad should permit beyond the tour of duty during which the critical incident occurred. FRA believes the specific time period for this coping period is an issue better resolved by each railroad on a case-by-case basis and should not be mandated by FRA. Accordingly, FRA has not modified the regulatory text in § 272.101(e) from the NPRM. FRA notes, however, that it expects that most railroads would simply use the three-day period that has been common practice in the industry. The three-day period may comport well with duty schedules and provide a sufficient coping period for many employees involved in a critical incident.

FRA also appreciates SEPTA's recommendation that FRA add the phrase to § 272.101(e), "so long as the requestor is availing themselves of pro-offered EAP counseling, guidance, and support services." FRA expects that all employees who are relieved from a tour of duty following a critical incident are put into contact with an EAP. Thus, while FRA does not agree that a clinical diagnosis should be required for additional

leave to be granted for time to “cope” with what happened, EAP counseling, guidance, and support services should be employed during this process to ensure that an employee’s needs are addressed appropriately.

As proposed, paragraph (f) of this section would require a railroad’s CISP to provide for permitting employees directly-involved in a critical incident additional leave from duty “as may be necessary and reasonable to receive preventative services or treatment related to the incident, or both.” Commenters generally express support for this provision, noting that most existing railroad CISPs provide for such additional time off. However, noting that many passenger railroads’ existing CISPs permit leave in addition to the duty tour(s) subsequent to the critical incident (covered by paragraph (e) of the section) if a clinical diagnosis supports the need for additional time off, both NYS MTA and APTA recommend that FRA modify this paragraph to make clear that an employee’s request for additional time off must be supported by a clinical diagnosis. Specifically, APTA recommends that the paragraph be revised to reflect industry practice by requiring a clinical diagnosis and treatment plan be established as a basis for an employee’s continued leave from duty tours subsequent to the critical incident (i.e., subsequent to the “coping period”). Further, NYS MTA notes that “FRA’s analysis of the economic impact [of the rule] may be underestimating the costs if the regulation allows additional time off beyond the ‘coping period’ without a clinical diagnosis.” The proposed language is consistent with the language of Section 410, as well as the RSAC recommended language. However, in light of commenters concerns and to clarify the intention of this provision, FRA is modifying paragraph (f) to require a railroad’s CISP to include a provision “[p]ermitting each directly-involved employee such additional leave

from normal duty as may be necessary and reasonable to receive preventive services or treatment related to the incident or both, provided the employee is in consultation with a health care professional.” In this manner, FRA expects that additional leave requested, beyond the coping period specified in § 272.101(e), would be supported by a clinical diagnosis, or would be granted in consultation with a health care professional (e.g., in instances where affected individuals are seeking care from a health care professional, but for practical reasons do not yet have a clinical diagnosis or are receiving preventive services from a health care professional).

Section 272.103 Submission of critical incident stress plan for approval by FRA

As proposed, § 272.103 requires a railroad to submit its CISP to FRA for approval, and in accordance with paragraph (b) provide a copy of its CISP and any material modifications to the international/national president of any non-profit employee labor organization representing a class or craft of the railroad’s employees subject to this rule. As FRA requested in the NPRM, several commenters discuss the service list requirement of paragraph (b). Consistent with the views expressed by Labor representatives during CIWG meetings, Labor disagrees with FRA’s proposal to limit service of a proposed CISP to only the international/national president of the relevant Labor organizations. Instead, Labor reiterates the views it expressed during the RSAC working group meetings, stating that because “general chairpersons are the designated collective bargaining representatives with day-to-day responsibility for direct interaction with railroad management and the union membership” and because each CISP is an “on-property program unique to each railroad,” railroads should be required to provide a copy of a proposed CISP (or material modification to a CISP) to each general chairperson.

Moreover, Labor asserts that such a requirement would not be burdensome on the railroads as they already communicate with those individuals nearly daily.

In contrast, noting that there are well over 40 general chairpersons on some railroads, AAR supports FRA's proposed rule text because "labor presidents are perfectly capable of circulating proposed plans to those in their organizations." AAR asserts that "[r]equiring service on general chairs would result in service lists with large numbers of people, which might lead to a railroad inadvertently not serving a general chair." NYS MTA notes that the process outlined in proposed § 272.103(b) is "consistent with notification requirements used for FRA's conductor certification and minimum training standards regulations." APTA similarly comments that it "sees no advantage in providing wide circulation of the plan and supports only involving the labor organization representatives maintained on the service lists used by each railroad."

While FRA understands Labor's position, FRA's requirement in § 272.103(b) was intended to be consistent with other proposed and final FRA regulations, such as the NPRM on training standards (77 FR 6412, Feb. 7, 2012) and the final rule on conductor certification (76 FR 69802, Nov. 9, 2011). If FRA required service to general chairpersons as well, such a large mandatory service list could pose a potential compliance problem for the railroads. FRA notes that the designated points of contact on the service lists in existence for collective bargaining purposes may be used so long as that service list conforms to the requirement in the rule that requires the railroad to serve the "international/national president of any non-profit employee labor organization representing a class or craft of the railroad's employees subject to this part." Of course,

FRA would not take exception if a railroad and labor organization agreed to include additional persons on this service list.

AAR, NYS MTA, and APTA also note that FRA requested comment on whether FRA should require that railroad management consult with railroad employees on the formation of critical incident programs, as is required for system safety plans by the RSIA. Noting that railroads already have critical incident stress plans in place with which Labor is already familiar, all three commenters express the view that adding such a consultation requirement would be unnecessary and undesirable. Although FRA appreciates these comments, FRA notes that in the NPRM the agency was seeking comments on the issue of the service list, not on a consultation requirement. FRA was attempting to explain that while the System Safety Program NPRM required a service list that included general chairpersons, that regulation also required consultation (as mandated by the RSIA). The RSIA did not require consultation for the critical incident regulation nor is FRA including such a requirement in this final rule.

The final rule contemplates that railroads may submit existing critical incident stress plans to FRA for approval that have previously been established through any applicable collective bargaining agreement. However, in order to satisfy the eventual final rule, any preexisting critical incident stress plan would have to contain all prescribed elements of the plan as set forth in the regulation, and such a plan would have to be submitted to FRA pursuant to this section for review. Thus, FRA would approve critical incident stress plans previously vetted through the collective bargaining agreement process, provided that those plans meet the criteria specified in the final regulation.

FRA's regulation constitutes a minimum standard and would not negate any higher standards set by a collective bargaining agreement.

As no comments were received regarding § 272.103(a), (c), (d), (e), (f), or (g), FRA has adopted the regulatory language for each of those paragraphs as proposed.

Section 272.105 Requirement to file critical incident stress plan electronically

As proposed, § 272.105 provided for optional electronic submission of CISPs to FRA for approval. Responding to FRA's request for comments on whether the option to file CISPs electronically should be mandatory, both Labor and AAR express support for electronic submission. AAR further comments that because critical incident stress plans would not contain confidential information, FRA's proposed electronic submission process is "overly complicat[ed]." In response to these comments, in this final rule, FRA is mandating that railroads submit CISPs electronically to the agency. FRA is also simplifying the requirements for electronic submission, as AAR recommends, because the agency agrees that the electronic submission process proposed in the NPRM was unnecessarily complex.

Paragraph (a) of § 272.105 as adopted in this final rule requires railroads to submit CISPs to FRA electronically using a Web link on FRA's Safety Data Web site (<http://safetydata.fra.dot.gov/OfficeofSafety/CISP>). The Web link is easily accessible by all railroads and will not require railroads to maintain a username and password, which would have been necessary under the secure document Web site proposed in the NPRM. When submitting a CISP or a material modification of a CISP through the Web link, a railroad will be prompted to complete certain required fields containing the information outlined in § 272.105(b) (including e-mail addresses for two points of contact at the

railroad) and to upload its CISP (or the corresponding document reflecting any material modification(s) to an existing approved CISP). FRA expects that railroads will upload the necessary documents in commercial off-the-shelf software formats (e.g., Microsoft Word or Adobe PDF). The Web link will allow for easy submission and validation that key information is provided. FRA will notify the railroad's point of contacts via the e-mail addresses provided of the agency's approval of a CISP (or material modification of an existing approved CISP) or the need to resubmit the document in the event FRA cannot approve the document as initially submitted.

FRA received no comments in opposition to mandatory electronic submission. Accordingly, in this final rule, FRA is making electronic submission of CISPs to FRA mandatory. FRA believes that electronic submission will allow FRA to review submissions more efficiently and eliminate the need to store hardcopies of the numerous submissions.

Appendix A to Part 272—Schedule of Civil Penalties

As no comments were received regarding this section, FRA has adopted the regulatory language as proposed.

VIII. Regulatory Impact and Notices

A. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures and determined to be non-significant under both Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034, February 26, 1979. FRA has prepared and placed in the docket a Regulatory Evaluation addressing the economic impact of this

rule. As part of the Regulatory Evaluation, FRA has assessed the quantitative costs and benefits from the implementation of this rule.

The purpose of the rule is to enhance safety by mandating that certain railroads (each Class I railroad, intercity passenger railroad, and commuter railroad) have a critical incident stress plan intended to mitigate the long-term negative effects of critical incidents upon railroad employees. Specifically the rule would help ensure that every railroad employee covered by the rule who works for these railroads and who is affected by a critical incident can receive the support services needed.

The Railroad Safety Advisory Committee (RSAC) formed a working group to provide advice and recommendations on the regulatory matters involving critical incident stress plans.¹⁵ Based on both RSAC meetings and discussions with the rail industry, FRA's analysis in the Regulatory Evaluation assumes that all railroads affected by the rule currently have policies that include a critical incident stress plan, thereby reducing the costs of compliance associated with the rule.

FRA's analysis follows DOT's revised "Guidance on the Economic Value of a Statistical Life in US Department of Transportation Analyses," published in March 2013. Based on real wage growth forecasts from the Congressional Budget Office, DOT's guidance estimates that there will be an expected 1.07 percent annual growth rate in median real wages over the next 20 years (2014-2034) and assuming an income elasticity of 1.0 adjusts the Value of Statistical Life (VSL) in future years in the same way. Real wages represent the purchasing power of nominal wages. VSL is the basis for

¹⁵ This RSAC working group reached consensus on all items but one: whether a railroad should be required to provide its critical incident stress plan to the general chairperson of a labor organization, in addition to the organization's international/national president.

valuing avoided casualties. FRA’s analysis further accounts for expected wage growth by adjusting the taxable wage component of labor costs. Other non-labor hour based costs and benefits are not impacted. FRA estimates that the costs of the rule for a 20-year period would total \$1.9 million, with a present value (PV, 7%) of \$1.3 million and (PV, 3%) of \$1.6 million. In estimating these compliance costs, FRA included costs associated with training supervisors on how to interact with railroad employees who have been affected by a critical incident, additional costs associated with greater use of Employee Assistance Programs, and costs associated with the submission of critical incident stress plans to FRA. FRA also estimates that the quantifiable benefits of the rule for a 20-year period would total \$2.6 million, with a present value (PV, 7%) of \$1.5 million and (PV, 3%) of \$2.0 million. FRA is confident that potential benefits of the rule would exceed the total costs.

Table 1: 20-Year Costs for Rulemaking	Present Value (7 Percent)	Present Value (3 Percent)
Training	\$1,135,685	\$1,342,391
Submission of Critical Incident Stress Plans for approval by FRA	\$114,266	\$153,415
EAP Specialist	\$87,879	\$119,713
Total	\$1,337,830	\$1,615,519

The Regulatory Evaluation also explains the likely benefits of this rule, providing quantified estimates of the benefits where feasible. The rule contains minimum standards for leave, counseling, and other support services. These standards would help create benefits by providing employees with knowledge, coping skills, and services that would

help them: (1) recognize and cope with symptoms of normal stress reactions that commonly occur as a result of a critical incident; (2) reduce their chance of developing a disorder such as depression, PTSD, or ASD as a result of a critical incident; and (3) recognize symptoms of psychological disorders that sometimes occur as a result of a critical incident and know how to obtain prompt evaluation and treatment of any such disorder, if necessary.

Specifically, FRA anticipates that implementation of the rule would yield benefits by reducing long-term healthcare costs associated with treating PTSD, ASD, and other stress reactions; and costs that accrue either when an employee is unable to return to work for a significant period of time or might leave railroad employment due to being affected by PTSD, ASD, or other stress reactions.

The majority of the quantifiable benefits identified are associated with railroad employee retention and a reduction of long-term healthcare costs associated with PTSD cases that were not treated appropriately after a critical incident. FRA estimates that one-half of one percent of railroad employees who develop PTSD exit the railroad industry. According to this estimate, one railroad employee would leave the railroad industry due to PTSD every ten years. If an employee is unable to return to work, the railroad not only loses an experienced employee, but also must train a new employee. FRA expects that the rule would decrease the number of new employees that have to be trained to backfill for those who leave the railroad industry due to PTSD, ASD, or other stress reactions, as early treatment for potential PTSD cases following exposure to a critical incident by reducing both the likelihood of developing and the duration of PTSD or other stress reactions. The rule would also increase the early identification and treatment of PTSD

thus reducing long-term healthcare costs. Overall, FRA finds that the value of the anticipated benefits would justify the cost of implementing the rule.

Table 2: 20-Year Benefits for Rulemaking	Present Value (7 Percent)	Present Value (3 Percent)
Reduction in Long-term Healthcare Costs	\$1,445,288	\$1,953,784
Retention of Employees (reduced backfilling costs)	\$60,334	\$69,764
Total	\$1,505,622	\$2,023,548

B. Regulatory Flexibility Act and Executive Order 13272

To ensure potential impacts of rules on small entities are properly considered, FRA has developed this final rule in accordance with 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 of 1980 (5 U.S.C. 601 et seq.).

The Regulatory Flexibility Act requires an agency to review regulations to assess their impact on small entities. An agency must prepare a regulatory flexibility analysis (RFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

This final rule will enhance safety by mandating that railroads have a critical incident stress plan that may help mitigate the long-term negative effects of critical incidents upon covered railroad employees. One of the most important assets to the railroad industry is its labor force. The railroads spend significant resources training their workforces. Although all of the railroads potentially affected by the rule have policies that include critical incident stress plans, the rule will promote implementation as

intended to every applicable employee covered by critical incident stress plan and also ensure that all such plans meet certain minimum Federal requirements.

(1) Description of Regulated Entities and Impacts: The “universe” of the entities to be considered generally includes only those small entities that are reasonably expected to be directly regulated by this action. This final rule directly affects Class I, intercity passenger, and commuter railroads as defined in the final rule.

“Small entity” is defined in 5 U.S.C. 601. Section 601(3) defines a “small entity” as having the same meaning as “small business concern” under section 3 of the Small Business Act. This includes any small business concern that is independently owned and operated, and is not dominant in its field of operation. Section 601(4) likewise includes within the definition of this term not-for-profit enterprises that are independently owned and operated, and are not dominant in their field of operation. The U.S. Small Business Administration (SBA) stipulates in its size standards that the largest a railroad business firm that is “for profit” may be and still be classified as a “small entity” is 1,500 employees for “Line Haul Operating Railroads” and 500 employees for “Switching and Terminal Establishments.” Additionally, 5 U.S.C. 601(5) defines as “small entities” governments of cities, counties, towns, townships, villages, school districts, or special districts with populations less than 50,000.

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Pursuant to that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as being 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, which is \$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 68 FR 24891, May 9, 2003, codified at appendix C to 49 CFR part 209. The \$20 million-limit is based on the Surface Transportation Board's revenue threshold for a Class III railroad. Railroad revenue is adjusted for inflation by applying a revenue deflator formula in accordance with 49 CFR 1201.1-1. FRA is using this definition for this rulemaking.

Railroads: Based on the railroad reporting data from 2011, there are 719 Class III railroads. Due to the applicability of the rule, however, none of these railroads would be impacted. The railroad reporting data also shows that there are 30 intercity passenger and commuter railroads.¹⁶ Although two of these railroads are considered small entities, they do not fall within the rule's definition of a "commuter railroad," which means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, that provides regularly-scheduled passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979. Therefore FRA finds that there are 28 intercity passenger and commuter railroads that will incur additional costs by the rule. However, the affected commuter railroads are part of larger public transportation agencies that receive Federal funds and serve major jurisdictions with populations greater than 50,000.

As FRA believes that no small entities will be affected by this rule, there would also be no cost impacts on small businesses. Railroads operated entirely by contract operators such that the contractor organization itself meets the definition of a commuter

¹⁶ This total includes the Alaska Railroad, which is categorized as a Class II railroad.

railroad, class I, or inter-city passenger railroad, would be subject to this rule. In these circumstances, FRA assumes that the contract operator would utilize the critical incident stress plan developed by the reporting railroad. FRA will hold the reporting railroads responsible for defects or deficiency, not the contracted operators. Therefore, FRA does not expect that the rule will directly impact any contractors that are considered to be large or small entities.

During the public comment period following the NPRM, FRA did not receive any comments discussing the initial regulatory flexibility analysis or Executive Order 13272. FRA certifies that the final rule will not have any significant economic impact on the competitive position of small entities, or on the small entity segment of the railroad industry as a whole.

(2) Certification: Pursuant to the Regulatory Flexibility Act (5 U.S.C. 605(b)), FRA certifies that this final rule will not have a significant economic impact on a substantial number of small entities. As all of the affected commuter railroads are part of larger public transportation agencies that receive Federal funds and serve major jurisdictions with populations greater than 50,000; based on the definition, therefore, they are not considered small entities.

C. Executive Order 13175

FRA analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13175 (“Consultation and Coordination with Indian Tribal Governments”).

Because this rule does not significantly or uniquely affect tribes and does not impose substantial and direct compliance costs on Indian tribal governments, the funding

and consultation requirements of Executive Order 13175 do not apply, and a tribal summary impact statement is not required.

D. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section	Respondent Universe	Total Annual Responses	Average Time per Response	Total Annual Burden Hours
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272.103 – RR Submission of Updated/ Modified Existing Critical Incident Stress Plan	34 Railroads	34 modified plans	16 hours	544 hours
- RR Copies of Updated Critical Incident Stress Plans to 5 Employee Labor Organizations	34 Railroads	170 plan copies	5 minutes	14 hours
- Rail Labor Organization Comments to FRA on RR Critical Incident Stress Plan	5 Labor Organizations	65 comments	3 hours	195 hours
- Rail Labor Organization Affirmative Statement to FRA that Comment Copy has been served on Railroad	5 Labor Organizations	65 certifications	15 minutes	16 hours
- Copy to RR Employees of Updated/Modified Critical Incident Stress Plans	169,500 Employees	169,500 copies	5 minutes	14,125 hours
- Copy to FRA Inspector Upon Request of Critical Incident Stress Plan	34 Railroads	136 plan copies	5 minutes	11 hours
272.105 – Electronic Filing/Submission of Critical Incident Stress Plan to FRA	34 Railroads	34 requests	5 minutes	3 hours

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA’s estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For

information or a copy of the paperwork package submitted to OMB, contact Mr. Robert Brogan, Information Clearance Officer, at 202-493-6292, or Ms. Kimberly Toone at 202-493-6137.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Mr. Robert Brogan or Ms. Kimberly Toone, Federal Railroad Administration, 1200 New Jersey Avenue, S.E., 3rd Floor, Washington, D.C. 20590. Comments may also be submitted via e-mail to Mr. Brogan or Ms. Toone at the following address: Robert.Brogan@dot.gov; Kim.Toone@dot.gov.

OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

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 information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the Federal Register.

E. Environmental Impact

FRA has evaluated this final rule in accordance with its “Procedures for Considering Environmental Impacts” (FRA’s 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 that this action 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 pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28547, May 26, 1999. In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this final rule that might trigger the need for a more detailed environmental review. As a result, FRA finds that this final rule is not a major Federal action significantly affecting the quality of the human environment.

F. Federalism Implications

Executive Order 13132, "Federalism" (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." "Policies that have federalism implications" are defined in the Executive Order 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." 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. 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 has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. If adopted, this final rule would not have a substantial direct effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. FRA has also determined that this final rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

Moreover, FRA notes that RSAC, which endorsed and recommended the majority of this final rule, has as permanent members, two organizations representing State and local interests: AASHTO and ASRSM. Both of these State organizations concurred with the RSAC recommendation made in this rulemaking. RSAC regularly provides recommendations to the Administrator of FRA for solutions to regulatory issues that reflect significant input from its State members. To date, FRA has received no indication of concerns about the federalism implications of this rulemaking from these representatives or from any other representatives of State government.

However, this final rule could have preemptive effect by operation of law under 49 U.S.C. 20106 (Section 20106). Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “local safety or security hazard” exception to Section 20106.

In sum, FRA has analyzed this final rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this final rule has no federalism implications, other than the possible preemption of State laws under Section 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this final rule is not required.

G. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (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).” Section 202 of the Act (2 U.S.C. 1532) further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any 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) [currently \$151,000,000] in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and tribal governments and the private sector. This final rule will not result in the expenditure, in the aggregate, of \$151,000,000 or more in any one year, and thus preparation of such a statement is not required.

H. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” See 66 FR 28355 (May 22, 2001). Under the Executive Order a “significant energy action” is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking: (1)(i) that 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) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. FRA has evaluated this final rule in accordance with Executive Order 13211. FRA has determined that this final rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this final rule is not a “significant energy action” within the meaning of the Executive Order.

I. Privacy Act Statement

FRA wishes to inform all interested parties that anyone is able to search the electronic form of any written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). See <http://www.regulations.gov/#!privacyNotice> for the privacy notice of regulations.gov or interested parties may review DOT’s complete Privacy Act Statement in the Federal Register published on April 11, 2000 (65 FR 19477).

List of Subjects in 49 CFR Part 272

Accidents, Critical incident, Penalties, Railroads, Railroad employees, Railroad safety, Safety, and Transportation.

The Final Rule

For the reasons discussed in the preamble, FRA amends chapter II, subtitle B of Title 49 of the Code of Federal Regulations by adding a new part 272 to read as follows:

PART 272 CRITICAL INCIDENT STRESS PLANS

Subpart A—General

Sec.

272.1 Purpose.

272.3 Application.

272.5 General duty.

272.7 Coverage of a critical incident stress plan.

272.9 Definitions.

272.11 Penalties.

Subpart B—Plan Components and Approval Process

272.101 Content of a critical incident stress plan.

272.103 Submission of critical incident stress plan for approval by the Federal Railroad Administration.

272.105 Requirement to file critical incident stress plan electronically.

Appendix A to Part 272—Schedule of Civil Penalties

Authority: 49 U.S.C. 20103, 20107, 20109, note; 28 U.S.C. 2461, note; 49 CFR 1.89; and sec. 410, Div. A, Pub. L. 110-432, 122 Stat. 4888.

Subpart A—General

§ 272.1 Purpose.

(a) The purpose of this part is to promote the safety of railroad operations and the health and safety of railroad employees, especially those who are directly involved in a critical incident by requiring that the employing railroad offers and provides appropriate support services, including appropriate relief, to the directly-involved employees following that critical incident.

(b) Nothing in this part constrains a railroad from implementing a critical incident stress plan that contains additional provisions beyond those specified in this part (including provisions covering additional incidents or persons), provided that such additional provisions are not inconsistent with this part.

§ 272.3 Application.

This part applies to each

- (a) Class I railroad, including the National Railroad Passenger Corporation;
- (b) Intercity passenger railroad; or
- (c) Commuter railroad.

§ 272.5 General duty.

A railroad subject to this part shall adopt a written critical incident stress plan approved by the Federal Railroad Administration under § 272.103 and shall comply with that plan. Should a railroad subject to this part make a material modification to the approved plan, the railroad shall adopt the modified plan approved by the Federal Railroad Administration under § 272.103 and shall comply with that plan, as revised.

§ 272.7 Coverage of a critical incident stress plan.

The critical incident stress plan of a railroad subject to this part shall state that it covers, and shall cover, the following individuals employed by the railroad if they are directly involved (as defined in § 272.9) in a critical incident:

(a) Railroad employees who are subject to the hours of service laws at—

(1) 49 U.S.C. 21103 (that is, train employees not subject to subpart F of part 228 of this chapter regarding the hours of service of train employees engaged in commuter or intercity rail passenger transportation);

(2) 49 U.S.C. 21104 (signal employees); or

(3) 49 U.S.C. 21105 (dispatching service employees);

(b) Railroad employees who are subject to the hours of service regulations at subpart F of part 228 of this chapter (regarding the hours of service of train employees engaged in commuter or intercity rail passenger transportation);

(c) Railroad employees who inspect, install, repair, or maintain railroad right-of-way or structures; and

(d) Railroad employees who inspect, repair, or maintain locomotives, passenger cars, or freight cars.

§ 272.9 Definitions.

As used in this part—

Accident/incident has the meaning assigned to that term by part 225 of this chapter.

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Associate Administrator means the Associate Administrator for Railroad Safety and Chief Safety Officer of the Federal Railroad Administration or that person's delegate.

Class I has the meaning assigned to that term by the regulations of the Surface Transportation Board (49 CFR part 1201; General Instructions 1-1).

Commuter railroad means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, that provides regularly-scheduled passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979.

Critical incident means either—

(1) An accident/incident reportable to FRA under part 225 of this chapter that results in a fatality, loss of limb, or a similarly serious bodily injury; or

(2) A catastrophic accident/incident reportable to FRA under part 225 of this chapter that could be reasonably expected to impair a directly-involved employee's ability to perform his or her job duties safely.

Directly-involved employee means a railroad employee covered under § 272.7—

(1) Whose actions are closely connected to the critical incident;

(2) Who witnesses the critical incident in person as it occurs or who witnesses the immediate effects of the critical incident in person; or

(3) Who is charged to directly intervene in, or respond to, the critical incident (excluding railroad police officers or investigators who routinely respond to and are specially trained to handle emergencies).

FRA means the Federal Railroad Administration, 1200 New Jersey Ave., SE, Washington, DC 20590.

Home terminal means an employee's regular reporting point at the beginning of the tour of duty.

Intercity passenger railroad means a railroad, as described by 49 U.S.C. 20102(2), including public authorities operating passenger train service, which provides regularly-scheduled passenger service between large cities.

§ 272.11 Penalties.

(a) Civil penalties. A person who violates any requirement of this part, or causes the violation of any such requirement, is subject to a civil penalty of at least \$650 and not more than \$25,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$105,000 per violation may be assessed. Each day that a violation continues is a separate offense. See Appendix A to part 209 of this chapter for a statement of agency civil penalty policy.

(b) Criminal penalties. A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

Subpart B—Plan Components and Approval Process

§ 272.101 Content of a critical incident stress plan.

Each critical incident stress plan under this part shall include, at a minimum, provisions for—

(a) Informing each directly-involved employee as soon as practicable of the relief options available in accordance with the railroad's critical incident stress plan;

(b) Offering timely relief from the balance of the duty tour for each directly-involved employee, after the employee has performed any actions necessary for the safety of persons and contemporaneous documentation of the incident;

(c) Offering timely transportation to each directly-involved employee's home terminal, if necessary;

(d) Offering counseling, guidance, and other appropriate support services to each directly-involved employee;

(e) Permitting relief from the duty tour(s) subsequent to the critical incident, for an amount of time to be determined by each railroad, if requested by a directly-involved employee as may be necessary and reasonable;

(f) Permitting each directly-involved employee such additional leave from normal duty as may be necessary and reasonable to receive preventive services or treatment related to the incident or both, provided the employee's clinical diagnosis supports the need for additional time off or the employee is in consultation with a health care professional related to the incident and such health care professional supports the need for additional time off in order for the employee to receive preventive services or treatment related to the incident, or both; and

(g) Addressing how the railroad's employees operating or otherwise working on track owned by or operated over by a different railroad will be afforded the protections of the plan.

§ 272.103 Submission of critical incident stress plan for approval by the Federal Railroad Administration.

(a) Each railroad subject to this part shall submit to the Federal Railroad Administration, Office of Railroad Safety, 1200 New Jersey Avenue, SE, Washington, DC 20590, for approval, the railroad's critical incident stress plan no later than 12 months after [INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

(b) Each railroad subject to this part shall—

(1) Simultaneously with its filing with FRA, serve, either by hard copy or electronically, a copy of the submission filed pursuant to paragraph (a) of this section or a material modification filed pursuant to paragraph (e) of this section on the international/national president of any non-profit employee labor organization representing a class or craft of the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) of this section or a material modification filed pursuant to paragraph (e) of this section a statement affirming that the railroad has complied with the requirements of paragraph (b)(1) of this section, together with a list of the names and addresses of the persons served.

(c) Not later than 90 days after the date of filing a submission pursuant to paragraph (a) of this section or a material modification pursuant to paragraph (e) of this section, a labor organization representing a class or craft of the railroad's employees subject to this part, may file a comment on the submission or material modification.

(1) Each comment shall be submitted to the Associate Administrator for Railroad Safety and Chief Safety Officer, FRA, 1200 New Jersey Avenue, SE, Washington, DC 20590; and

(2) The commenter shall certify that a copy of the comment was served on the railroad.

(d) A critical incident stress plan is considered approved for purposes of this part if and when FRA notifies the railroad in writing that the critical incident stress plan is approved, or 120 days after FRA has received the railroad's critical incident stress plan, whichever occurs first.

(e) After FRA's initial approval of a railroad's critical incident stress plan, if the railroad makes a material modification of the critical incident stress plan, the railroad shall submit to FRA for approval a copy of the critical incident stress plan as it has been revised to reflect the material modification within 30 days of making the material modification.

(f) Upon FRA approval of a railroad's critical incident stress plan and any material modification of the critical incident stress plan, the railroad must make a copy of the railroad's plan and the material modification available to the railroad's employees identified in § 272.7.

(g) Each railroad subject to this part must make a copy of the railroad's plan available for inspection and reproduction by the FRA.

§ 272.105 Requirement to file critical incident stress plan electronically.

(a) Each railroad subject to this part must submit its critical incident stress plan and any material modifications to that plan electronically through FRA's Web site at <http://safetydata.fra.dot.gov/OfficeofSafety/CISP>.

(b) The railroad's electronic submission shall provide the Associate Administrator with the following:

- (1) The name of the railroad;
 - (2) The names of two individuals, including job titles, who will be the railroad's points of contact;
 - (3) The mailing addresses for the railroad's points of contact;
 - (4) The railroad's system or main headquarters address located in the United States;
 - (5) The email addresses for the railroad's points of contact;
 - (6) The daytime telephone numbers for the railroad's points of contact; and
 - (7) An electronic copy of the railroad's critical incident stress plan or any material modifications to that plan being submitted for FRA approval.
- (c) FRA may electronically store any materials required by this part.

Appendix A to Part 272—Schedule of Civil Penalties¹

Section	Violation	Willful Violation ¹
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SUBPART B— PLAN COMPONENTS AND APPROVAL PROCESS:

272.101 Content of a critical incident stress plan

(a) Failure to inform about relief options.....	5,000	6,000
(b) Failure to offer timely relief from duty tour.....	5,000	10,000
(c) Failure to offer timely transportation to home terminal...5,000		10,000
(d) Failure to offer counseling, guidance, support services...5,000		10,000
(e) Failure to permit relief from duty tour(s) subsequent to incident.....	5,000	10,000
(f) Failure to permit additional leave to receive preventive		

services or treatment related to the incident.....	5,000	10,000
272.103 Submission of critical incident stress plan for approval by the Federal Railroad Administration		
(a) Failure to submit a plan to FRA	9,000	18,000
(b) Failure to simultaneously file a copy	5,000	10,000
(e) Failure to submit a material modification to the plan.....	7,500	15,000
(f) Failure to make a copy of the plan available to covered employees.....	3,000	6,000
(g) Failure to make a copy of the plan available to FRA	3,000	6,000

¹ A civil penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to \$105,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304 and 49 CFR part 209, Appendix A.

Issued in Washington, DC, on March 17, 2014.

Karen J. Hedlund,
Deputy Administrator.

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