

then sixteen inches above the top of the rail.

The Belfast & Moosehead Lake Rail Road Company is requesting an exemption to the requirement of these steps (2) for their steam locomotive #1149. The railroad states that due to the design and placement of the locomotive cylinders and pilot truck, the steps cannot be applied without substantially rebuilding the front of the locomotive. Also, application of the pilot sill steps would block access to the pilot truck journal boxes, make inspections more difficult, and possibly interfere with the movement of the locomotive's outside-frame pilot truck. Employees of the Belfast & Moosehead Lake Rail Road Company are not permitted to ride the pilot of the locomotive.

Interested parties are invited to participate in these proceedings by submitting written views, data, or comments. FRA does not anticipate scheduling a public hearing in connection with these proceedings since the facts do not appear to warrant a hearing. If any interested party desires an opportunity for oral comment, they should notify FRA, in writing, before the end of the comment period and specify the basis for their request.

All communications concerning these proceedings should identify the appropriate docket number (e.g., Waiver Petition Docket Number H-97-4) and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel, FRA, Nassif Building, 400 Seventh Street, S.W., Mail Stop 10, Washington, D.C. 20590. Communications received within 30 days of the date of this notice will be considered by FRA before final action is taken. Comments received after that date will be considered as far as practicable. All written communications concerning these proceedings are available for examination during regular business hours (9:00 a.m.-5:00 p.m.) at FRA's temporary docket room located at 1120 Vermont Avenue, N.W., Room 7051, Washington, D.C. 20005.

Issued in Washington, D.C. on August 6, 1997.

**Grady C. Cothen, Jr.,**

*Deputy Associate Administrator for Safety Standards and Program Development.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

[FRA Docket No. SBR 97-1, Notice 1]

RIN NO. 2130-AB15

### Interim Policy Statement Concerning Small Entities Subject to the Railroad Safety Laws

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

**ACTION:** Notice of interim statement of agency policy concerning small entities subject to the railroad safety laws.

**SUMMARY:** In this notice, FRA explains its communication and enforcement policies and programs concerning small businesses subject to the federal railroad safety laws. These policies are being published pursuant to requirements set forth in the Small Business Regulatory Enforcement Fairness Act of 1996. FRA has in place programs that devote special attention to the unique concerns and operations of small entities in the administration of the national railroad safety compliance and enforcement program. FRA expects that publication of these policies and programs will enhance safe operations for small railroads, contractors, and shippers, and improve communication between FRA and small entities.

**DATES:** *Effective Date:* This Interim Statement of Policy is effective October 10, 1997.

*Written Comments:* Written comments must be submitted to FRA before November 30, 1997.

### FOR FURTHER INFORMATION PLEASE CONTACT:

(1) *Principal Program Person:* Mark Weihofen, Office of Safety, Planning and Evaluation Staff Director, RRS-21, Federal Railroad Administration, 400 Seventh Street, SW, Stop 25, Washington, D.C., 20590; telephone 202-632-3303.

(2) *Principal Attorney:* Christine Beyer, Office of Chief Counsel, RCC-11, Federal Railroad Administration, 400 Seventh Street, SW, Stop 10, Washington, D.C., 20590; telephone 202-632-6189.

### SUPPLEMENTARY INFORMATION:

#### I. Legislative Background

The Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. No. 104-121) (SBREFA) establishes new requirements for federal agencies to follow with respect to small businesses, creates new duties for the Small Business Administration (SBA), and

amends portions of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) and the Equal Access to Justice Act (EAJA) (5 U.S.C. 501, *et seq.*). The primary purposes of SBREFA are to implement recommendations developed at the 1995 White House Conference on Small Business, to provide small businesses enhanced opportunities for judicial review of final agency action, to encourage small business participation in the regulatory process, to develop accessible sources of information on regulatory requirements for small business, to create a cooperative regulatory environment for small business, and to make federal regulators accountable for "excessive" enforcement actions.

In order to accomplish these goals, SBREFA, among other things, requires federal enforcement agencies to institute two new policies. The first is a communication policy, described in section 213 of the legislation, in which each agency must "answer inquiries by small entities concerning information on, and advice about, compliance with" statutes and regulations within the agency's jurisdiction, "interpreting and applying the law to specific sets of facts supplied by the small entity." The second is an enforcement policy, required by section 223 of SBREFA, which requires each agency to establish a policy or program

to provide for the reduction, and under appropriate circumstances for the waiver, of civil penalties for violations of a statutory or regulatory requirement by a small entity. Under appropriate circumstances, an agency may consider ability to pay in determining assessments on small entities.

This enforcement policy must include conditions or exclusions, such as requiring a small entity to correct the violation within a reasonable time; excluding small businesses that have been subject to several enforcement actions by the agency; excluding actions that involve willful or criminal conduct; excluding actions that pose serious health, safety, or environmental threats; and requiring a good faith effort to comply with the law.

SBREFA incorporates the definition for "small entity" that is established by existing law (5 U.S.C. 601, 15 U.S.C. 632, 13 CFR part 121) for those businesses to be covered by the agency policies. Generally, a small entity is a business concern that is independently owned and operated, and is not dominant in its field of operation. Also, "small governmental jurisdictions" that serve populations of 50,000 or less are small entities. (Commuter railroads are governmental jurisdictions, and some may fit within this statutory delineation

for small governmental jurisdictions, or small entities.) An agency may establish one or more other definitions for this term, in consultation with the SBA and after opportunity for public comment, that are appropriate to the agency's activities.

## II. Definition of Small Entity in the Railroad Industry

Pursuant to its statutory authority, the SBA promulgated regulations that clarify the term "small entity" by industry, using number of employees or annual income as criteria. 13 CFR 121.101-108, and 201. In the SBA regulations, main line railroads with 1500 or fewer employees, and switching or terminal establishments with 500 or fewer employees constitute small entities. The SBA regulations do not address hazardous material shippers in the railroad industry.

Prior to the SBA regulations establishing size categories, the Interstate Commerce Commission (ICC) developed a classification system for freight railroads as Class I, II or III, based on annual operating revenue. (The detailed, qualifying criteria for these classifications are set forth in 49 CFR part 1201.) The Department of Transportation's Surface Transportation Board, which succeeded the ICC, has not changed these classifications. The ICC classification system has been used pervasively by FRA and the railroad industry to identify entities by size. The SBA recognizes this classification system as a sound one, and concurs with FRA's decision to continue using it, provided the public has notice of the classification system in use for any particular proceeding and an opportunity to comment on it. FRA has decided to define "small entity," on an interim basis, to include only those entities whose revenues would bring them within the Class III definition. FRA believes this definition is a much more realistic and useful place to draw the line for safety purposes than the general SBA definition, but that several other possible definitions deserve consideration. Therefore, for purposes of the Interim Statement of Policy at this point in time, FRA wishes to clarify that small entities are: the Class III railroads; the hazardous material shippers that meet the income level established for Class III railroads (those with annual operating revenues of \$20 million per year or less, as set forth in 49 CFR 1201.1-1); railroad contractors that meet the income level established for Class III railroads; and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. The principles concerning the aggregation of

company affiliates set forth in DOT's regulations at 49 C.F.R. 6.7(f) apply to this definition for purposes of claims brought under EAJA. However, FRA intends to develop a new definition for the term "small entity" for the railroad industry that will apply to the programs set forth in this Policy Statement.

Therefore, FRA now invites comment from the public on potential, alternative definitions for the term "small entity." Suggested new definitions should be accompanied by supportable rationale, including economic and employee data, operating concerns, and an explanation of how SBREFA's legislative intent would be met by the adoption of a particular definition. The comments should also include how the proposed definition would apply to railroads, shippers, commuter railroads, and contractors working in the railroad industry.

FRA is contemplating several potential new definitions at this time: fifteen employees subject to the hours of service laws, which was established by Congress as a benchmark for small business exemptions in the Hours of Service Act, 49 U.S.C. 20102, 21101-21107, 21303-4; 400,000 person/hours worked annually, which equates to approximately 200 employees and which FRA has used as a size classification in regulatory programs in the past; the Class III income designation currently in use; the employee delineations established by SBA regulation for main line and switching railroads; any combination of these; and entirely new designations. FRA invites comments from all individuals and entities subject to the railroad safety laws and other members of the public on these potential designations for "small entity" or any additional classifications that have not yet been discussed. After reviewing comments submitted, FRA will conduct a public meeting to further discuss and consider potential designations with all interested parties. Commenters should be aware that the "small entity" definition FRA adopts here on an interim basis and the one it ultimately adopts will determine the entities that will be considered small for purposes of Regulatory Flexibility Act analysis, the Equal Access to Justice Act, and FRA's small business enforcement policy and communication program. However, whatever "small entity" definition FRA adopts, FRA will retain the authority to use different criteria to tailor the applicability of any regulations it issues to address appropriately the specific safety problem at issue. For example, even if FRA decides to retain the interim Class III standard for "small

entity," it may issue a rule that applies only to railroads with more than a certain number of annual person/hours or to all railroads, regardless of size.

## III. FRA's Small Business Communication and Enforcement Programs

FRA's purpose in publishing this notice and policy statement is to formally announce and explain its communication and enforcement policies concerning small entities in the railroad industry. FRA is hopeful that this publication will, aside from achieving compliance with the SBREFA requirements, enhance railroad safety in several ways: the number of small entities that participate cooperatively in the safety compliance and enforcement program will increase; small businesses will gain a greater understanding of railroad safety requirements; small entities will be encouraged to communicate more freely with agency personnel to alleviate potential safety risks before they become hazardous; and FRA's understanding of small operations will improve.

FRA's small business communication program has existed for some time, and continues to grow to meet the needs of our customers in the railroad industry. FRA Office of Safety and Office of Chief Counsel personnel, at the headquarters, regional and local level, devote a great deal of attention to the inquiries and concerns of small entities. FRA's program is flexible and responsive to the particular need expressed. The agency's response takes a variety of forms: verbal and written answers to questions received, training sessions for new or existing small businesses on the substance of railroad safety regulations, and advice on a particular standard or interpretation of a standard. Some of the FRA Regional Administrators have established programs in which small entities in the region meet with FRA regional specialists on a regular basis to discuss new regulations, persistent safety concerns, developing technology, and ongoing compliance issues. FRA regional offices hold yearly conferences, in which specific blocks of time are set aside to meet with small businesses and hear their concerns. In addition, FRA has instituted new, innovative programs that expand our existing communication policy for small entities. The Railroad Safety Advisory Committee and Technical Resolution Committees, which play an integral role in the development of railroad safety regulations and the clarification of regulatory interpretations, include representatives of small businesses.

Similarly, FRA's enforcement program devotes special attention to ensuring that the limited financial resources of small entities are considered during the enforcement process. FRA inspectors have and utilize discretion when determining whether a civil penalty citation or other enforcement action should be taken against a small entity. Staff attorneys in FRA's Office of Chief Counsel regularly assess information provided by a company concerning the degree to which fines will impact the viability of a small business, and the extent to which a fine may prevent the business from improving the safety of its operation. In fact, the federal railroad safety laws include the requirement that agency personnel consider a respondent's ability to pay in any civil penalty action taken. Staff attorneys regularly invite small entities to present information concerning financial status and other factors that may result in a reduction or waiver of penalty assessments. FRA has instituted a new enforcement program, the Safety Assurance and Compliance Program (SACP), that also benefits small entities, and it is described in more detail in the interim policy statement set forth below.

FRA anticipates that when this interim policy statement becomes final, it will be codified in the Code of Federal Regulations as an appendix to 49 CFR part 209, so that all members of the public have access to it as needed. The terms "small business" and "small entity" have identical meaning for purposes of this document, and are used interchangeably throughout.

#### **Comments Requested**

FRA invites written comment on the definition of "small entity," potential alternative definitions, and supporting rationale for suggested alternative definitions. Please direct all written comments in triplicate to the Docket Clerk, FRA, 400 Seventh Street, SW, Stop 10, Washington, D.C. 20590 before November 30, 1997.

#### **Federal Railroad Administration Interim Statement of Agency Policy Concerning Small Entities**

This interim policy statement explains FRA's communication and enforcement policies concerning small entities subject to the federal railroad safety laws. These policies have been developed to take into account the unique concerns and operations of small businesses in the administration of the national railroad safety program, and will continue to evolve to meet the needs of our customers in the railroad industry. For purposes of this policy

statement, Class III railroads, contractors and hazardous materials shippers meeting the economic criteria established for Class III railroads in 49 CFR 1201.1-1, and commuter railroads that serve populations of 50,000 or less constitute the class of organizations considered "small entities" or "small businesses."

FRA understands that small entities in the railroad industry have significantly different characteristics than large carriers and shippers. FRA believes that these differences necessitate careful consideration in order to ensure that those entities receive appropriate treatment on compliance and enforcement matters, and enhance the safety of railroad operations. Therefore, FRA has developed programs to respond to compliance-related inquiries of small entities, and to ensure proper handling of civil penalty and other enforcement actions against small businesses.

#### ***Small Entity Communication Policy***

It is FRA's policy that all agency personnel respond in a timely and comprehensive fashion to the inquiries of small entities concerning rail safety statutes, safety regulations, and interpretations of these statutes and regulations. Also, FRA personnel provide guidance to small entities, as needed, in applying the law to specific facts and situations that arise in the course of railroad operations. These agency communications take many forms, and are tailored to meet the needs of the requesting party.

FRA inspectors provide training on the requirements of all railroad safety statutes and regulations for new and existing small businesses upon request. Also, FRA inspectors often provide impromptu training sessions in the normal course of their inspection duties. FRA believes that this sort of preventive, rather than punitive, communication greatly enhances railroad safety. FRA's Office of Safety and Office of Chief Counsel regularly provide verbal and written responses to questions raised by small entities concerning the plain meaning of the railroad safety standards, statutory requirements, and interpretations of the law. As required by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), when FRA issues a final rule that has a significant impact on a substantial number of small entities, FRA will also issue a compliance guide for small entities concerning that rule.

It is FRA's policy to maintain frequent and open communications with the national representatives of the primary

small entity associations and to consult with these organizations before embarking on new policies that may impact the interests of small businesses. In some regions of the country where the concentration of small entities is particularly high, FRA Regional Administrators have established programs in which all small entities in the region meet with FRA regional specialists on a regular basis to discuss new regulations, persistent safety concerns, emerging technology, and compliance issues. Also, FRA regional offices hold periodic conferences, in which specific blocks of time are set aside to meet with small businesses and hear their concerns.

In addition to these communication practices, FRA has recently instituted innovative partnership programs that expand the extent to which small entities participate in the development of policy and process. The Railroad Safety Advisory Committee (RSAC) has been established to advise the agency on the development and revision of railroad safety standards. The committee consists of a wide range of industry representatives, including organizations that represent the interests of small business. The small entity representative groups that sit on the RSAC may appoint members of their choice to participate in the development of new safety standards. This reflects FRA's policy that small business interests must be heard and considered in the development of new standards to ensure that FRA does not impose unnecessary economic burdens, and to create more effective standards. Similarly, FRA has established Technical Resolution Committees for each railroad safety discipline, which meet throughout the country to discuss, refine, and clarify compliance policies and interpretations of existing safety standards. These committees generally include small business representation and provide another avenue of communication between FRA and small entities. Finally, FRA has established a home page on the Internet and makes pertinent agency information available to the public in that medium. FRA's internet address is <http://www.fra.dot.gov> and any particular FRA employee can be reached by entering the following: first name.last name@fra.dot.gov.

FRA's longstanding policy of open communication with small entities is apparent in these practices. FRA will make every effort to develop new and equally responsive communication procedures as is warranted by new developments in the railroad industry.

### *Small Entity Enforcement Policy*

FRA has adopted an enforcement policy that addresses the unique nature of small entities in the imposition of civil penalties and resolution of those assessments. Pursuant to FRA's statutory authority and as described in 49 CFR part 209, Appendix A, it is FRA's policy to consider a variety of factors in determining whether to take enforcement action against persons, including small entities, who have violated the safety laws and regulations. In addition to the seriousness of the violation and the person's history of compliance, FRA inspectors consider "such other factors as the immediate circumstances make relevant." In the context of violations by small entities, those factors include whether the violations were made in good faith (e.g., based on an honest misunderstanding of the law) and whether the small entity has moved quickly and thoroughly to remedy the violation(s). In general, the presence of both good faith and prompt remedial action militates against taking a civil penalty action, especially if the violations are isolated events. On the other hand, violations involving willful actions and/or posing serious health, safety, or environmental threats should ordinarily result in enforcement actions, regardless of the entity's size.

Once FRA has assessed a civil penalty, it collects at least the statutory minimum amount (\$250 for hazardous materials violations and \$500 for all others) unless it must terminate the claim for some reason. However, civil penalties may be reduced from the initial assessment based on the consideration of a variety of criteria found in the railroad safety statutes and SBREFA: the severity of the safety, health or environmental risk presented; the existence of alternative methods of eliminating the safety hazard; the entity's culpability; the entity's compliance history; the entity's ability to pay the assessment; the impacts an assessment might exact on the entity's continued business; and evidence that the entity acted in good faith. FRA staff attorneys regularly invite small entities to present any information related to these factors, and reduce civil penalty assessments based on the value and integrity of the information presented. Staff attorneys conduct conference calls or meet with small entities to discuss pending violations, and explain the merits of any defenses or mitigating factors presented that may have resulted or failed to result in penalty reductions. Among the "other factors" FRA considers at this stage is the promptness and thoroughness of the entity's

remedial action to correct the violations and prevent a recurrence. Small entities should be sure to address these factors in communications with FRA concerning civil penalty cases. Such long-term solutions to compliance problems will be given great weight in FRA's determinations of a final settlement offer.

Finally, under FRA's Safety Assurance and Compliance Program (SACP), FRA identifies systemic safety hazards that continue to occur in a carrier or shipper operation, and in cooperation with the subject business, develops an improvement plan to eliminate those safety concerns. Typically, the plan provides small entities with a reasonable time frame in which to make improvements without the threat of civil penalty. If FRA determines that the entity has failed to comply with the improvement plan, however, enforcement action is initiated.

FRA's small entity enforcement policy is flexible and comprehensive. FRA's first priority in its compliance and enforcement activities is public and employee safety. However, FRA is obtaining compliance and enhancing safety with reasoned, fair methods that do not inflict undue hardship on small entities.

Submitted in Washington, DC, on August 6, 1997.

**Donald M. Itzkoff,**

*Deputy Administrator.*

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BILLING CODE 4910-06-P

## DEPARTMENT OF TRANSPORTATION

### Federal Transit Administration

#### **Environmental Impact Statement on Southwest Corridor Transit Improvements in Cleveland, Ohio**

**AGENCY:** Federal Transit Administration, DOT.

**ACTION:** Notice of intent to prepare an environmental impact statement (EIS).

**SUMMARY:** The Federal Transit Administration (FTA) and the Greater Cleveland Regional Transit Authority (GCRTA) are undertaking the preparation of an Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA), for transit improvements. The local agency will ensure that the EIS also satisfies requirements established by the Ohio Environmental Protection Agency. The Environmental Impact Statement will evaluate alternative rail transit alignments in the corridor

between the GCRTA Red Lines current terminus at Cleveland Hopkins International Airport, to the International Exposition (I-X) Center and the Central Business District (CBD) in Berea, Ohio. In addition, the EIS will evaluate Transportation System Management (TSM) improvements and a No-Build alternative and any new alternatives generated through the scoping process. Scoping will be accomplished through correspondence with interested persons, organizations, and federal, state, and local agencies and through three public meetings. See **SUPPLEMENTARY INFORMATION** below for details.

**DATES:** *Comment Due Date:* Written comments on the scope of the alternative alignments and impacts to be considered should be sent to the GCRTA by Saturday, September 20, 1997.

*Scoping Meetings:* The public scoping meetings will be held on Monday, September 8, 1997 between 3:00 P.M. and 6:00 P.M. at the Frank J. Lausche State Office Building; Tuesday, September 9, 1997 between 3:00 P.M. and 9:00 P.M. at Berea City Hall and Wednesday, September 10, 1997 between 3:00 P.M. and 9:00 P.M. at Brook Park City Hall. See **ADDRESSES** below. People with special needs should contact Edward Taylor of the GCRTA at (216) 566-5020. A TDD number is available (216) 781-4271. The buildings are accessible to people with disabilities.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Fish, Director, Office of Planning and Program Development; Federal Transit Administration, 55 East Monroe Street, Suite 1415; Chicago, Illinois 60603 (312) 353-2865.

**ADDRESSES:** Written comments on project scope should be sent to Mr. Edward Taylor, Deputy Project Manager, Greater Cleveland Regional Transit Authority, 615 Superior Avenue, W, Cleveland, Ohio 44113. Scoping Meetings will be held at the following locations:

1. Frank J. Lausche State Office Building, 615 Superior Avenue, W, Cleveland, Ohio 44113
2. City Hall, City of Berea, 11 Berea Commons, Berea, Ohio 44017
3. City Hall, City of Brook Park, 6161 Engle Road, Brook Park, Ohio 44142

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Scoping**

FTA and the GCRTA invite interested individuals, organizations, and federal, state and local agencies to participate in defining the alternatives to be evaluated in the EIS and identifying any significant social, economic, or