

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 240**

[Docket No. FRA–2018–0053, Notice No. 1]

RIN 2130–AC40

Qualification and Certification of Locomotive Engineers; Miscellaneous Revisions

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA is proposing to revise its regulation governing the qualification and certification of locomotive engineers to make it consistent with its regulation for the qualification and certification of conductors. The proposed changes include: Amending the program submission process; handling engineer and conductor petitions for review with a single FRA review board (Operating Crew Review Board or OCRB); and revising the filing requirements for petitions to the OCRB. The proposed revisions would result in cost savings and benefits for railroads and locomotive engineers by adopting the conductor certification regulation's streamlined processes developed twenty years after the engineer certification regulation. Consistent with Executive Order 13771, the proposed rule would reduce the overall regulatory burden and the paperwork and reporting burden under the Paperwork Reduction Act of 1995 on railroads and locomotive engineers.

DATES: *Written Comments:* Written comments on the proposed rule must be received by July 8, 2019. FRA will consider comments received after that date to the extent practicable. FRA anticipates being able to determine these matters without a public hearing. However, if prior to June 10, 2019, FRA receives a request for a public hearing accompanied by a showing that the party cannot adequately present his or her position by written statement, a hearing will be scheduled and FRA will publish a supplemental document in the **Federal Register** informing interested parties of the date, time, and location of the hearing.

ADDRESSES: You may submit comments identified by the docket number FRA–2018–0053 by any one of the following methods:

- Electronically through the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments;

• *Mail:* U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590;

- *Hand Delivery:* U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays; or
- *Fax:* 1–202–493–2251.

Instructions: All submissions must include the agency name, docket name, and docket number or Regulatory Identification Number (RIN) for this rulemaking (2130–AC40). Note that all comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time or to U.S. Department of Transportation, Docket Operations, M–30, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE, Washington, DC, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT:

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I. Executive Summary

The Secretary of Transportation (Secretary) has broad statutory authority to “prescribe regulations and issue orders for every area of railroad safety.” 49 U.S.C. 20103. The Rail Safety Improvement Act of 1988, Public Law 100–342, Sec. 4, 102 Stat. 624, 625–27 (June 22, 1988) (recodified at 49 U.S.C. 20135) (1988 RSIA), specifically required the Secretary to “prescribe regulations and issue orders to establish a program requiring the licensing or certification . . . of any operator of a locomotive.” The Secretary delegated these authorities to the Federal Railroad Administrator (Administrator). See 49 CFR 1.89(a). Exercising these delegated authorities, in 1991, FRA issued a certification final rule for locomotive engineers. 56 FR 28228 (codified at 49 CFR part 240).¹ Since that first final rule, FRA has amended the locomotive engineer certification requirements through six rulemakings. In 2009, FRA published the most recent final rule amending the locomotive engineer requirements. 74 FR 68173.

In 2008, over 17 years after FRA’s promulgation of the engineer certification rule, Congress required the Secretary to prescribe regulations establishing a program requiring the certification of train conductors. See Rail Safety Improvement Act of 2008, Sec. 402, Public Law 110–432, 122 Stat. 4884 (Oct. 16, 2008) (codified at 49 U.S.C. 20163). The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89(b). To implement this statutory provision, FRA established a Railroad Safety Advisory Committee (RSAC) Conductor Certification Working Group (RSAC Working Group or Working Group)² to make recommendations regarding the certification of train conductors.³ In

¹ Unless otherwise specified, all references to CFR sections and parts refer to title 49 of the CFR.

² The RSAC provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. For more information regarding the RSAC process and the conduct of the Working Group, see 76 FR 69802, 69802–69804 (Nov. 9, 2011).

³ RSAC accepted the task (Task No. 08–07, titled “Conductor Certification”) on December 10, 2008. This issue was thoroughly discussed and analyzed at the part 242 RSAC Working Group meetings and in the part 242 rulemaking documents. See 75 FR 69166, 69168 (Nov. 10, 2010).

2011, FRA published a final conductor certification rule. 76 FR 69802 (Nov. 9, 2011) (codified at 49 CFR part 242).

FRA's locomotive engineer certification regulation (Part 240) provided a starting point for discussions on what requirements could be appropriate for conductor certification and the final conductor certification regulation (Part 242) is largely organized and comparable to the locomotive engineer certification regulation. The NPRM FRA published in 2010 in the conductor certification rulemaking noted that the Working Group's accepted task statement included the discretion to "consider any revisions to 49 CFR part 240 appropriate to conform and update the certification programs for locomotive engineers and conductors." 75 FR 69166, 69167 (2010). During the Working Group's meetings, some members provided feedback to FRA on whether corresponding amendments to the locomotive engineer rule were preferable. However, this feedback was not part of a consensus recommendation and, after considering the Working Group's discussions and the limited scope of this proposed rule, FRA decided not to seek RSAC recommendations on the contents of this proposed rule.

FRA believes that issues that go beyond conforming FRA's locomotive engineer regulation with FRA's conductor certification regulation and updating and clarifying the existing requirements for locomotive engineer certification are best saved for a separate, future rulemaking. Accordingly, FRA is proposing to revise its regulation governing the minimum requirements for the qualification and certification of locomotive engineers to make certain provisions consistent with its regulation for the qualification and certification of conductors and to update and clarify, as appropriate, the existing requirements of the locomotive engineer certification regulation.

President Trump issued Executive Order 13771 (E.O. 13771), "Reducing Regulation and Controlling Regulatory Costs," on January 30, 2017. E.O. 13771 seeks to "manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations" and directs each executive department or agency to identify for elimination two existing regulations for every new regulation issued. E.O. 13771 also requires any new incremental cost associated with a new regulation, to the extent permitted by law, be at least offset by the elimination of existing costs associated with at least two prior regulations.

Similarly, Executive Order 13610, "Identifying and Reducing Regulatory Burdens," issued May 12, 2012, seeks "to modernize our regulatory system and to reduce unjustified regulatory burdens and costs" and directs each executive agency to conduct retrospective reviews of its regulatory requirements to identify potentially beneficial modifications to regulations. 77 FR 28469. Executive agencies are to "give priority, consistent with the law, to those initiatives that will produce significant quantifiable monetary savings or significant quantifiable reductions in paperwork burdens while protecting public health, welfare, safety and our environment." *See id.* at 28470.

In compliance with these E.O.s, FRA expects this rulemaking will reduce the railroad industry's overall regulatory, paperwork, and cost burden without affecting safety on the nation's railroad system and, at the same time, benefit individual locomotive engineers. FRA also expects the proposals in this NPRM, if implemented, to generate savings in governmental administrative costs by reducing FRA's Part 240 program's reliance on paper documents and conforming its review processes under Part 240 as much as possible to those under Part 242. FRA believes consistency in the processes, procedures and criteria between Part 240 and Part 242 will not only lead to an overall reduction in the regulatory, paperwork and cost burden on the railroad industry, but also benefit individual locomotive engineers by making the processes, procedures and requirements of the two certification systems consistent to the extent possible. Over a 20-year period, FRA estimates \$11.6 million in total cost savings would accrue—a present, discounted value of \$6.1 million (7% discount).

II. Section-by-Section Analysis

Section 240.1 Purpose and Scope

FRA proposes to amend paragraph (c) of this section to conform it to paragraph (c) of § 242.1. However, the intent of the paragraph remains the same—*i.e.*, even though a person may have a job classification title other than "locomotive engineer," the locomotive engineer certification requirements of this rule apply to that person if he or she meets the definition of locomotive engineer.

Section 240.3 Application and Responsibility for Compliance

FRA proposes to amend § 240.3 to clarify FRA's jurisdiction and conform to § 242.3. Section 242.3 provides that Part 242 applies to all railroads except:

(1) "plant railroads"; (2) tourist, scenic, historic or excursion operations that are not part of the general railroad system of transportation; and (3) rapid transit operations in an urban area that are not connected to the general railroad system of transportation. As proposed, § 240.3 provides that Part 240 applies to all railroads with the same three exceptions.

The first exception applies to "plant railroads." Plant railroads operate only on track inside installations (*see* proposed definition in § 240.7). Plant railroads' operations do not go beyond the plants' boundaries and do not involve the switching of rail cars for entities other than themselves.

The second exception applies to "tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation" (as defined in § 240.7). In § 240.7, FRA proposes to define these operations as "a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track)." This definition is the same as the definition of the term in Part 242. Moreover, excluding these types of railroads from Part 240 is consistent with FRA's jurisdictional policy that already excludes these operations from all but a limited number of Federal railroad safety requirements.

The third exception covers rapid transit operations in an urban area that are not connected to the general system. FRA notes that some rapid transit operations, given their connections to the general system, are within FRA's jurisdiction and FRA specifically intends Part 240 to apply to those operations, as it always has. FRA does not intend for this proposed rule to have any effect on FRA's jurisdiction. A more detailed analysis of the applicability of Part 240 is in the preamble discussions of 49 CFR 240.3 in 64 FR 60966, 60974 (Nov. 8, 1999), 63 FR 50626, 50636–50637 (Sept. 22, 1998), and 56 FR 28228, 28240 (June 19, 1991).

Section 240.5 Effect and Construction

FRA proposes to amend this section to conform it to 49 CFR 242.5 and, in the process, update the section with respect to issues of preemption and "flowback." Proposed paragraphs (a), (b), and (d) are the same as the language currently in paragraphs (c), (d), and (f), respectively. FRA proposes to remove existing paragraphs (a) and (b), which address the preemption of State law. A member of the RSAC Working Group recommended FRA not remove existing

paragraph (a) to prevent any ambiguity that Federal preemption of State and local laws remains firmly in place. However, FRA believes these paragraphs are unnecessary because 49 U.S.C. 20106 and other Federal railroad safety statutes sufficiently address the preemptive effect of FRA's regulations. Maintaining a separate Federal regulatory provision concerning the regulation's preemptive effect is duplicative and unnecessary.⁴ FRA notes that Part 242 does not contain any language comparable to the language in existing paragraphs (a) and (b) of this section. Because FRA is proposing removal of the preemption provisions, FRA proposes to remove the word "preemptive" from the title of this section and make the title the same as § 242.5.

New proposed paragraph (c) of this section addresses the issue of "flowback" and mirrors paragraph (c) of § 242.5. Industry uses the term flowback to describe a situation where an employee leaves his or her current position to return to a previously held position or craft. An example of flowback occurs when a person who holds a conductor position subsequently qualifies for a locomotive engineer position, and at some later point in time the person seeks to revert back to a conductor position. An individual's reasons for reverting back to a previous position or craft may be a personal choice or the result of circumstances beyond the individual's control (*e.g.*, downsizing).

Many collective bargaining agreements address the issue of flowback and, generally, FRA does not intend to create or prohibit any individual's right to flowback or take a position on whether flowback is desirable. Paragraph (c) of this section, however, must be read in conjunction with proposed § 240.308, which limits flowback in certain situations. Therefore, as described in the section-by-section analysis for § 240.308 below, a person who holds both a conductor and locomotive engineer certificate, and who has had his or her locomotive engineer certificate revoked for certain violations, could not work as a conductor during the period of revocation. In addition, a person who holds both a conductor and locomotive engineer certificate, and who has had his or her conductor certification revoked for certain violations, could not

work as a locomotive engineer during the period of revocation.

Section 240.7 Definitions

FRA proposes to amend this section by: (1) Adding definitions for "conductor," "drug and alcohol counselor," "ineligible or ineligibility," "on-the-job training (OJT)," "physical characteristics," "plant railroad," "remote control operator," "Substance Abuse Professional," "territorial qualifications," and "tourist, scenic, historic, or excursion operations that are not part of the general system of transportation"; (2) revising the definitions of "file, filed and filing," "FRA Representative," "instructor engineer," "main track," "medical examiner," "qualified," "railroad rolling stock," and "substance abuse disorder"; (3) removing the definitions for "EAP Counselor" and "newly hired employee"; and (4) replacing the defined term "service" with the term "serve or service." These proposed amendments will make the definitions in Part 240 consistent with the definitions in Part 242.

Conductor

This rule proposes to adopt the definition of "conductor" used in Part 242. Part 242 defines the term "conductor" as "the crewmember in charge of a 'train or yard crew' as defined in part 218 of this chapter." Title 49 CFR part 218 (Part 218) defines "train or yard crew" as one or more railroad employees assigned a controlling locomotive, under the charge and control of one crew member; called to perform service covered by Section 2 of the (former) Hours of Service Act; involved with the train or yard movement of railroad rolling equipment they are to work with as an operating crew; reporting and working together as a unit that remains in close contact if more than one employee; and subject to the railroad operating rules and program of operational tests and inspections required in §§ 217.9 and 217.11 of 49 CFR chapter II.

FRA's proposal to adopt the same definition of "conductor" as Part 242 (referring to a single "crewmember") means, under Part 240, only one person can be in charge of a train or yard crew and that person is the conductor. In some circumstances, a locomotive engineer, including a remote control operator (RCO), must be certified as both a locomotive engineer under Part 240 and as a conductor under Part 242. See 49 CFR 242.213(d). See also proposed § 240.308. All other train or yard crew members (*e.g.*, assistant conductors, brakemen, hostlers,

trainmen, switchmen, utility persons, flagmen, yard helpers, and others who might have different job titles, but perform similar duties and are not in charge of a train or yard crew) are not "conductors" for purposes of this proposed rule.

Drug and Alcohol Counselor (DAC)

FRA proposes to adopt the definition of "drug and alcohol counselor" used in Part 242. Part 242 defines the term to mean a person who meets the credentialing and qualification requirements of a "Substance Abuse Professional" (SAP) under part 40. Defining the term this way will avoid interfering with terms used in parts 40 and 219. See Section-by-Section Analysis for "Substance Abuse Professional."

EAP Counselor

FRA proposes to remove the definition for EAP Counselor (EAP) and replace that term throughout Part 240 with either a SAP or DAC. This proposed change will not only make Part 240's handling of substance abuse issues the same as Part 242, but also should improve employee confidence in the substance abuse evaluation process. See Section-by-Section Analysis for "Substance abuse disorder" and "Substance Abuse Professional." A member of the RSAC Working Group suggested railroads should be permitted to use EAPs interchangeably with SAPs and DACs because small railroads cannot afford full-time employees with DAC/SAP credentials. The RSAC Working Group thoroughly discussed and analyzed this issue and the issue is discussed in the Part 242 rulemaking (*see* 75 FR 69166, 69171 (Nov. 10, 2010); 76 FR 69802, 69816–69817 (Nov. 9, 2011)). Because replacing EAPs with SAPs and DACs in Part 242 received unanimous consensus from the RSAC Working Group and the full RSAC accepted the proposal in developing Part 242, FRA declines to propose this RSAC Working Group member's alternative approach in Part 240.

File, Filed, and Filing

FRA proposes to remove the "on or after September 4, 2001" language from the existing definition of "file, filed, and filing" because the date is obsolete. To conform the definition to the same term in Part 242, FRA also proposes to add "DOT" to the term "Docket Clerk" and a reference to "FRA" to acknowledge that, under this proposed rule, documents will either be filed with the DOT Docket Clerk or, in the case of proposed § 240.103, with FRA.

⁴ This issue was thoroughly discussed and analyzed at the Part 242 RSAC Working Group meetings and in the Part 242 rulemaking documents. See 75 FR 69166, 69168 (Nov. 10, 2010).

A member of the RSAC Working Group suggested FRA add the following sentence to the definition of “file, filed, filing”: “In the application of Section 240.103, a document is not considered properly filed unless it is simultaneously served upon the president of each labor organization that represents the railroad’s employees subject to this part.” FRA is not proposing to adopt this suggestion because FRA is proposing to revise § 240.103 to require railroads to serve copies of their locomotive engineer programs on the president of each labor organization that represents each railroad’s employees subject to Part 240. Thus, adopting this suggestion would duplicate the proposed requirement in § 240.103.

FRA Representative

FRA proposes to revise this definition to conform to the definition of “FRA Representative” in Part 242 and update the title of the Associate Administrator referenced in that definition.

Ineligible or Ineligibility

FRA proposes to add the same definition of this term as the definition of “ineligible or ineligibility” in Part 242 and to describe some instances when a person may not serve as a locomotive engineer. The proposed term “ineligible or ineligibility” means that a person is legally disqualified from serving as a certified locomotive engineer. The term is broadly defined to cover a number of circumstances when a person may not serve as a certified locomotive engineer. Revocation of certification under § 240.307 and denial of certification under § 240.219 are two examples when a person would be ineligible to serve as a certified locomotive engineer. A period of ineligibility may end when a condition or conditions are met. For example, a period of ineligibility may end when a person meets the conditions to serve as a certified locomotive engineer following an alcohol or drug violation under § 240.119.

FRA’s original suggested text presented to the RSAC Working Group defined “ineligible or ineligibility” to be when a person is legally disqualified from serving as a “locomotive engineer.” A member of the RSAC Working Group suggested FRA insert “certified” before “locomotive engineer” each place “locomotive engineer” appears in the definition because there might be circumstances where a person performs duties a railroad designates to be performed by an “engineer,” but the duties do not require a “certified” engineer under Part

240. Because we propose to use the same definition of “ineligible or ineligibility” in Part 240 as Part 242, and Part 242 contains the term “certified,” FRA is adopting this suggestion in this proposed rule.

Other members of the RSAC Working Group suggested that the term “suspension” should be inserted into the definition as another example of when a person would be ineligible to serve as a locomotive engineer. Part 242 does not define “ineligible or ineligibility” to include “suspension” and FRA declines to include it in this proposed rule. Consistent with the definition of the term “ineligible or ineligibility” in Part 242, the proposed definition of “ineligible or ineligibility” in this rule means that a person is “legally disqualified from serving” as a certified locomotive engineer for any railroad. A suspension by one railroad, however, does not create a legal disqualification by all other U.S. railroads that may have certified the individual. The disqualification is legally binding when a person’s certification is denied or revoked.

Instructor Engineer

FRA proposes to revise the definition of “instructor engineer” to make it as similar as possible to the definition of “qualified instructor” in Part 242. The existing Part 240 definition does not include a role for “designated employee representatives” as the corresponding provision in Part 242 does. Thus, consistent with Part 242’s definition of “qualified instructor” FRA proposes to amend the definition of “instructor engineer” in Part 240 to: (1) Establish a role for employee representative participation; and (2) establish methods for identifying instructors through railroad and employee representative coordination, as well as by the railroad unilaterally. The slight differences FRA proposes to leave between the definitions are necessary to recognize that engineers operate trains and conductors do not.

In both Parts 240 and 242, the designation of a certified person as an instructor recognizes that the person chosen can instruct other similarly certified persons. Not every certified person is viewed as automatically having “the necessary operating experience to effectively instruct in the field.” An instructor is typically not a railroad officer or supervisor, but instead a person with current, relevant experience who can be counted on to impart knowledge and demonstrate safety-related tasks through on-the-job (OJT) training. Senior certified people are often chosen as instructors, although

some senior people may not be good at teaching others and some certified people who are not considered senior may be excellent teachers.

Under the proposed requirements, a designated railroad officer and a designated employee representative may agree that a particular certified engineer should be an instructor engineer because the person is recognized as having the knowledge, skill, and ability “to teach others proper train handling procedures.” Because it is unnecessary for conductors to understand proper train handling procedures, Part 242 does not include such a requirement when a railroad and employee representative select an instructor. However, FRA believes that when a railroad and employee representative select an instructor engineer, the paramount concern is whether the person can teach proper train handling procedures and therefore FRA proposes to retain that language in the Part 240 instructor definition.

If the railroad and designated employee representative cannot agree on the selection of a person as an instructor, Part 242 establishes that the railroad can unilaterally select the person as long as the person “has a minimum of 12 months service working as a train service employee.” This Part 242 concept is carried over in the proposed Part 240 definition with the exception that the phrase “as a train service employee” is replaced with “in the class of service for which the person is designated to instruct.” The difference between the two regulatory provisions recognizes the uniqueness of the locomotive engineer position, as compared to other train service employee positions. Only locomotive engineers operate locomotives or trains, while other train service employees line switches for trains, help locomotive engineers make shoving or pushing movements safely, and help trouble shoot mechanical or brake failures. Thus, a conductor with 12 months of service working as a train service employee may have enough experience to instruct conductor candidates. Meanwhile, because of the different classes of locomotive engineer service, FRA proposes a minimum service requirement in the class of service for which a person is designated to instruct. Consequently, because a locomotive servicing engineer is not permitted to move a locomotive or group of locomotives with cars attached, a person who is a certified locomotive servicing engineer for 12 months or more would potentially be qualified to instruct candidates for locomotive servicing engineer certification, but not

candidates for train service engineer service certification if cars would be attached to the movement.

The final Part 242 provision FRA is proposing as a requirement for Part 240 instructor engineers addresses the question of what a railroad may do when employees do not have designated employee representation. Under that scenario, a railroad may designate any certified locomotive engineer as an instructor engineer if the person has demonstrated the necessary qualifications under the railroad's written certification program. This provision is the same as the Part 242 provision, except that the Part 242 provision refers to conductors. This provision gives the maximum flexibility to short line railroads and other railroads where employees do not have designated representatives.

A member of the RSAC Working Group recommended FRA remove the requirement to have 12 months of experience from Part 242 and not propose it for Part 240. The member asserted the reduced locomotive engineer population in small railroads will make it impractical if not impossible for all instructor engineers to have this level of experience. FRA notes that as proposed, not all instructor engineers will be required to have a minimum of 12 months of experience in the class of service for which the person is designated to instruct. If a railroad does not have designated employee representation, or if the designated employee representative concurs with the instructor selection, then the proposed 12 months of experience requirement is not applicable. Accordingly, FRA declines to adopt the recommendation.

Other RSAC Working Group members suggested that a Part 240 proposed rule should define what constitutes a month, and that one tour of duty in a calendar month should not count as a month. No such limitation is included in Part 242. FRA believes it is in a railroad's best interests to designate instructors who have experience and have demonstrated they can effectively teach others. The proposed definition of "instructor engineer" includes the requirement that a railroad's program must contain the criteria the railroad will use to determine who may be an instructor. As such, FRA declines to include a requirement in this proposed rule defining what constitutes a month of experience because there appears to be sufficient safeguards to prevent a railroad from designating instructors with subpar qualifications.

During the RSAC Working Group meetings, FRA suggested using the term

"train service engineer" in the definition of "instructor engineer" (*i.e.*, FRA's suggested text would have required a person to have a minimum of 12 months of service working as a "train service engineer"). A member of the RSAC Working Group questioned this suggestion by asking FRA to clarify whether the purpose of this restriction would restrict RCOs and hostlers from participating as instructor engineers in the training of other RCOs and hostlers.

After careful consideration of this RSAC Working Group member's response, FRA realized that the suggestion had an unintended consequence. Part 240's current definition of "instructor engineer" does not restrict instructor engineers to only those people who are in the train service engineer class and FRA does not intend to introduce such a limitation in this proposed rule. Rather, FRA intends to permit a train service engineer or, where appropriate, a locomotive servicing engineer (as described in § 240.107) or RCO to serve as an "instructor engineer" within the parameters of that person's class. Accordingly, as noted above, FRA proposes that in situations where concurrence is needed between the railroad and the designated employee representative in selecting an instructor engineer, and concurrence is not reached, the person selected must have a minimum of 12 months of service working in "the class of service for which the person is designated to instruct." For example, a person who had not received concurrence could not serve as an instructor engineer regarding the handling of a locomotive coupled to cars unless that person had a minimum of 12 months of service working as a train service engineer (as described in § 240.107).

Given this background, consistent with Part 240's existing definition of "instructor engineer," as proposed, RCOs and hostlers could be instructor engineers conducting training of other RCOs and hostlers. To be clear, under both the existing requirements and this proposed rule, any certificate can be restricted, and an instructor can be limited to instructing based on the class of service and the restriction. Presumably, an instructor engineer for RCOs or hostlers may be designated and certified as a train service engineer or locomotive servicing engineer but potentially limited to instructing only in the certain types of work for which the person is qualified. Thus, a person designated as an instructor engineer for RCOs may hold a certification that identifies him or her as a train service engineer restricted to RCO work. Other instructor engineers for RCOs may be

designated as train service engineers with no restrictions. Similarly, instructor engineers for hostlers may be designated as train service engineers or locomotive servicing engineers with no restrictions, or train service engineers or locomotive servicing engineers restricted to yard or yard-type work. Of course, consistent with existing Part 240, under this proposed rule, a person may not serve as an "instructor engineer" if the person fails to meet the requirements of an "instructor engineer" described in that definition in § 240.7.

Main Track

FRA proposes to revise the definition of "main track" to be the same as the definition of "main track" in Part 242 by including a reference to positive train control as a method of operation that would make a track a "main track."

Medical Examiner

FRA proposes to revise the definition of "medical examiner" to be the same as the definition of "medical examiner" in Part 242 by removing the portion of the existing definition stating that the medical examiner owes "a duty to the railroad." Instead, consistent with Part 242, the proposed definition says "the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee."

Newly Hired Employee

FRA proposes to delete the definition of "newly hired employee" because that term is not used in Part 240.

On-the-Job Training (OJT)

The term "on-the-job training" means job training that occurs in the workplace, *i.e.*, the employee learns the job while doing the job. In § 243.5 of this chapter, OJT is described as a type of "formal training" that has a structured and defined curriculum, and that provides an opportunity for training participants to have questions timely answered during the training or at a later date. In appendix B to this part (Appendix B), FRA mentions OJT as one type of training that a railroad may describe in its locomotive engineer certification program.

Operator Control Unit (OCU)

FRA proposes to add a definition of OCU to Part 240 that is the same as that used in part 229 of this chapter. FRA proposes to add this definition so the proposed RCO class of service in § 240.107 can be precisely explained using the same terms FRA uses in describing the equipment safety standards required for remote control

locomotives in § 229.15 of this chapter. The conductor certification rule does not contain a definition of OCU because, for purposes of that rule, an RCO is a certified locomotive engineer.

Physical Characteristics

The term “physical characteristics” is used throughout existing Part 240, but is not defined. Accordingly, FRA proposes to add the same definition for the term used in Part 242. As proposed, “physical characteristics” would mean the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train, and include both main track physical characteristics and other than main track physical characteristics.

Plant Railroad

FRA proposes adding a definition of “plant railroad” in this proposed rule to be the same as the definition of “plant railroad” in Part 242 and clarify the applicability of Part 240 as described in § 240.3. The definition is consistent with FRA’s longstanding policy of not exercising its jurisdiction over a plant railroad that does not operate on the general system of railroad transportation and does not move cars for other entities. *See* 49 CFR part 209, app. A.

Qualified

FRA proposes to revise the definition of “qualified” to be the same as the definition of “qualified” in Part 242 and to ensure the completeness of a railroad’s instruction and training program. The current definition in Part 240 focuses on an individual’s knowledge whereas the proposed definition in this rule focuses not only on the individual’s knowledge but also on whether the individual could reasonably be expected to be proficient at performing all assigned tasks. The update to the definition of “qualified” is to ensure a railroad’s instruction and training program not only provides knowledge of how to perform a task but also adequately prepares an individual to be able to proficiently perform the task. For example, a qualified locomotive engineer would need to be taught the railroad’s rules and procedures for performing different types of brake tests. An individual who receives classroom training only would be expected to have the requisite knowledge to perform the brake tests, and an individual who is provided OJT or hands-on training would be expected to be able to proficiently perform the tasks required that make up the brake test requirements. Without both knowledge and hands-on practice, the

person could not be expected to be qualified to perform brake tests. Some members of the RSAC Working Group suggested an alternative definition of “qualified” emphasizing that the employer’s requirements must be “identified in the plan submitted in accordance with” Part 240. FRA understands the RSAC Working Group members who made this suggestion were concerned that an employer might have qualification requirements outside of a railroad’s locomotive engineer certification plan submitted to FRA. Part 242 does not address this issue and FRA declines to propose such a provision in Part 240. FRA does, however, encourage interested parties to comment on the proposed definition of “qualified.”

Railroad Rolling Stock

FRA proposes to revise the definition of “railroad rolling stock” to be the same as the definition of the term in Part 242 (*i.e.*, on-track equipment that is either a “railroad freight car” (as defined in § 215.5) or a “passenger car” (as defined in § 238.5)). This proposed definition is the same as the current definition of “railroad rolling stock” in Part 240 except for adding the word “railroad” in front of “freight car” to mirror the definition in § 215.5.

Remote Control Locomotive (RCL)

FRA proposes to add a definition of RCL to Part 240 that is the same as the definition in § 229.5. FRA is proposing to include this definition in Part 240 so the proposed RCO class of service in § 240.107 can be precisely explained using the same terms FRA uses in describing the equipment safety standards required for an RCL in § 229.15. As proposed, with the use of a radio link, an individual does not have to be physically within the confines of an RCL’s cab to operate the RCL. By definition, the term RCL does not refer to a locomotive or group of locomotives remotely controlled from the lead locomotive of a train, as in a distributed power arrangement.

Serve or Service

FRA proposes to replace the definition of “service” with a definition of “serve or service.” By replacing the definition, the terminology and definition will be the same as in Part 242. Service is a legal term and is given specific meaning in the Federal Rules of Civil Procedure, which explains why FRA references it. One party serves another party with a document, thereby performing a legal obligation to notify the other party. The act of serving a party with a document is the act of performing service. The words are used

interchangeably in the regulation, but FRA is making the change as it may help some readers better understand that serve and service have the same meaning. For example, in proposed § 240.307(c)(11)(iii), FRA proposes that a railroad issuing a decision must serve that decision on the employee and the employee’s representative, if any, as well as a requirement for the railroad to retain proof of that service.

Substance Abuse Disorder

FRA proposes to revise the definition of “substance abuse disorder” to be the same as the definition of the term in Part 242. Under this definition, a substance abuse disorder is “active” if the person: (1) Is currently using alcohol or other drugs, except under medical supervision consistent with § 219.103; or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a SAP or DAC. This definition varies from the existing definition in Part 240 in two respects. First, Part 240’s existing definition refers to an “EAP Counselor” rather than a SAP or DAC. SAPs and DACs may be better qualified to direct an individual’s treatment or aftercare because they have more stringent credential, knowledge, training, and continuing education requirements relating to substance abuse than EAPs. Second, existing Part 240 also uses the phrase “is currently using alcohol and other drugs” to describe active substance abuse disorders. As proposed, this definition would revise that phrase to read “is currently using alcohol or other drugs” to clarify that an individual with an active substance abuse disorder could be using alcohol or other drugs. Additional discussion of this definition is found in the preamble to the conductor certification final rule. 76 FR at 69817.

Substance Abuse Professional (SAP)

FRA proposes to add the same definition of the term “substance abuse professional” as in Part 242. As proposed, “substance abuse professional” is defined to mean “a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title.” Part 40 defines a SAP as “[a] person who evaluates employees who have violated a DOT drug and alcohol regulation, and makes recommendations concerning education, treatment, follow-up testing and aftercare.” *See* 49 CFR 40.3.

By definition, a SAP may evaluate and treat only an employee who has committed a violation of FRA’s alcohol and drug regulation (Part 219), such as

the prohibitions in §§ 219.101 and 219.102. An employee who may have a substance or alcohol abuse problem but has not violated Part 219 is therefore not eligible for SAP referral. Accordingly, FRA proposes to use the term SAP in § 240.119(d), which addresses the follow-up that must occur after a Part 219 violation. However, because off-duty driving of a motor vehicle under the influence (DUI) is not a Part 219 violation, the follow-up required by § 240.115 for a DUI conviction may not be completed by a SAP. Therefore, for those sections of Part 240 that address drug and alcohol evaluation requirements not involving a Federal violation, FRA is proposing to replace the term SAP with the term DAC. As used in this proposed rule, a DAC will have to meet the same qualifications as a SAP. FRA believes these changes will avoid interfering with Parts 40 and 219 while requiring higher qualification and credentialing requirements for persons evaluating substance abuse disorders.

Territorial Qualifications

FRA proposes to add to Part 240 the same definition for the term “territorial qualifications” as in Part 242. As proposed, “territorial qualifications” means “possessing the necessary knowledge concerning a railroad’s operating rules and timetable special instructions including familiarity with applicable main track and other than main track physical characteristics of the territory over which the locomotive or train movement will occur.”

Although not currently defined in Part 240, the term is derived from Part 240’s requirement that, with certain exceptions, a locomotive engineer may not operate a locomotive over a territory unless the engineer is “qualified on the physical characteristics of the territory.” See § 240.231. The proposed definition would clarify what “territorial qualifications” means in proposed revisions to §§ 240.125, 240.221, and 240.309.

Tourist, Scenic, Historic, or Excursion Operations That Are Not Part of the General Railroad System of Transportation

FRA proposes to add to Part 240 the same definition for the phrase “tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation” as in Part 242. As proposed, the phrase means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track). If there is any freight,

intercity passenger, or commuter passenger railroad operation on the track, the track would be considered part of the general system. See part 209, app. A. See the Section-by-Section analysis of § 240.1 for further discussion of the applicability of Part 240 to these types of railroad operations.

Section 240.11 Penalties and Consequences for Noncompliance

FRA proposes a minor amendment to paragraph (d) of this section. FRA proposes to revise the words “Federal Railroad Safety Act” (FRSA) in that paragraph to read “Federal rail safety laws” to more accurately describe the source of FRA’s authority since the recodification of the laws comprising the former FRSA. See Public Law 103–272, 108 Stat. 745 (July 5, 1994). This revision would also make the paragraph the same as § 242.11(d).

Section 240.103 Approval of Design of Individual Railroad Programs by FRA

FRA proposes two amendments to this section, which will make the filing and FRA approval process for individual railroads’ Part 240 programs the same as for conductor certification programs under § 242.103. Specifically, FRA proposes revising paragraphs (b) and (c) of this section to require railroads to serve a copy of their program submissions, resubmissions, and material modifications on the president of each labor organization that represents the railroad’s certified locomotive engineers. It also would allow any designated representative of certified locomotive engineers to submit comments to FRA on the railroad’s submission within 45 days of the railroad’s filing with FRA. Although FRA, not the commenters, will decide whether to approve a railroad’s submission, FRA expects comments will be useful in determining whether the railroad’s program conforms to the criteria in this proposed rule. These proposed changes would be in newly added paragraphs (b) and (c). Consequently, FRA proposes redesignating existing paragraphs (b) through (e) as paragraphs (d) through (g), to make the language of these paragraphs consistent with § 242.103(e)-(h). Also, FRA is proposing to redesignate existing paragraph (c)(2) as paragraph (e)(2) and then revise that paragraph to be the same as § 242.103(g)(2), indicating that a deficient program may remain in effect for a specified period of time “so long as the railroad has complied with the requirements” for resubmission found in another paragraph of this section.

In proposed paragraph (h) (which revises existing paragraph (e) and is the same as paragraph (i) of § 242.103), FRA would require a railroad intending to materially modify its FRA-approved program to submit to FRA a description of its intended material modification 60 days before implementing the modification (as opposed to the current requirement to do so 30 days in advance). This proposed revision would allow time for the labor organizations to comment on the proposed modification(s) under proposed paragraph (c) of this section and for FRA to consider any comments from the relevant labor organizations.

In developing this NPRM, FRA considered proposing to require railroads to file their complete Part 240 programs (including any modifications made as a result of this rule) with FRA and serve those complete programs on the president of each labor organization that represents the railroad’s certified locomotive engineers. Although the proposed requirement to serve programs would be new to Part 240, FRA considered that Part 240 was effective in 1991 and it would be expected that each president of a relevant labor organization that wanted a copy of a railroad’s locomotive engineer certification program would have obtained it by now. FRA thus views the proposed conforming amendment as requiring a railroad to serve material modifications or wholly new programs on the president of each labor organization that represents the railroad’s certified locomotive engineers but not a program that is revised due to promulgation of this rule. FRA requests comment on the potential adoption of such a requirement in a final rule.

Section 240.105 Criteria for Selection of Designated Supervisors of Locomotive Engineers

This existing section requires each railroad to designate certain supervisors qualified to test and evaluate the knowledge and skills of locomotive engineers. FRA proposes to add new paragraph (d) to address that some designated supervisors of locomotive engineers (DSLEs) may not be train service engineers. Those that are locomotive servicing engineers or remote control operators may still be DSLEs, but the range of their supervision would be limited by the railroad to the person’s actual qualifications. Although the existing rule does not prohibit a railroad from creating a DSLE subset known as Designated Supervisor of Remote Control Operators (DSRCOs), and many have done just that, the addition of

proposed paragraph (d) recognizes that each railroad is authorized to make such designations that apply additional conditions or operational restrictions on the service that a DSLE may perform just as each railroad may apply conditions and restrictions on any person's certificate. Because Part 242 does not differentiate among different classes of service for conductors, there is no comparable provision to proposed paragraph (d) in Part 242. FRA intends proposed paragraph (d) to help railroads effectively differentiate among the potential different DSLE classes of service contemplated by Part 240.

Section 240.107 Types of Service

FRA is proposing several changes to this section, including a change to the heading of this section. The current section heading is "Criteria for designation of classes of service," and the proposed change would make it the same as the section heading in its Part 242 counterpart.

In existing paragraph (a), each railroad is required to state in its program which of the three classes of service named in paragraph (b) it will cover (*i.e.*, train service engineers, locomotive servicing engineers, and student engineers). FRA proposes to add two additional classes of service to paragraph (b) (*i.e.*, remote control operators and student remote control operators). Thus, FRA proposes to revise paragraph (a) to remove the specific reference to "three" because paragraph (b) would now list five classes of service. However, those railroads that already name remote control operators as a class of service in a Part 240 program or do not conduct remote control operations would not need to make any change to their programs as a result.

Existing paragraph (c) requires railroads to apply certain operational constraints to each class of service. The proposed changes to paragraph (c) are intended to add operational constraints for the two new classes of service. In paragraph (c)(3), FRA proposes to add operational constraints to the proposed RCO class of service. This new class of service recognizes that many railroads now employ and train individuals who have never operated conventional locomotives, but are instead restricted to operations using an RCL controlled solely by an OCU. Currently, many railroads use RCLs for switching movements or low-speed operations on main track as § 229.15(a)(14) limits this equipment to a maximum speed of 15 mph. An individual certified as a "train service engineer" under § 240.107(c)(1) may operate any type of locomotive,

whether conventionally operated from the control stand in the locomotive cab or remotely controlled, and with or without cars or other locomotives coupled to the controlled locomotive. An individual certified as a "locomotive servicing engineer" under § 240.107(c)(2) may operate any type of locomotive, whether conventionally operated from the control stand in the locomotive cab or remotely controlled, with other locomotives coupled to the controlled locomotive but not with cars coupled to the movement. An RCO is distinguishable from these other classes of service because an RCO is limited to operating only remotely controlled locomotives by using the OCU. The industry currently recognizes that an RCO's service is limited by the type of locomotive and controls used. The changes proposed in paragraph (c)(3) catch up to this industry practice.

Existing paragraph (c)(3), which address student engineers, would be redesignated as paragraph (c)(4) with the addition of student RCOs. As proposed, paragraph (c)(4) provides that any student, operating any locomotive, whether conventionally operated from the control stand in the locomotive or from an OCU, is operationally constrained because each student may operate only under the direct and immediate supervision of an instructor engineer. FRA recognizes that in order to learn some RCO duties, an instructor engineer may be separated from the student RCO by a significant physical distance; under those circumstances, the instructor engineer would be required to have some override feature or ability to stop the student's remotely controlled locomotive or train movement. However, in each case, the instructor must observe the student's actions to properly monitor the student's activities. This supervision requirement could not be accomplished if, while riding the point on an RCO move, the student RCO was on one side of the car and the instructor was on the other side. If both the student RCO and instructor were riding the same side of the car (on each end) and the instructor has the ability to stop the move, this would meet the intent of the regulation.

The existing rule requires, at a minimum, a student certification for any person operating a locomotive in any capacity, and the type of student certification may further limit the person's authority to operate equipment. For example, an individual who is a student locomotive serving engineer would be prohibited from operating with a locomotive coupled to cars—even if operating under the direct and immediate supervision of a qualified

instructor engineer. Similarly, as proposed, a student RCO is operationally constrained from operating a conventional, *i.e.*, a non-remotely controlled locomotive, even if the student RCO is under the direct and immediate supervision of an instructor engineer.

Section 240.111 Individual's Duty To Furnish Data on Prior Safety Conduct as Motor Vehicle Operator

Existing § 240.111 requires persons subject to Part 240 to make information on his or her motor vehicle driving record available to any railroad considering the individual for certification or recertification under Part 240, unless the person reports to the railroad that he or she has never obtained a motor vehicle driver's license. Because obtaining a motor vehicle driver's license is not a precondition for obtaining locomotive engineer certification, an individual who reports that fact to a railroad is not required under Part 240 to request the non-existent driving history.

FRA proposes a change to paragraph (a)(2) that would add the words "or foreign law" to clarify that the reference to "State or Federal law" is not limited to driver licenses issued within the United States. An individual's duty under this section extends to providing any necessary consent under foreign law to obtain information from foreign countries that issued the person a motor vehicle driver's license. This proposed change to paragraph (a)(2) would make the requirement the same as the corresponding requirement in § 242.111(g)(2). Similarly, the proposed changes to paragraphs (c)(1) and (2) would make the paragraphs the same as § 242.111(i)(1) and (2) so that the same requirements would apply to both engineers and conductors to request driver's license information, whether issued in the United States or by a foreign country.

One difference between the locomotive engineer and conductor certification requirements that this proposed rule does not address is that those seeking locomotive engineer certification must request motor vehicle information from the National Driver Register (NDR), even though the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR 1327) prohibit railroads from requesting NDR information from individuals seeking employment as certified conductors. In 1991, States were not required to provide information to NDR and there only were a limited number of State licensing agencies that had the capacity to make a direct NDR inquiry. Today,

however, each State and the District of Columbia are required to send information on all revocations, suspensions, and license denials within 31 days of receipt of the convictions from the courts to the NDR and each of these driver licensing agencies has the capability to provide NDR's data. 49 U.S.C. 30304. With that understanding, proposed changes to paragraphs (d) and (e) remove an outdated reference to a list of driver licensing agencies that used to reside in appendix D, and the proposed substitution clarifies that each State and the District of Columbia are able to perform a check of the NDR. As NDR explains, "[t]he entire driver history record for a licensed driver is maintained at the State level."⁵ Thus, under paragraph (d), there is no need to request information directly from NDR if a State or the District of Columbia issued the person a driver's license and a request is sent directly to the motor vehicle license agency that issued the license. Under paragraph (e), an individual issued a driver's license by one of the driver licensing agencies of a State or the District of Columbia shall request that the NDR information be added to the request.

Again, because Part 240 requires NDR record checks and Part 242 does not, changes are proposed for paragraph (f) that are similar, but not identical to § 242.111(j). These paragraphs address how a railroad must potentially contact additional motor vehicle licensing agencies when an individual's motor vehicle record reveals that additional information concerning that person's driving history may exist in the files of another agency not previously contacted. The proposed changes to paragraph (f) would address what an individual must do when a railroad is informed by an authority with driver's license information that additional information about the individual may exist in files of a foreign country.

Existing paragraph (h) requires certified locomotive engineers or engineer candidates to report certain motor vehicle incidents to his or her employing railroad within 48 hours of "being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle drivers license for" such incidents. FRA proposes to amend paragraph (h) so it is the same as the corresponding conductor certification requirement in § 242.111(l) by adding: "For purposes of this paragraph and § 240.115(h), 'state action' means action of the jurisdiction that has issued the motor vehicle

driver's license, including a foreign country." Thus, the proposed change would clarify that an individual who is a certified engineer has a duty to report certain motor vehicle incidents to any railroads that have certified the person within 48 hours of the completed "state action" by both U.S. states that issue driver licenses and foreign countries.

Several members of the RSAC Working Group suggested FRA remove the requirement for an individual seeking certification or recertification as a locomotive engineer to request that the railroad be provided consent to request from the NDR a report of the person's motor vehicle driving history. Because those checks of the NDR are statutorily required for locomotive engineers, FRA cannot eliminate them. See 49 U.S.C. 20135(b)(6)(B).

Section 240.113 Individual's Duty To Furnish Data on Prior Safety Conduct as an Employee of a Different Railroad

Existing § 240.113 requires persons subject to Part 240 to make information on his or her prior railroad service record available to any railroad considering the individual for certification or recertification under Part 240. FRA proposes amending paragraph (a) of this section to make it conform as closely as possible to paragraph (c) of § 242.113 and to clarify what service record information an individual must request from a former railroad employer. Currently, paragraph (a) requires the person "to make information concerning his or her prior railroad service record available to the railroad that is considering" his or her certification or recertification. This proposed rule would require an individual to share only a subset of his or her prior railroad service record (*i.e.*, only information on an individual's compliance or non-compliance with §§ 240.111 (prior safety conduct as a motor vehicle operator), 240.117 (prior operating rule or practice violations), and 240.119 (prior substance abuse disorders and alcohol/drug rules compliance)).

Section 240.115 Criteria for Consideration of Prior Safety Conduct as a Motor Vehicle Operator

This section provides the requirements and procedures a railroad must follow when evaluating an engineer's or engineer candidate's prior conduct as a motor vehicle operator. FRA proposes revising this section in its entirety to be consistent with paragraphs (a) through (f), and (n) and (o) of § 242.111. Proposed paragraph (a) requires railroads to adopt and comply with an engineer certification program meeting the requirements of § 240.115.

Proposed paragraph (b) requires railroads to determine if an individual meets the eligibility requirements of the section before initially certifying or recertifying the person.

Proposed paragraphs (c) through (f) incorporate the same temporary certification provisions as in paragraphs (c) through (f) of § 242.111. During RSAC Working Group meetings, members raised concerns about certification candidates who had properly requested motor vehicle operator information but could not be certified or recertified as locomotive engineers because of a driver licensing agency's delay or mix-up sending the required information to the railroad. To address this concern as it relates to conductors, paragraphs (c) and (d) of § 242.111 require railroads to certify or recertify an individual as a conductor for 60 days if the person: (1) Requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in the rule. Paragraph (e) of § 242.111 provides that if a railroad certifies or recertifies an individual as a conductor for 60 days under § 242.111, but cannot obtain and evaluate the required information during those 60 days, the person is ineligible to perform as a conductor until the information can be evaluated. However, paragraph (f) of § 242.111 provides that if an individual simply cannot obtain the required information, that person or the certifying or recertifying railroad can petition FRA for a waiver of the requirement (*see* part 211). During the pendency of the waiver request, a railroad must certify or recertify an individual as a conductor if the person otherwise meets the eligibility requirements of Part 242. Because the RSAC Working Group's concerns regarding motor vehicle operator information for conductors are equally applicable to locomotive engineers, FRA proposes to adopt the same temporary certification provisions of § 242.111(c) through (f) in § 240.115(c) through (f).

With the exception of citations to relevant sections of Part 240, proposed paragraphs (g) and (h) of this section are the same as paragraphs (m) and (n) of § 242.111. These paragraphs prohibit railroads from considering certain information about a certification candidate's motor vehicle driving record and specify the types of motor vehicle incidents that a railroad may consider when making a certification decision.

FRA proposes paragraph (i) of this section to be the same as paragraph (o) of § 242.111, which provides that if a railroad identifies a prior motor vehicle

⁵ <https://www.nhtsa.gov/research-data/national-driver-register-ndr>.

incident it must provide the data along with “any information concerning the person’s railroad service record” to its DAC (not an “EAP Counselor” as existing paragraph (c) of § 240.115 provides). Further, the same as paragraph (o) of § 242.111, proposed paragraph (i) would require the railroad’s DAC to refer the certification candidate for evaluation to determine if the person is currently affected by an active substance abuse disorder. If the person is currently affected by such a disorder, the person cannot be currently certified. Alternately, even if the person is evaluated as not currently affected by an active substance abuse disorder, the railroad would be required, if recommended by a DAC, to condition certification upon participation in needed aftercare and/or follow-up testing for alcohol or drugs, or both. For the reasons explained in the above section-by-section analysis for the definitions of “drug and alcohol counselor,” “EAP Counselor,” “Substance abuse disorder,” and “Substance Abuse Professional,”⁶ FRA notes that any testing performed as a result of a DAC’s recommendation under paragraph (i) of this proposed rule must be done under company authority, not Federal. Such testing, however, would still be required to comply with Part 219, subpart H, and Part 40. The same as paragraph (o)(5) of § 242.111, proposed paragraph (i)(5) would clarify that a failure to cooperate in the DAC evaluation will result in the person being ineligible to perform as a locomotive engineer until the person cooperates in the evaluation.

FRA notes it does not intend for DOT’s requirement for direct observation of urine collection to apply to follow-up testing required as a result of motor vehicle alcohol or drug incidents. A motor vehicle alcohol or drug incident requiring follow-up testing is not a Part 219 violation. As such, a motor vehicle alcohol or drug incident does not meet the criteria justifying direct observation as provided by § 40.67. A DAC, however, may recommend direct observation of urine collection as necessary for follow-up testing under company authority. *See* 76 FR 69802, 69806–69807 (Nov. 9, 2011).

⁶ A member of the Working Group objected to using a SAP for § 240.115 purposes, asserting that some railroad employees may have to travel great distances to be evaluated by a SAP. This issue was thoroughly discussed at Working Group meetings during the development of Part 242. For the reasons discussed at the Working Group meetings and in the preamble discussion of Part 242 (*see* 76 FR 69802, 69806–69807 (Nov. 9, 2011)), FRA disagrees with the objection to using a SAP for purposes of § 240.115.

Section 240.117 Criteria for Consideration of Operating Rules Compliance Data

Existing § 240.117 provides the criteria and procedures a railroad must follow to evaluate an engineer’s or engineer candidate’s compliance with specific types of operating rules and practices. FRA is proposing a number of revisions to clarify the meaning of this section and to conform the section to the corresponding provisions of the conductor certification rule in § 242.403.

Existing paragraph (a) requires railroads’ Part 240 programs to include “criteria and procedures for implementing” § 240.117. FRA is proposing to revise paragraph (a) to explicitly state that each railroad, railroad officer, supervisor, or employee who violates any requirement of a railroad’s FRA-approved certification program shall be considered to have violated the requirements of § 240.117. FRA intends this proposed revision to clarify the responsibility of railroads and individuals to comply with § 240.117. FRA proposes parallel changes in several other sections in subpart B, including paragraphs (a) of §§ 240.119, 240.121, 240.123, 240.125, 240.127, and 240.129. These proposed changes would make the implementing language in these sections of Part 240 the same as that in the corresponding sections of Part 242 (*i.e.*, §§ 242.111 through 242.125).

Existing paragraph (c)(1) requires the mandatory revocation of a locomotive engineer’s certificate when he or she has “demonstrated a failure to comply, as described in paragraph (e) of this section, with railroad rules and practices for the safe operation of trains.” To clarify this requirement and make it the same as § 242.403(c)(1), but not substantively change it, FRA proposes to revise paragraph (c)(1) in part by removing the phrase “with railroad rules and practices for the safe operation of trains.” Even though that phrase is conditioned by the reference to paragraph (e), some railroads incorrectly read the phrase as expanding the number or type of operating rules or practices violations that require revocation. The more concise proposed revision specifies that the unlawful actions requiring mandatory revocation of a locomotive engineer’s certification are limited to those involving a certified locomotive engineer who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of the section.

Existing paragraph (c)(3) prohibits the revocation of a locomotive engineer’s

certification if he or she is called to perform the duty of a train crew member other than a locomotive engineer and is performing that non-locomotive engineer duty. As proposed, FRA would add the words “or conductor” to paragraph (c)(3) to prohibit revocation of an individual’s locomotive engineer certification when that person is called to perform the duty of a train crew member, other than that of locomotive engineer or conductor, and the person is performing such duties. This proposed revision would make § 240.117(c)(3) similar to the related Part 242 provision (§ 242.403(c)(3)).

Proposed paragraph (e)(5) would add an “or” after the semicolon and proposed paragraph (e)(6) would correct the existing typographical error of a semicolon at the end of the paragraph instead of a period.

Existing paragraph (f) provides: (1) If a single incident contravenes more than one operating rule or practice listed in paragraph (e) of the section, that incident is to be treated as a single violation; (2) an engineer may have his or her certification revoked for violations occurring during properly conducted operational compliance tests; and (3) an engineer may not have his or her certification revoked for operational tests not conducted in compliance with Part 240, the railroad’s operating rules, or a railroad’s program under § 217.9. FRA proposes adding new paragraph (f)(4), which would prohibit a railroad from denying or revoking an employee’s certification based upon additional conditions or operational restrictions imposed pursuant to § 240.107(d). Thus, a railroad could not revoke a locomotive engineer’s certificate for an alleged violation of a railroad rule or practice that is more stringent than the condition or restrictions required by Part 240. This proposal conforms to § 242.403(f)(4).

Existing paragraphs (g)(3)(i) and (ii) currently state the mandatory revocation periods in terms of “months.” FRA proposes to change “month” to 30 days and “six months” to 180 days to ensure uniformity and eliminate any ambiguity.

Finally, FRA proposes adding a new paragraph (h) after existing paragraph (g) in this section, providing that all periods of revocation may consist of training. While existing Part 240 does not contain a similar provision, it is certainly not prohibited under the current regulation and FRA is including this proposed revision to make FRA’s intent clear and to conform to § 242.405(b). By inserting proposed paragraph (h) after existing paragraph (g), existing paragraph (h) (addressing an individual’s future eligibility to hold a locomotive engineer certificate after a

denial of certification or revocation event) would be redesignated as proposed paragraph (i).

Section 240.119 Criteria for Consideration of Data on Substance Abuse Disorders and Alcohol/Drug Rules Compliance

Existing § 240.119 addresses active substance abuse disorders and prior alcohol/drug rules compliance of engineers or engineer candidates. FRA is proposing to revise this section to make it the same as corresponding § 242.115, which FRA believes is better organized and easier to understand than existing § 240.119. The only differences between the proposed Part 240 version of this section and the Part 242 version are the references to locomotive engineer instead of conductor, and citations to the engineer rule instead of the conductor rule. Existing paragraph (b)(2) requires a “certified engineer who is determined to have an active substance abuse disorder” to be “suspended from certification.” Because the word “suspended” is not defined in existing Part 240, FRA proposes to replace the phrase “suspended from certification” with the phrase “ineligible to hold certification.” This revision would make existing § 240.119(b)(2) consistent with the corresponding provision in § 242.115(d)(2), and the revised paragraph would be renumbered as paragraph (d)(2).

FRA is also proposing to remove the word “failure” from the phrase “refusal or failure” in existing paragraph (c)(2) and renumber the paragraph as proposed paragraph (e)(2) of this section. Existing paragraph (c)(2) requires a railroad, when determining whether an individual may be or remain certified as a locomotive engineer, to consider any previous violations of §§ 219.101 or 219.102 and any “refusal or failure to provide a breath or body fluid sample for testing” under Part 219. Removing the word “failure” will make this paragraph the same as paragraph (e)(2) of § 242.115 and ensure consistency with subpart I of Part 40, which provides the medical conditions under which an individual’s failure to provide a sufficient sample is not deemed a refusal.

In addition, FRA proposes to amend this section by replacing “EAP Counselor” with “Substance Abuse Professional (SAP) or drug and alcohol counselor (DAC)” for the reasons explained above in the section-by-section analysis for the definitions of “drug and alcohol counselor,” “EAP Counselor,” “substance abuse disorder,” and “Substance Abuse Professional.”

Finally, existing paragraph (d) of this section, now proposed paragraph (f), prescribes the conditions under which employees may be certified or recertified after a determination that their certification should be denied, suspended, or revoked due to a violation of §§ 219.101 or 219.102. Existing paragraph (d)(1)(iii) provides that an individual is not eligible for certification or recertification unless and until the person presents a urine sample that tests negative for alcohol and controlled substances assayed. FRA is proposing to revise this paragraph to make it the same as § 242.115(f)(1)(iii) and specify that an individual must have “an alcohol test with an alcohol concentration of less than .02.” Specifying the alcohol concentration limit more accurately reflects the provisions of Part 219.

FRA notes Part 240, like Part 242, does not require compensation of the employee for the time spent in testing, evaluation, counseling, or other treatment under paragraph (d) (now proposed paragraph (f)) of this section, which, under certain circumstances, is a condition precedent to retention of a locomotive engineer certificate. Instead, any applicable collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act would dictate what compensation, if any, an employee is due.

Section 240.121 Criteria for Vision and Hearing Acuity Data

Existing § 240.121 contains the requirements for visual and hearing acuity railroads must incorporate into their locomotive engineer certification programs. FRA proposes to amend paragraphs (a) and (c) of this section to conform to § 242.117(a) and (i). These proposed revisions update Part 240’s testing procedures and standards for the hearing acuity requirements. FRA is not proposing language consistent with § 242.117(c), (d), and (e) because similar requirements exist in § 240.207(b), (c), and (d). The proposed testing procedures and standards for the hearing acuity requirements, which mirror those in § 242.117(i), are derived from the procedures and standards in 49 CFR part 227 governing occupational noise exposure and are more stringent than those in existing § 240.121. The criteria an individual must meet to pass the hearing test, however, remains the same (*i.e.*, an individual cannot have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz).

The proposed testing procedures and standards for the hearing test or

audiogram are the same three choices provided to conductors in § 242.117(i). The hearing test or audiogram must (1) meet the requirements of the Occupational Safety and Health Administration’s requirements in 29 CFR 1910.95(h); (2) comply with § 227.111; or (3) be conducted using an audiometer meeting the specifications of ANSI S3.6–2004, “Specifications for Audiometers,” provided the audiometer is maintained and used as that standard requires.

Section 240.123 Training

Existing § 240.123 requires railroads to provide their certified locomotive engineers initial and continuing education to ensure each engineer maintains the necessary knowledge, skill, and ability to carry out the duties of a locomotive engineer. FRA proposes to revise this section’s heading to be the same as § 242.119 (Training). FRA also proposes to amend this section to be similar to Part 242 (§ 242.119), and to relate the training and education requirements of Part 240 to the requirements of 49 CFR part 243 (Part 243) for the training, qualification, and oversight of safety-related railroad employees.

Although Part 243 was a statutorily mandated rule, it was neither proposed nor effective when Part 242 became effective. However, the Part 243 proposed rule was based on an RSAC recommendation made before Part 242 was published,⁷ and so the industry was aware of the likely requirements to be proposed and FRA understood RSAC’s intent as a desire for conductor training standards to meet any future, FRA training standard requirements in § 243.101. Part 243 requires each employer of safety-related railroad employees to submit training programs for FRA’s review and approval. FRA’s Part 243 review is intended to ensure that each employer will deliver formal training on all required Federal railroad safety requirements to each occupational category or subcategory of employee doing safety-related work and that OJT is formalized, with a structured curriculum that provides measurable results.

In FRA’s estimation, locomotive engineer and conductor training programs have been, and continue to be, sufficiently robust to meet the Part 243 standards. These certification training

⁷ On November 9, 2011, FRA published the conductor certification final rule which was effective on January 1, 2012. 76 FR 69802. On February 7, 2012, FRA published the Part 243 proposed rule which noted that the Working Group’s recommendations were accepted by the full RSAC on December 14, 2010. 77 FR 6412, 6415.

programs are already required to be submitted to FRA for review and approval under Parts 240 and 242, and thus railroads were exempted from submitting them under Part 243, unless the railroad's plan did not provide sufficient detail regarding the OJT components (§ 243.103(b)). When that is the case, the railroad is only required to supplement the certification training program with the updated OJT portion as a material modification as required in §§ 240.103(e) and 242.103(i). In keeping with the Part 243 requirements, FRA proposes to amend paragraph (c) of this section to require a railroad training a previously untrained person to be a locomotive engineer to provide initial training that, at a minimum, complies with the requirements of § 243.101. The proposed language is intended to ensure that locomotive engineer OJT programs are properly modified, if necessary to conform to the requirements in § 243.101. The deadlines for implementing the modifications are governed by Part 243. Note that FRA amended the implementation deadlines for compliance with § 243.101, and so railroads and other employers that employ locomotive engineers are not required to modify locomotive engineer OJT programs until January 1, 2020, at the earliest (a May 1, 2021 deadline is established for an employer conducting railroad operations employing fewer than 400,000 total employee work hours annually). 82 FR 20549 (May 3, 2017) (extending all implementation dates in Part 243 by one year) and 82 FR 18455 (April 27, 2018) (extending all implementation dates in Part 243 by an additional year, thereby delaying each of the implementation dates in the 2014 Part 243 final rule by a total of two years).

Existing paragraph (c)(4) lists the subject matters a railroad's initial locomotive engineer training must cover. Proposed paragraph (c)(4)(ii) would add "railroad operating procedures" to the list of subject matter areas to be covered during initial training. Existing paragraph (c)(4)(ii) only references "railroad operating rules."

Proposed paragraph (c)(4)(vi) would clarify that a railroad's initial locomotive engineer training must cover "[c]ompliance with Federal railroad safety laws, regulations, and orders." The existing paragraph only mentions compliance with Federal regulations, so the proposed language is more precise in expressing the Federal requirements that must be covered. The proposed language is also the same as that found throughout § 242.119.

Existing paragraph (c)(5) specifies that the performance skill component of initial engineer training must meet certain conditions. FRA proposes to add the phrase shall "meet the following conditions" to the introductory text of this paragraph to clarify that each of the listed conditions must be met.

Finally, FRA proposes to add new paragraphs (e) and (f) to this section. These paragraphs would require railroads to designate in their locomotive engineer programs the time period in which a locomotive engineer must be absent from a territory or yard before requalification on physical characteristics is required and the procedures used to qualify or requalify an individual on the physical characteristics. These proposed new paragraphs would be the same as paragraphs (j) and (k) of § 242.119, and are important components for ensuring locomotive engineers are familiar with the physical characteristics of the territory over which they will operate.

Section 240.125 Knowledge Testing

This section requires railroads to provide initial and periodic training and testing of locomotive engineers to determine that each such person has sufficient knowledge of the railroad's rules and practices for the safe operation of trains. FRA proposes to revise paragraph (a) of this section to be the same as paragraph (a) of § 242.121, which sets forth the requirement that railroads must adopt and comply with a program meeting the requirements of the section.

Similar to the proposed revision to § 240.123(c)(4)(vi) discussed above, FRA is also proposing to amend § 240.125(c)(4)(v) to clarify that the criteria for testing a locomotive engineer's knowledge must cover not only compliance with "Federal safety laws," but also "[c]ompliance with Federal railroad safety laws, regulations, and orders."

FRA also proposes to add new paragraphs (e), (f), and (g), which would be the same as paragraphs (e), (f), and (g) of § 242.121. Proposed new paragraph (e) would require a railroad to provide the person(s) being tested with an opportunity to consult with a supervisory employee who possesses territorial qualifications for the territory to explain a test question. Proposed new paragraph (f) would require the railroad to keep documentation indicating whether the person passed or failed the knowledge test. Proposed new paragraph (g) would require each railroad to ensure that an individual who fails a knowledge test is not permitted or required to function as a

locomotive engineer until that person achieves a passing score during a reexamination of the person's knowledge. FRA included these requirements in Part 242 to address RSAC Working Group members' concerns. Proposed paragraph (e) addresses RSAC Working Group members' concerns that individuals being tested should be able to obtain clarification of test questions by someone with knowledge of the relevant territory. Proposed paragraph (f) ensures test documentation indicates whether the person taking the test passed or failed the test. Proposed paragraph (g) prohibits a railroad from permitting or requiring an individual to function as a locomotive engineer until that person achieves a passing score on his or her knowledge test. This paragraph addresses the concern that an individual who fails a knowledge test would therefore lack adequate knowledge of the railroad's rules and practices for the safe operation of trains, even if the person is currently certified to do so. Because these same concerns addressed by requirements in the conductor rule are applicable to locomotive engineers, FRA is proposing to incorporate the same requirements into Part 240 as applied to locomotive engineers.

Section 240.127 Criteria for Examining Skill Performance

Existing § 240.127 requires a railroad to have procedures for examining the performance skills of an individual being evaluated for qualification as a locomotive engineer. As discussed in the above section-by-section analysis of § 240.117, FRA proposes to amend paragraph (a) of this section simply to clarify the responsibilities of railroads, railroad officers, supervisors, and employees regarding the requirements of this section.

Section 240.129 Criteria for Monitoring Operational Performance of Certified Engineers

Existing § 240.129 requires railroads to have procedures for monitoring the operational performance of locomotive engineers and contains the requirements for railroads to conduct both an operational monitoring observation and an unannounced compliance test each calendar year. FRA proposes to amend this section to provide the same flexibility as in Part 242 to conduct monitoring outside of the calendar year requirement when a certified person is not performing service requiring certification. See § 242.123(f). For example, a certified engineer may be on furlough, in military service, off with an extended illness, or working in another

capacity for the railroad. Existing § 240.129 requires railroads to seek a waiver from FRA for engineers they are unable to test each calendar year. The proposed amendments would remove this requirement and railroads would not be required to conduct unannounced compliance tests or operational monitoring observations on engineers who are not performing service requiring certification. Instead, when such a certified locomotive engineer returns to engineer service, this proposed rule would require that the engineer be given both tests within 30 days of his or her return. This proposed change would make the treatment of certified engineers who are not performing service requiring certification consistent with the treatment of conductors under § 242.123 not performing conductor service. *See* § 242.123(b) and (f). Moreover, proposed § 240.129(b)(2) would require a railroad intending to avoid conducting an operational monitoring observation or an unannounced compliance test on a certified engineer not performing service requiring certification to retain a written record documenting certain dates regarding a locomotive engineer's service to prove that the locomotive engineer met the exception in proposed paragraph (h). This is the same recordkeeping requirement as in § 242.123(b)(2).

Several other revisions are proposed to add clarity to the existing requirements. Existing paragraph (c) says "the procedures shall," which does not make clear that the procedures in paragraph (c) apply to the operational monitoring observation, not the unannounced compliance test. Proposed paragraph (c)(2) clarifies that the procedure applies to an "operational monitoring observation," not the more generic term "operational performance monitoring" which could apply to both the operational monitoring observation and the unannounced compliance test. Proposed paragraph (d) also clarifies that the procedure applies to an "operational monitoring observation," as the existing language does not clearly specify whether it applies to an operational monitoring observation or an unannounced compliance test. Proposed paragraph (e) clarifies that the requirements listed apply to the unannounced compliance test program and not the "operational monitoring observation," as the existing language does not clearly specify the type of test.

Section 240.205 Procedures for Determining Eligibility Based on Prior Safety Conduct

Existing section 240.205 requires railroads, before initially certifying or recertifying an individual as a locomotive engineer, to determine that the person meets the eligibility requirements of §§ 240.115, 240.117 and 240.119 involving the individual's prior conduct as a motor vehicle operator, prior revocations as a locomotive engineer or railroad worker with duties under Part 240, and prior FRA alcohol and drug violations that may be indicative of substance abuse disorders. FRA proposes to amend paragraph (a) of this section to clarify that a railroad need not, prior to certifying an individual as a student engineer, determine the person meets the listed eligibility requirements. FRA intends this revision as a clarification to make § 240.205(a) consistent with existing § 240.203. Under existing § 240.203, a railroad may certify an individual as a student engineer after determining the person meets the hearing and vision acuity standards of § 240.121, but the railroad does not need to determine if a student engineer meets the eligibility requirements of §§ 240.115, 240.117, and 240.119. There is no comparable provision in Part 242 because the conductor certification regulation does not recognize student conductors as a class of service.

For the reasons discussed above in the section-by-section analysis for the definitions of "drug and alcohol counselor," "EAP Counselor," "substance abuse disorder," and "Substance Abuse Professional," FRA proposes to revise paragraph (b) of this section by replacing "EAP Counselor" with DAC, the abbreviation for drug and alcohol counselor.

Section 240.207 Procedures for Making the Determination on Vision and Hearing Acuity

FRA proposes to amend this section by adding a semicolon at the end of paragraph (b)(2)(i). This proposed change does not change the meaning of this section. This existing section is the same as § 242.117(b) through (f).

Section 240.209 Procedures for Making the Determination on Knowledge

FRA proposes to amend this section by adding three punctuation marks and correcting the designation of paragraphs (b)(i) and (b)(ii) to (b)(1) and (b)(2) respectively. At the end of paragraph (b), FRA proposes to add a colon. At the end of paragraph (b)(i), FRA proposes to

add a semicolon. Finally, in paragraph (c), FRA proposes to add a comma after the phrase "[i]f a person fails to achieve a passing score under the testing procedures required by this part." The proposed changes do not change the meaning of this section and the requirements of this existing section are consistent with the requirements of § 242.121(f) and (g).

Section 240.211 Procedures for Making the Determination on Performance Skills

FRA proposes to amend this section by adding two punctuation marks and correcting the numbered paragraphs in paragraph (b). At the end of paragraph (b)'s introductory text, FRA proposes to add a colon. At the end of paragraphs (b)(i), FRA proposes to add a semicolon. The proposed changes do not change the meaning of this section.

Section 240.215 Retaining Information Supporting Determinations

This section contains the recordkeeping requirements for railroads that certify locomotive engineers. FRA proposes to amend paragraph (j) of this section to update Part 240's electronic record retention requirements and make those requirements the same as Part 242's. *See* § 242.203(g). While this section currently permits railroads to retain records electronically, proposed paragraph (j) of this section provides more specific requirements regarding the electronic storage system used to retain the records. FRA recognizes the growing prevalence of electronic records, and acknowledges the unique challenges electronic transmission, storage, and retrieval of records can present. FRA also recognizes the need to maintain the integrity and security of records stored electronically. Thus, FRA believes the more specific requirements for electronic storage systems adopted in Part 242 are appropriate. Further, to allow for future advances in technology, the electronic record storage provisions in proposed paragraph (j) are technology-neutral.

FRA also proposes to remove a semicolon at the end of paragraph (e)(2). The proposed change in punctuation does not change the meaning of this paragraph.

Section 240.217 Time Limitations for Making Determinations

This section contains various time constraints precluding railroads from relying on stale information when evaluating a candidate for certification or recertification. FRA proposes amending paragraphs (a)(2) and (a)(4) to

conform to Part 242 (*see* § 242.201). Existing paragraph (a)(2) prohibits a railroad from making a certification decision based on a visual and hearing acuity examination more than 366 days before its certification decision. As under § 242.201(a)(2), FRA proposes to allow railroads to use visual and hearing acuity examination data from up to 450 days before the certification decision. The 450-day period corresponds to the requirement in § 227.109 that railroads must offer employees included in a hearing conservation program a hearing test at least every 450 days.

To accommodate railroads performing knowledge testing on a two-year cycle, FRA also proposes adding a new paragraph (a)(4) to this section, the same as § 242.201(a)(4), which would allow those railroads to rely on knowledge determinations and knowledge examinations administered up to 24 months before the railroad's certification decision.

Given proposed new paragraph (a)(4), existing paragraph (a)(4) allowing railroads to rely on performance skills and performance skill testing up to 366 days before the railroad's certification decision would be redesignated as paragraph (a)(5). Part 242 does not contain a comparable provision.

FRA proposes to delete the prefatory language in paragraph (d) that refers to an exception during the initial implementation of the program. Because that initial implementation occurred in 1991 when Part 240 first became effective, there is no longer a need to state the exception.

FRA is also proposing a grammatical correction to paragraph (a)(1) to change "were" to "was."

Section 240.219 Denial of Certification

This section provides the minimum procedures railroads must follow before denying an individual's certification or recertification. FRA proposes to amend this section to update the minimum procedures railroads must follow before denying a candidate's certification or recertification and make it the same as the process for denying a conductor's certification or recertification under § 242.401. FRA believes the proposed amendments to paragraphs (a), (c), and (d) will not only improve the transparency of the locomotive engineer certification denial process and improve FRA's ability to adjudicate petitions seeking review of a railroad's denial decision pursuant to subpart E of Part 240 (Subpart E), but also ease the regulatory burden on railroads by having one consistent process to follow for denying both locomotive engineer

and conductor certifications or recertifications.

Existing paragraph (a) of this section requires a railroad, before denying an individual's certification or recertification, to notify the individual of information known to the railroad that forms a basis for denying his or her certification and to provide the individual with a reasonable opportunity to explain or rebut the information in writing. To make this existing provision the same as § 242.401(a), FRA proposes adding a second sentence to this paragraph requiring a railroad to provide a locomotive engineer certification candidate with any written documents or records "related to his or her failure to meet a requirement of Part 240 which supports a railroad's pending denial decision." FRA intends this revision to prevent situations where a railroad does not provide a locomotive engineer certification candidate with enough information regarding a denial decision to draft an appropriate rebuttal. FRA wants to avoid the delay and cost of a locomotive engineer candidate having to petition FRA's OCRB to obtain the documents he or she needs to rebut the denial decision. If locomotive engineer certification candidates are provided better information upfront, FRA expects they will file fewer petitions with the OCRB. As under Part 242, FRA would not require railroads to provide documentation on employment or personal issues because generally those issues are outside the scope of Part 240. Instead, FRA would require railroads to provide certification candidates with documents related to a failure to meet a requirement of Part 240 that would support a decision to deny the individual certification or recertification. For example, FRA would expect railroads to provide certification candidates locomotive download printouts, Form Bs, and/or transcripts of railroad communications support a pending denial decision. As it does under existing Part 240, under this proposed rule the OCRB would already have the authority to order a railroad to produce these types of documents and FRA would not expect these documents to be privileged. In a small number of petitions to the Locomotive Engineer Review Board (LERB), FRA noticed a railroad merely making the documents or records available for viewing by the person within a railroad office. The changes to this paragraph clarify FRA's current interpretation that a railroad is required to provide the person with a complete copy of those documents or records relied on, including color copies

of photographs and videos in a readable format.

Existing paragraph (c) of this section requires each railroad denying an individual certification or recertification to notify the person of its decision in writing and explain, in writing, the basis for its denial decision. This existing paragraph requires the railroad's written explanation to be "mailed or delivered" to the certification candidate within 10 days after the railroad's decision. FRA proposes to revise this paragraph to require railroads to "serve" a written explanation of an adverse decision on a certification candidate (*see* proposed definition of "serve or service" in § 240.7, which is consistent with the term as defined in § 242.7). Using the defined term "serve," rather than the current phrase "mailed or delivered," will make Part 240 internally consistent and will help FRA in determining whether a petition seeking review of a denial decision is timely filed under § 240.403. As paragraph (c) to § 242.401 does, the proposed changes to § 240.219 would also explicitly require a railroad's denial decision address any explanation or rebuttal information a locomotive engineer candidate may have provided in writing under paragraph (a) of this section. The current rule strongly implies a railroad's denial decision should address any such information a certification candidate provides, but often railroads' decisions do not address this information. The failure of railroads to explicitly address information certification candidates provide to rebut potential adverse decisions has led to delays in FRA's review of railroads' decisions, as FRA often needs to query the railroad on why the explanation or rebuttal was unsatisfactory before determining whether the railroad's decision was proper. By requiring a railroad's decision to explicitly address a candidate's rebuttal, FRA anticipates locomotive engineer candidates petitioning FRA will have a better understanding of the railroad's reasoning for its denial decision and FRA's OCRB will be able to complete its review of the railroad's decision on a more-timely basis.

Consistent with paragraph (d) of § 242.401, which prohibits a railroad from denying an individual's conductor certification for failure to comply with certain operating rules or practices if sufficient evidence exists that an intervening cause prevented or materially impaired the conductor's ability to comply, FRA proposes to add a new paragraph (d) to this section. Paragraph (d) would explicitly prohibit a railroad from denying an individual's

locomotive engineer certification based on his or her failure to comply with § 240.117(e)(1) through (5) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with those provisions. FRA derived proposed paragraph (d) from the intervening cause exception for revocation in existing § 240.307(i)(1). Although the regulation already implies a railroad may not deny an individual certification for an alleged operating rule violation occurring when the person's actions are the result of an intervening cause, this proposed revision to paragraph (d) will clarify this limitation.

Section 240.221 Identification of Qualified Persons

Existing § 240.221 requires railroads to maintain, and update at least annually, a written record identifying each person designated as a supervisor of locomotive engineers (DSLE) and as a certified locomotive engineer.

Currently, paragraph (d) requires railroads to update the listings this section requires at least annually and paragraph (e) requires railroads to keep the required lists at the divisional or regional headquarters of each railroad. To simplify the regulation, FRA proposes to combine the requirements of existing paragraphs (d) and (e) into one paragraph, proposed paragraph (d). As proposed, paragraph (d) would be the same as paragraph (c) of § 242.205.

FRA also proposes to add new language to paragraph (e) clarifying that it is unlawful for a railroad to knowingly, or an individual to willfully, make a false entry on or falsify the lists this section requires. The same language is found in § 242.205(d) and similar language is found in § 240.215(i) (referencing "records" as opposed to "lists").

While existing paragraph (f) of this section permits railroads to retain records electronically, the proposed revision to paragraph (f) provides more specific requirements for the electronic storage system used to retain the records and does not require a railroad to obtain FRA approval to maintain the records electronically. The electronic storage requirements in proposed paragraph (f) track those in §§ 242.203(g) and 242.205(e).

Section 240.223 Criteria for the Certificate

This section contains the requirements for the certificates railroads must issue to each certified locomotive engineer. Among other things, existing § 240.223 requires

locomotive engineer certificates to contain the certified individual's birth date and the date the railroad issued the certificate. To address privacy concerns RSAC Working Group members expressed, conform the requirements of this section to § 242.207, and make it easier for railroads to issue a single certificate to an individual certified as both a conductor and a locomotive engineer, FRA proposes two changes to this section. First, FRA proposes to revise paragraph (a)(3) to be the same as paragraph (a)(3) of § 242.207. As revised, paragraph (a)(3) would require the certificate to contain only the year of the individual's birth (as opposed to his or her full birth date). FRA also proposes to revise paragraph (a)(5) to be the same as paragraph (a)(5) of § 242.207. As revised, paragraph (a)(5) would require certificates to include the effective date of the certificate (as opposed to the issuance date currently required). Some railroads currently include both the issuance date and the effective date on certificates, which has caused confusion when calculating certificates' expiration dates. Unless an expiration date is provided on a certificate, the effective date, in conjunction with the railroad's Part 240 program, is the date that FRA will use to determine when the certificate expires. In other words, when reviewing a certificate that contains only an effective date, FRA will assume that the certificate is valid for 36 months from the effective date unless the railroad's Part 240 program specifies a shorter expiration period.

Section 240.225 Reliance on Qualification Determinations Made by Other Railroads

Existing § 240.225 contains the conditions under which a railroad considering certification of an individual as a qualified engineer may rely on determinations concerning that person's qualifications made by another railroad. FRA is not proposing any substantive change to this section. However, for clarity and consistency with the corresponding provision in Part 242 (§ 242.125), FRA is proposing to redesignate as paragraph (b) the last sentence of paragraph (a)'s introductory text, along with the list in paragraphs (a)(1) through (5). This change would make the structure of § 240.225 consistent with the structure of § 242.125. Paragraph (a) would provide that in making certification decisions, a railroad may rely on determinations made by another railroad, and paragraph (b) would specify the determinations a railroad needs to make when relying on another railroad's

certification of an individual as a qualified locomotive engineer.

Section 240.229 Requirements for Joint Operations Territory

FRA is not proposing any changes to the requirements in this section, but offers this analysis to address issues raised by some RSAC Working Group members. Under existing § 240.229, the railroad responsible for controlling joint operations with another railroad is also responsible for determining who is permitted to operate in the joint operations territory and for certifying those locomotive engineers to operate in the joint operations territory.

Some RSAC Working Group members suggested that a railroad controlling joint operations should not be responsible for making any determinations concerning the certification and territorial qualifications of another railroad's locomotive engineers. However, because this is a requirement of both Part 240 (see §§ 240.221(c) and (d), and 240.229(c)(1)(i)) and Part 242 (see § 242.301(a)), this suggestion would involve more than just conforming Part 240 to Part 242. Further, this is an issue that FRA extensively addressed in an August 29, 2008 published interpretation. 73 FR 50883. In that interpretation, FRA explained that some controlling railroads directly certify and qualify another railroad's locomotive engineers, whereas other controlling railroads indirectly certify and qualify. Controlling shortline and regional railroads typically directly certify and qualify; controlling major freight railroads generally indirectly certify and qualify. 73 FR at 50884. FRA maintains that although the employing railroad may generally bear the most direct responsibility to ensure each of its locomotive engineers is certified and qualified to operate in the joint operations territory, the controlling railroad also bears significant responsibility. The controlling railroad that indirectly certifies and qualifies may provide training to the other railroad's DSLEs who then train their own locomotive engineers, and it is possible that the training provided to the other railroad is inadequate. Although FRA may be willing to revisit this issue in another rulemaking, FRA believes that a controlling railroad must bear some responsibility for hosting another railroad's locomotive engineers and conductors in joint operations territory and for that reason FRA declines to adopt the suggestion to eliminate that responsibility in this proposed rulemaking.

Paragraph (f) does provide an exception to this section's requirements for "minimal joint operations" if four conditions are met. The four conditions include: (1) Maximum authorized speed on the track is 20 miles per hour; (2) the track is other than main track; (3) operations are conducted under operating rules requiring every locomotive and train to proceed at a speed permitting stopping within one half the range of vision of the locomotive engineer; and (4) there is no more than one mile of joint operations territory. This locomotive engineer exception is more lenient than the equivalent conductor provision, which is a strict prohibition on an unqualified conductor working in joint operations territory. § 242.301(a).

A RSAC Working Group member suggested FRA revise paragraph (f) of § 240.229 to require compliance with only one of the listed conditions, not all four. FRA declines to propose this suggestion because it would permit locomotive engineers who are unfamiliar with the physical characteristics of the joint operations territory to operate far into that unfamiliar territory under conditions that could be extremely challenging for the locomotive engineer. Thus, it is probable that such a provision would lead to many unsafe situations in joint operations.

Section 240.301 Replacement of Certificates

Existing § 240.301 requires railroads to have a system, reasonably accessible to certified locomotive engineers, for the prompt replacement of lost, stolen, or mutilated certificates. FRA proposes to revise this section to be the same as the corresponding provision in Part 242, § 242.211. Specifically, FRA proposes dividing this section into two paragraphs. Proposed paragraph (a) would be the same as paragraph (a) of § 242.211 and would make railroads responsible for providing replacement certificates to engineers at no cost to the locomotive engineer. Proposed paragraph (b) would be the same as paragraph (b) of § 242.211, which authorizes railroads to issue temporary replacement certificates valid for no more than 30 days.

Section 240.303 Operational Monitoring Requirements

Section 240.303 currently requires railroads subject to Part 240 to have a program to monitor the conduct of their certified locomotive engineers by performing both operational monitoring observations and by conducting unannounced operating rules

compliance tests. For consistency with the proposed revisions to § 240.129 (discussed above in the section-by-section analysis for that section), FRA proposes to amend paragraphs (b) and (c) of this section to exempt railroads from the requirement to conduct unannounced compliance tests on locomotive engineers who are not performing service requiring certification.

Section 240.305 Prohibited Conduct

This section sets forth the general prohibitions on actions of certified locomotive engineers, requires individual engineers to keep their certificates with them while on duty as engineers, and requires engineers to display their certificates in certain situations. Specifically, under existing paragraph (b) of this section, a certified locomotive engineer must display her or her certificate upon the request of an FRA or railroad representative. In the section-by-section analysis for the conductor certification final rule, FRA clarified its intent that State inspectors authorized under FRA's State Safety Participation Regulations, 49 CFR part 212 (Part 212), could be considered "FRA representatives," but that by mentioning such State inspectors separately it would ensure that there would be no dispute regarding their authority. 76 FR at 69824–25. For that same reason, FRA proposes to amend this paragraph to make it the same as paragraph (a) of § 242.209 and expressly add a new paragraph (b)(2)(ii) making clear that, upon request, a locomotive engineer must display his or her certificate to a State inspector authorized under Part 212. In doing so, FRA proposes to add a colon to the end of paragraph (b)(2) and renumber existing paragraphs (b)(2)(ii) and (iii).

Section 240.307 Revocation of Certification

Existing § 240.307 provides the procedures a railroad must follow to revoke a certified locomotive engineer's certification. FRA proposes to amend this section to clarify its intent and make it the same as § 242.407, which addresses the revocation of conductor certifications. A more detailed discussion of these changes is found in the section-by-section analysis of § 242.407 in the conductor certification final rule. 76 FR at 69829.

Existing paragraph (a) requires a railroad to revoke an engineer's certification if it "acquires information" about the engineer's violations of certain operating rules and practices or prior alcohol or drug violations "which convinces the railroad the person no

longer meets the qualification requirements" of Part 240. FRA proposes to amend this paragraph to add the word "reliable" before "information," and to remove the phrase "which convinces the railroad that the person no longer meets the qualification requirements of this part." These proposed revisions would make paragraph (a) of this section the same as paragraph (a) of § 242.407.⁸

Paragraph (b)(1) currently requires railroads to immediately suspend an engineer's certificate upon receipt of "reliable information indicating the person's lack of qualification" under Part 240. FRA believes this phrase is prone to misinterpretation and proposes to replace the reference to an individual's "lack of qualification" under Part 240 with more specific language "regarding violation(s) of § 240.117(e) or § 240.119(c) of this chapter." This proposed change would make paragraph (b)(1) of this section the same as paragraph (b)(1) of § 242.407(b), with the exception of the regulatory provisions cited.⁹

To mirror the procedures in Part 242, FRA proposes to add a new paragraph (b)(4) to this section specifying that no later than the convening of a hearing, the railroad convening the hearing must provide the person whose engineer certificate is at stake with a "copy of the written information and list of witnesses the railroad will present at the hearing." Further, if the railroad does not provide the required information until just before the hearing is convened, a recess at the start of the hearing must be granted if requested to consider the information. In addition, any relevant information required to be provided under this section that leads to the suspension of an engineer's certificate pursuant to paragraph (b)(1), is to be provided through statements of an employee of the convening railroad, and the railroad must make that employee available for examination during the hearing. Finally, FRA proposes to clarify in the last sentence of new paragraph (b)(4) that a witness's examination may be telephonic where it is impractical to have the witness appear at the hearing. These proposed provisions would make paragraph (b)(4) of § 240.307 the same as paragraph (b)(4) of 242.407.

⁸ The only difference between proposed paragraph (a) of § 240.307 and existing paragraph (a) of § 242.407 are the regulatory citations referenced for violations of (1) operating rules and practices and (2) alcohol or drug use. Paragraph (a) of § 240.307 refers to the relevant provisions of Part 240 (§ 240.117(e) and § 240.119(c)); paragraph (a) of § 242.407 refers to the relevant provisions of Part 242 (§ 242.403(e) and § 240.115(e)).

⁹ See footnote 8.

Some members of the RSAC Working Group suggested revising proposed paragraph (b)(4) to require railroads to provide all (as opposed to written) information relied upon to suspend an individual's certificate and to add the word "only" in the last sentence of that paragraph to read: "Examination may be telephonic only where it is impractical to provide the witness at the hearing." Because those changes do not conform to Part 242, FRA declines to adopt them for this rulemaking. However, FRA will consider addressing these issues in any future Part 240 and Part 242 rulemaking.

As proposed, paragraph (b)(4) would be a new requirement and its insertion in the existing list of six items in paragraph (b) means that paragraphs (b)(4) through (6) would be renumbered as paragraphs (b)(5) through (7). Paragraphs (b)(6) and (b)(7) would contain the same exact requirements as existing paragraphs (b)(5) and (b)(6). The proposed changes to existing paragraph (b)(4) (renumbered as proposed in paragraph (b)(5)), are described below.

Existing paragraph (b)(4) (which would become paragraph (b)(5) if new proposed paragraph (b)(4) discussed above is adopted), requires a railroad to "[d]etermine, on the record of the hearing, whether the person no longer meets the qualification requirements of this part." Similarly, existing paragraph (c)(2) requires the hearing to be conducted by a "presiding officer, who can be any qualified person authorized by the railroad other than the investigating officer." FRA proposes to replace the words "qualification" and "qualified" in these paragraphs with the words "certification" and "proficient," respectively. These proposed amendments would make the language of paragraphs (c)(2) and (b)(5) of § 240.307 the same as paragraphs (c)(2) and (b)(5) of §§ 242.407 and FRA intends these amendments to avoid conflicting with the defined term "qualified" (discussed in the section-by-section analysis for § 240.7).

Although FRA is not proposing to revise existing paragraphs (c)(1) and (3) of this section, FRA is taking this opportunity to clarify these existing paragraphs and how they affect an engineer's rights and a presiding officer's authority in a certification hearing that is not held in accordance with a collective bargaining agreement. Paragraph (c)(1) requires a Part 240 hearing to be convened within 10 days of an individual's certificate suspension unless the locomotive engineer requests or consents to delaying the start of the hearing. Paragraph (c)(3), on the other hand, provides the presiding officer

with the "powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy." Thus, while existing paragraph (c)(1) provides a locomotive engineer with significant input into when a hearing is held, the paragraph must be read in conjunction with paragraph (c)(3) which provides the presiding officer with the powers necessary to regulate the conduct of the hearing. Thus, a presiding officer is permitted to deny excessive hearing request delays by a locomotive engineer. Moreover, a presiding officer could find implied consent to postpone a hearing where a locomotive engineer's witnesses are not available within 10 days of the date the railroad suspends the engineer's certificate. FRA notes, however, the OCRB may grant a petition on review if it finds the hearing schedule caused a petitioner substantial harm.

Existing paragraph (c)(9) provides that a railroad proceeding under § 240.307(c) shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of information. FRA is proposing typographical corrections to this paragraph to make the paragraph substantively the same as paragraph (c)(9) of § 242.407 (*i.e.*, adding the word "the" before "conclusion" in the first sentence and adding a comma after the introductory phrase "[i]n such instances" in the second sentence).

Existing paragraph (c)(11) requires a railroad's decision to contain the findings of fact and basis for those findings concerning all material issues presented on the record. The paragraph also requires the decision to be served on the employee. FRA is proposing revisions to paragraph (c)(11) to make it the same as paragraph (c)(11) of § 242.407, including expanding what information is required in the railroad's written decision and who must be served with a copy of that decision. Specifically, FRA proposes to amend paragraph (c)(11)(i) to require a railroad's written decision to not only include the factual findings, but also include "citations to all applicable railroad rules and practices." FRA is also proposing a new paragraph (c)(11)(ii), which would require a railroad's decision to state whether the railroad official found that a revocable event occurred and the applicable period of ineligibility with a citation to § 240.117 or § 240.119. As proposed, the requirement in existing paragraph (c)(11)(ii) for a railroad to serve a copy of the decision on the adverse party would be renumbered as proposed

paragraph (c)(11)(iii) and expanded to require the railroad to serve the decision not only on the employee but also on the employee's representative, if any, and to require the railroad serving the decision to retain proof of service on the employee and the employee's representative, if any. The existing rule does not specifically require a railroad to retain proof of service, but it is routine for a railroad to do so. In some prior certification cases, employees have complained to FRA that they were unaware of any written decision regarding their revocation, and if a railroad could not provide proof of service then that procedural concern became a viable issue. FRA believes requiring railroads to retain proof of service of their decertification decisions will help reduce the number of OCRB petitions alleging that a railroad did not issue a written decision, when in fact, the railroad did. In short, FRA believes its proposed changes to paragraph (c)(11) will ensure railroads issue clearer and more detailed decisions. Clearer and more detailed decisions will allow individual locomotive engineers to better understand a railroad's decision to revoke his or her certification and will allow the OCRB to better understand the case if it is asked to review the revocation decision under Part 240. Although the proposed changes are found in paragraph (c) which applies to a hearing not held in conformance with an applicable collective bargaining agreement, FRA would expect each hearing held pursuant to a collective bargaining agreement as permitted by paragraph (e) of this section to comply with these proposed changes to paragraph (c)(11), because they are fundamental to ensuring a railroad can prove its revocation decision was issued and served.

Existing paragraph (g) requires a railroad relying on an individual's locomotive engineer certification by another railroad under §§ 240.227 or 240.229 to revoke the individual's certification if, during the period the certification is valid, "the railroad acquires information which convinces it that another railroad has revoked [the person's] certification after determining in accordance with the provisions of this section, that the person no longer meets the qualification requirements of this part." FRA proposes amending paragraph (g) to make it the same as paragraph (g) of § 242.407. Specifically, FRA proposes to amend paragraph (g) to remove the phrases "after determining" and "that the person no longer meets the qualification requirements of this

part.” By removing those phrases, the proposed paragraph will more clearly require a railroad allowing a certified person from another railroad to operate in joint operations, whether from another U.S. railroad or from Canada, to provide reciprocal revocations when another railroad revokes the person’s certification. Both proposed and existing paragraph (g) are intended to ensure that each railroad issuing a certification to an individual who operates in joint operations does not “ignore the safety record of one of its engineers that was compiled while the engineer was operating on another railroad’s trackage.” 58 FR 18982, 18991 (1993). Similarly, all railroads operating in joint operations that certify an individual as a locomotive engineer “should rely on the single hearing provided and be bound by the decision made by the railroad conducting the hearing.” *Id.*

FRA proposes to clarify existing paragraph (i) of this section by deleting unnecessary references to engineer qualification requirements and specifying when, despite an individual’s violation of § 240.117(e)(1) through (5), a railroad is prohibited from revoking that individual’s certification and when a railroad has discretion not to revoke an individual’s certification for such violations. The proposed revisions to this paragraph will make this paragraph the same as paragraph (i) of § 242.407.¹⁰ Both existing paragraph (i) and the proposed revision to paragraph (i) provide two specific defenses for railroad supervisors and hearing officers to consider when deciding whether to suspend or revoke an individual’s certificate due to an alleged revocable event. Paragraph (i)(1) would prohibit a railroad from revoking an individual’s certificate if there is sufficient evidence of an intervening cause that prevented or materially impaired the person’s ability to comply. Paragraph (i)(2) would provide a railroad with the discretion necessary to decide not to revoke an engineer’s certification for an event that violates § 240.117(e)(1) through (5) if the violation was of a “minimal nature and had no direct or potential effect on rail safety.”

Proposed paragraph (j) would correct a typographical error by changing a semicolon to a period at the end of the paragraph.

Section 240.308 Multiple Certifications

FRA proposes to add new § 240.308, which would allow an individual to hold both a locomotive engineer and a conductor certification and would address different scenarios that an individual or railroad might face when the individual holds multiple certifications. This proposed section is based on § 242.213 but would not adopt § 242.213(a) and (g), which address an individual holding multiple types of conductor certifications, *i.e.*, passenger conductor and freight conductor, because holding multiple locomotive engineer certifications would not make sense. Specifically, an individual would not need to hold a train service engineer certificate and a locomotive servicing engineer certificate, because a locomotive servicing engineer’s duties are a subset of a train service engineer’s duties. Similarly, a locomotive servicing engineer and a train service engineer would be expected to be qualified on RCLs, so there would be no need for engineers with either of those classes of service to hold an RCO certificate.

As proposed, a railroad needs to issue only one certificate to an individual certified as both a locomotive engineer and a conductor, but that certificate must comply with both §§ 240.223 and 242.207. To the extent possible, a railroad issuing multiple certificates to an individual would have to coordinate the expiration date of those certificates. See proposed § 240.308(a) and (b). These paragraphs mirror the requirements in paragraphs (b) and (c) of § 242.213.

With the exception of a situation in which a passenger conductor’s removal from a passenger train is for a medical, police, or other such emergency, a locomotive engineer, including an RCO, must meet certain requirements to operate a locomotive or train without a certified passenger conductor. One option under the proposed requirement is for the person assigned as the certified locomotive engineer to also be a certified conductor. The other option is for the locomotive engineer who is operating without an assigned certified conductor to have a certified conductor attach to the crew “in a manner similar to that of an independent assignment.” See proposed § 240.308(c) and (d). These paragraphs mirror the requirements in paragraphs (d) and (e) of § 242.213.

Paragraphs (e) through (m) of proposed § 240.308 correspond to paragraphs (f) and (h) through (o), respectively, of existing § 242.213. A detailed analysis of these provisions is found in the section-by-section analysis

of § 242.213 in the conductor certification final rule. 76 FR 69825.

Section 240.309 Railroad Oversight Responsibilities

Existing § 240.309 requires each Class I railroad (including the National Railroad Passenger Corporation and a railroad providing commuter service) and Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified engineers. FRA proposes to amend this section to conform, where appropriate, to § 242.215.

Existing paragraph (b) of this section requires railroads to include four items in their annual review and analysis. Specifically, paragraph (b)(4) requires railroads conducting joint operations with another railroad or railroads to include the number of locomotive engineers employed by the other railroad(s) “to which such events were ascribed which the controlling railroad certified for joint operations.” FRA proposes to revise existing paragraph (b)(4) for clarity and to make the language mirror that in paragraph (b)(4) of § 242.215, but not to substantively change the requirement.

Existing paragraph (e) requires railroads to keep track of nine distinct types of events involving poor safety conduct by locomotive engineers. Specifically, existing paragraphs (e)(1) and (2) require railroads to keep track of incidents involving noncompliance with “part 218” and “part 219”. To clarify that these citations refer to 49 CFR parts 218 and 219, FRA proposes to add the phrase “of this chapter” to both paragraphs (e)(1) and (2). Additionally, in paragraphs (e)(8) and (9), FRA proposes to correct typographical errors by adding the word “and” at the end of paragraph (e)(8) after the semicolon and removing the semicolon and word “and” at the end of paragraph (e)(9) and putting a period at the end of the sentence.

To accommodate a new paragraph proposed as paragraph (f) to revise the reporting requirements of the section, existing paragraphs (f) through (h) have been redesignated as proposed paragraphs (g) through (i). As paragraph (f) of § 242.215 does, proposed paragraph (f) would require a railroad to report an instance of poor safety conduct involving an individual holding both a conductor and engineer certification only once (*i.e.*, either under § 242.215 or this section). As proposed and consistent with § 242.215(f), a railroad’s determination of whether to report the instance of poor safety conduct under Part 240 or Part 242 must

¹⁰ The only difference between proposed paragraph (i) of § 240.307 and paragraph (i) of § 242.407 are the regulatory citations referenced. Paragraph (i) of § 240.307 refers to violations of § 240.117(e)(1) through (5); paragraph (i) of § 242.407 refers to § 242.403(e)(1) through (11).

be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under 49 CFR part 225 in which railroads determine whether an accident was caused by poorly performing what is traditionally considered a conductor's job function (e.g., switch and derail handling) or whether it was caused by poorly performing what is traditionally considered a locomotive engineer's job function (e.g., operation of the locomotive or train).

Existing paragraph (f)(2) (which FRA is proposing to redesignate as paragraph (g)(2)), requires a railroad imposing formal discipline on a certified locomotive engineer for an instance of poor safety conduct to keep track of the type of punishment the "hearing officer" imposes. FRA proposes to slightly modify this paragraph, to acknowledge that the subject punishments are not always imposed by a "hearing officer" but instead may be imposed by other railroad officers. Accordingly, FRA proposes to replace the term "hearing officer" with the more general term "railroad." As proposed, paragraph (g)(2) would be the same as paragraph (g)(2) in § 242.215.

In addition, existing paragraph (h)(2) (which FRA is proposing to redesignate as paragraph (i)(2)) requires a railroad's analysis under this section to be capable of showing the total number of incidents of poor safety conduct identified for which an "FRA accident/incident report" was required. FRA proposes to clarify this requirement to specify an "FRA accident/incident report under part 225 of this chapter," to make clear which accident/incident report FRA is referring to in this paragraph. As proposed, paragraph (i)(2) would be the same as paragraph (i)(2) of § 242.215.

Subpart E—Dispute Resolution Procedures

Existing Subpart E details the opportunities and procedures for an individual to appeal a decision by a railroad to deny certification or recertification or to revoke an individual's locomotive engineer certification. Some members of the RSAC Working Group recommended changes to the existing appeals process contained in §§ 240.401 through 240.411. Those members suggested FRA create a pilot program for a dispute resolution procedure based on their recommended changes. Pursuant to the members' recommendations, FRA would designate one or more Class I railroads to participate in the pilot program. Those railroads, which are not part of the pilot program, would

proceed under FRA's existing procedures.

The suggested changes, which were also recommended during the conductor certification rulemaking, include eliminating the opportunity for parties to appeal FRA decisions to the Administrator, incorporating the Administrative Hearing Officer (AHO) level of appeal into the OCRB process, requiring the OCRB to grant a decision if any procedural error by the railroad is shown, adding an attorney as a member of the OCRB, and making the OCRB decision final agency action.

For the reasons provided in the conductor certification rulemaking (see, 76 FR 69802 (Nov. 9, 2011) and 77 FR 6482 (Feb. 8, 2012)), in this proposed rule FRA declines to adopt these suggestions to revise the appeals process and create a pilot program. Members of the RSAC Working Group thoroughly discussed these suggestions and most of the suggestions were rejected at those meetings. As explained to the RSAC Working Group, due process requirements and issues concerning trials *de novo* necessitate FRA retain the OCRB and AHO as distinct levels of review. Further, the pilot program would prevent those railroad employees whose employers were required to participate in the program from taking advantage of the same appeals process opportunities available to employees of other railroads not participating in the program. In addition, the pilot program would require FRA to develop a second appeals process which would only apply to certain railroads for an unspecified amount of time. Accordingly, FRA finds that the pilot program recommended would treat similarly situated engineers disparately and thus FRA declines to propose to adopt the recommendation.

Although FRA is not adopting the RSAC Working Group members' recommendations, FRA has taken steps internally to make the appeals process more efficient. For example, FRA's LERB and OCRB decided more than twice as many cases in fiscal year 2017 (106 in total) than they did in fiscal year 2016 (51 in total), and rendered their decisions on average 18 days earlier. Further, between fiscal years 2012 and 2017, the average length of time for the AHO to render a decision in a locomotive engineer or conductor case under Parts 240 and 242 averaged between 6 and 8 months compared with 11 to 18 months during fiscal years 2009 through 2011. In fiscal year 2017, the AHO rendered 4 decisions in an average of approximately 7 months; in fiscal year 2009, the AHO rendered 13 decisions in an average of 18 months.

In addition, FRA is proposing in this rule to revise Part 240 to require petitions to be submitted to the DOT Docket Clerk rather than FRA's Docket Clerk. With that change, the process for submitting petitions to the OCRB will be the same as the process for requesting an administrative hearing under § 240.407 and § 242.507. FRA believes this change will make the process more efficient as DOT's Docket Operations facility is best equipped to process, scan, and store these types of filings. The proposal to change the docketing requirements will also permit a single docket to be maintained throughout the three stages of FRA's dispute resolution process, rather than an FRA docket maintained for LERB petitions and a separate DOT docket created for AHO cases.

Section 240.401 Review Board Established

Paragraph (a) of existing § 240.401 provides that an individual who is denied certification or recertification or has his or her engineer certification revoked, and believes that a railroad incorrectly determined that he or she failed to meet the "qualification" requirements of Part 240, may petition FRA to review the railroad's decision. FRA proposes to amend this section to delegate initial responsibility for adjudicating denial of certification or recertification and revocation disputes to FRA's OCRB. In paragraph (a), FRA proposes to substitute the word "certification" for "qualification" to clarify that FRA is reviewing railroads' certification decisions, not railroads' decisions as to whether individuals meet the "qualification" requirements of Part 240. This proposed change would make paragraph (a) of § 240.401 the same as paragraph (a) of § 242.501 and is not intended to change the substantive requirements of this paragraph. Instead, the proposed change would clarify the existing requirements and ensure internal consistency within Part 240 and consistency with Part 242.

As noted above, FRA proposes to revise existing paragraph (b) to provide that the OCRB, not the LERB, is delegated initial responsibility for adjudicating certification disputes under Part 240.

FRA proposes to revise paragraphs (b) and (c) to replace the existing name of the FRA review board referenced (the LERB) with the name of the board used in the conductor certification rule, the OCRB. In practice, the LERB and the OCRB are staffed by the same FRA employees, so it is logical to combine them under the same name—a more general name referring to all operating

crewmembers. This will also make it clear that there is only one board, the OCRB, that reviews both conductor and locomotive engineer disputes.

FRA proposes to revise paragraph (c) of this section to remove the requirement that the review board be composed of “at least three” FRA employees. The number of board members is an issue of internal agency organization, procedure, or practice that is normally left for an agency to decide. Such internal agency decisions can be made without notice to the public. See 5 U.S.C. 553(b)(3)(A). FRA retains the right to use any number of FRA employees as OCRB members, in coordination with agency resources and priorities.

The proposed revisions to § 240.401 would make the section the same as the corresponding section in Part 242, § 242.501.

Section 240.403 Petition Requirements

Existing § 240.403 provides the requirements for obtaining FRA review of a railroad’s decision to deny certification, deny recertification, or revoke certification. FRA proposes to revise this section to make it the same as the corresponding provision in Part 242 (§ 242.503). The proposed amendments would provide a single process for aggrieved parties to submit FRA locomotive engineer petitions under Part 240 and conductor certification petitions under Part 242.

FRA proposes to revise paragraph (b)(2) to provide that petitions under Part 240 must be submitted to the DOT Docket Clerk rather than FRA’s Docket Clerk. With this change, the process for submitting petitions to the OCRB would be the same as the process for submitting petitions under Part 242 (§ 242.503) and for requesting an administrative hearing under both Parts 240 and 242. FRA believes this change will make the process more efficient as DOT’s Docket Operations facility is best equipped to process, scan, and store these types of filings. In addition, filings in OCRB proceedings will become more accessible because they will be available electronically on the DOT’s public docket website (www.regulations.gov).

FRA notes that anyone is able to search (at www.regulations.gov) the electronic form of all filings received into any of DOT’s dockets by the name of the individual submitting the filing (or signing the filing, if submitted on behalf of an association, business, labor union, or other organization). You may review DOT’s Privacy Act Statement published on April 11, 2000 (65 FR 19476), DOT’s notice modifying its system of records from DOT’s Docket

Management System (DMS) to the current Government-wide Federal DMS published on January 17, 2008 (73 FR 3316), or you may view the privacy notice of the Federal DMS at <http://www.regulations.gov#!/privacyNotice>.

Although FRA is proposing no changes to existing paragraph (b)(3) of this section, FRA notes that the “petitioner” referred to in paragraph (b)(3) of this section is the person who had his or her certificate revoked, not an employee representative who may respond on the petitioner’s behalf. If the petitioner has a representative, the petitioner is encouraged to also provide the representative’s name, mailing address, daytime telephone number, and email address (if available) in the petition.

FRA encourages all parties to an OCRB case to sign up for email alerts on www.regulations.gov. By subscribing to email alerts, a person will receive an email notification stating that information has been added to the specified docket and provide a link to view the addition. Email alerts have the potential to give a party earlier notice of a filing than actual service by mail.

FRA proposes to add a new paragraph (b)(7) to this section requiring a petitioner, upon the OCRB’s request, to supplement the petition with “a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees.” That paragraph would also require a petitioner to provide a written explanation in response to an OCRB request if written documents that should be reasonably available to the petitioner are not supplied. FRA is proposing these requirements to clarify a petitioner’s responsibilities for a petition seeking review of a railroad’s decision that is based on a failure to comply with any drug- or alcohol-related rule or a return-to-service agreement. The addition of proposed paragraph (b)(7) would make the paragraph the same as the corresponding paragraph in Part 242 (§ 242.503(b)(7)).

FRA proposes to revise existing paragraph (c) to require a petition seeking review of a railroad’s revocation or denial decision under this section to be filed with FRA within 120 days of the date the railroad served the decision on the petitioner. This revision would make this provision of Part 240 the same as the corresponding provision in Part 242 (see § 242.503(c)). This revision would differ from the current timeline in Part 240, which contains different time requirements depending on whether a person is seeking review of a

revocation decision (120 days) or a denial decision (180 days).

As proposed, paragraph (d) would also conform to paragraph (d) of § 242.503 by making clear that a person may also appeal a Board decision to the Administrator when the petition is found not to meet this section’s minimum requirements. Currently, paragraph (d) expressly provides only that an appeal is allowed when the Board finds the petition was untimely filed, although FRA has directed petitioners whose petitions did not meet this section’s minimum requirements that they may exercise this type of appeal. The reference to the “Board” in the existing rule refers to the LERB but for this proposed rule the Board is the OCRB.

Section 240.405 Processing Certification Review Petitions

FRA proposes to revise this section, which details how petitions for review will be handled by FRA, to make it the same as the corresponding provision in Part 242, § 242.505. To more accurately reflect the substance of this section, FRA proposes to revise the section heading to be the same as the heading of § 242.505—“Processing certification review petitions.” Proposed paragraph (a) adds the clarification that the Board will “attempt to” render a decision within 180 days once it has all the filings, rather than emphatically state that it will render a decision within that same timeframe. The change proposed to paragraph (a) would make it the same as § 242.505(a).

As discussed above in the section-by-section analysis of proposed § 240.403, OCRB petitions would be accessible on www.regulations.gov. Therefore, FRA proposes to revise paragraph (b) of this section to specify that, as opposed to FRA providing the railroad with a copy of each petition it receives under Part 240, FRA will notify the railroad of its receipt of a petition under Part 240 and where the petition may be accessed online.

FRA proposes to revise paragraph (c) of this section to clarify the time limit for a railroad to respond to a petition if it chooses to do so. The proposed rule states that a railroad may respond “[w]ithin 60 days from the date of the [FRA’s] notification provided in paragraph (b).” This differs from the existing language in paragraph (c) which states that “[t]he railroad will be given a period of not to exceed 60 days to submit” its response. As FRA has always considered the period to begin to run when service of the notice on the railroad was complete, the practical effect of the proposed change is to

clarify the existing time allowed for a railroad's response, but not to substantively change the existing requirement. Of course, even if a railroad's response is late, § 240.405(c) provides that the OCRB will consider the response "to the extent practicable." FRA is not proposing to change this provision, which is the same as in the conductor certification rule. See § 242.505(c). However, as the OCRB has significantly reduced the amount of time it takes to consider a case, railroads are on notice that the windows for submitting late filings are closing more quickly than in the past.

In the current and proposed paragraph (c) requirements, railroads are offered the opportunity to "submit to FRA any information that the railroad considers pertinent to the petition." The railroad, therefore, has a duty to ensure the documents that formed the basis for its decision are submitted for Board review. Even if a railroad chooses not to submit a response to the petition, it should review the documents submitted to the electronic docket. FRA also recommends that a railroad representative sign up to receive "email alerts" so the railroad will be notified whenever anything is added to the docket. A railroad may choose to submit missing documents, color photos, videos, and other evidence provided as the basis for its decision that may be missing from the docket, even if the railroad chooses not to file a response that rebuts the petitioner's assertions that the railroad's decision was improper.

FRA proposes to revise paragraph (d)(1) to require railroads to provide FRA with an email address if available. Each railroad should note that if FRA receives an email address, it should expect to receive email service from FRA regarding the case. As proposed, and consistent with FRA's handling of petitions under Part 242, FRA would be under no duty to serve by both email and by regular mail.

FRA proposes to revise paragraph (d)(2) to clarify that a railroad must serve a copy of its response on the petitioner and the petitioner's representative, if any. Existing paragraph (d)(2) only requires railroads to provide a copy to the petitioner, even though most railroads know to also serve a copy on a petitioner's representative.

FRA proposes to revise paragraph (d)(3) to require a railroad to submit its response to a petition to the DOT Docket Clerk rather than FRA's Docket Clerk as the paragraph currently requires. FRA believes this change will make the process more efficient as the DOT

Docket Clerk is best equipped to process, scan, and store these types of filings. In addition, as noted above, filings in OCRB proceedings will become more accessible because they will be posted on www.regulations.gov. Another significant proposed change to this paragraph would eliminate the existing requirement for a railroad to file three copies of its response. As the DOT dockets are electronic, there would no longer be a need for FRA to mail one copy to the railroad, keep one copy in the docket, and use the third copy as a working copy for the OCRB. FRA expects that this change would reduce copying expenses for both parties by not having to file in triplicate, and may also reduce the amount of time it takes to file a petition. In addition, most parties currently send their petitions by overnight courier service, and filing electronically carries no additional cost if the party already pays for internet access and thus will save petitioners the overnight courier service costs.

FRA proposes to revise paragraph (e) to identify the OCRB as the reviewing board, not the LERB, and FRA likewise proposes to revise paragraph (f) to explain the authority of the OCRB. Specifically, proposed paragraph (f) provides that the Board will have the authority to "grant, deny, dismiss, or remand" a petition. This is not a substantive change from existing Part 240, but FRA proposes to add this specific language here to make the language the same as that in § 242.505(e) and to clarify the OCRB's authority. If the Board grants a petition, then the petitioner has received a favorable ruling. If the Board denies a petition, then the railroad has received a favorable ruling. The Board will dismiss cases falling outside its jurisdiction. For example, if an engineer's certification is suspended and the railroad has not yet revoked the individual's certification, the case is not ripe for the Board to hear and the Board will issue a dismissal decision. Also, if the petition does not meet all the requirements of § 240.403, the Board may dismiss the petition. The Board has the authority to remand a case back to the railroad for a new decision. As the LERB has historically done, the Board will typically remand a case back to the railroad when both parties have failed to address an important factual issue and there is a reason to reopen the railroad's investigation and present evidence on that issue. Obviously, if the railroad is presenting new evidence on an issue it has not previously addressed or needs to clarify, a petitioner should be provided with a new opportunity for a

written rebuttal in a denial case or an opportunity to examine witnesses and evidence at a railroad hearing in a revocation case. A remand could also be warranted in a case involving a denial of certification or recertification where the petitioner has raised a potentially legitimate defense that was not addressed by the railroad's decision; in such cases, the Board expects a railroad to fully consider the defense raised in a new or supplemental decision. Of course, when the Board remands a denial case back to a railroad for a new or supplemental decision, the railroad is not obligated to deny the person certification or recertification again as it may reverse its prior denial decision.

In proposed paragraph (g), FRA provides that if there is an insufficient basis for deciding the petition, the Board will issue an order affording the parties an opportunity to provide additional information or argument.

To conform Part 240 with Part 242 and to address a concern of some RSAC Working Group members that railroads and petitioners would not know what standards of review the OCRB would use in considering petitions, FRA proposes to add paragraphs (h) through (j) to this section. Included in those proposed new paragraphs are the standards of review that the OCRB will utilize when considering a petition. Those standards are exactly the same standards currently used by the LERB to review locomotive engineer petitions under the existing engineer certification regulation.

Like the LERB currently does under existing paragraph (f) of this section, the OCRB would determine only whether a railroad's decision was improper. Although this requirement is found in existing paragraph (f), this rule proposes to redesignate paragraph (f) as new paragraph (k). If a railroad-conducted hearing were so unfair that it causes a petitioner substantial harm, the OCRB could grant the petition; however, the OCRB's review is not intended to correct all procedural wrongs committed by a railroad. Further, like the LERB, the OCRB's authority would be limited to approving the railroad's decision, overturning the railroad's decision, or returning the case to the railroad for additional fact finding. The OCRB would not be empowered to mitigate the consequences of a railroad's decision that was validly made under this regulation. The OCRB is only empowered to make determinations concerning certifications under Part 240. The contractual consequences, if any, of these determinations would have to be resolved, as they currently are, under dispute resolution mechanisms

that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay to accommodate a finding that a railroad wrongfully denied certification.

FRA notes this proposed rule would necessarily require the OCRB to determine whether a railroad revoked the correct certificate of an individual who holds both an engineer and conductor certification. For example, in a case in which a railroad finds that an individual who holds both a conductor and engineer certification violated a railroad rule involving a failure to comply with § 218.99 (*i.e.*, a Part 218, subpart F violation) but revoked that person's engineer certification, the OCRB, if petitioned, would have to find that the revocation decision was improper because, currently, an engineer cannot have his or her Part 240 certification revoked for violations of Part 218, subpart F.

New paragraph (l) of this section would require the OCRB's written decision to be "served" on the petitioner as opposed to the existing paragraph (g) requirement that "[n]otice of that decision will be provided in writing." This proposed revision is not a substantive change, but instead is intended to standardize the terminology used in Part 240 and make the language the same as that of § 242.505(l). Although existing § 240.405 does not require FRA to provide notice of the LERB's decision to a petitioner's representative, if any, FRA's past practice has been to do so. In new paragraph (l) of this section, FRA proposes to make the practice of serving a petitioner's representative mandatory, if the petitioner has a representative. Moreover, the proposed language in new paragraph (l) removes the requirement that every decision include findings of fact, which may not be appropriate or relevant to some decisions.

Further, under proposed paragraph (l), a party that has provided an email address under § 240.403(b)(3) voluntarily consents to be served documents, including the OCRB's decision, by email. Petitioners should note that if FRA receives an email address, FRA's preference may be to serve all correspondence regarding the petition or case by email. Currently, FRA serves a copy of each decision by mail, even if it has the email addresses for all the parties. Thus, the actual practice has not yet caught up with the flexibility built into the existing regulation. In the near future, potentially before implementation of this rule if it becomes final, FRA intends

to begin serving the OCRB notices, orders, and decisions by email to those parties that have provided an email address. A party to a case may also serve another party by email if the email was provided in the petition or railroad's response filing. However, while electronic service is a proper method of service, each party performing service is responsible for knowing that, under Rule 5(b)(2)(E) of the Federal Rules of Civil Procedure (FRCP), service "is not effective if the party making service learns that the attempted service did not reach the person to be served." See § 240.7 (defining "service" as having the same meaning as Rule 5 of the FRCP).

FRA also notes that recent amendments to FRCP Rule 5, effective December 1, 2018, recognize the benefits of electronic-filing systems, such as the one the OCRB uses found at www.regulations.gov. Once a petition is filed and receives a docket number, the parties and the Board will benefit as the filing process will be considered service and no certificate of service will be necessary unless a party opts out of using the electronic-filing system. FRA plans to explain this process to each party in the FRA Docket Clerk's letters issued upon receipt of a petition.

Section 240.407 Request for a Hearing

Existing § 240.407 provides that a party adversely affected by a LERB decision has the opportunity to request an administrative hearing under § 240.409. FRA proposes to make minor revisions to this section to make the language the same as the corresponding provision in Part 242 (§ 242.507). Specifically, FRA proposes to revise the section to indicate that the OCRB would replace the LERB and to require that a party requesting an administrative hearing provide an email address if available. Proposed paragraph (a) substitutes the OCRB for the LERB.

Existing paragraph (c) provides that the LERB's decision will constitute final agency action if a party does not request a hearing under § 240.407. FRA proposes to revise this paragraph to substitute the OCRB for the LERB and also make certain minor edits for clarity that do not change the substance of the existing paragraph.

Existing paragraph (d) contains the minimal requirements for a written request submitted under this section. FRA proposes to revise paragraph (d)(1) to require a party requesting a hearing to provide an email address if available. The AHO currently encourages the parties to provide their email addresses and the existing practice has been so widely accepted that it is rare for a party before the AHO to serve filings on other

parties in any manner but by email. Again, the practice of permitting service by email reduces the parties' costs for printing, copying, mailing, and creating or retaining receipts. It also provides service much more quickly than by mail or courier service, which are the other most frequently used forms of service.

Section 240.409 Hearings

Existing § 240.409 describes the authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing will be governed. FRA proposes minor revisions to this section to make the language the same as that in the corresponding provision of Part 242 (§ 242.509). Proposed paragraph (a) would substitute the word "certification" for "qualification" without making any practical change in the way in which this requirement is applied; however, the change would clarify that an administrative hearing is based on a certification petition, and not some lesser qualification issue.

Proposed paragraphs (p) and (q) substitute the review board's new name, the OCRB, for the existing name, the LERB.

Section 240.411 Appeals

Existing § 240.411 permits any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. FRA proposes to revise this section to make it the same as the corresponding provision in Part 242 (§ 242.511). Specifically, FRA proposes to amend existing paragraphs (a) and (f) to indicate that appeals to the FRA Administrator must be filed with both the Administrator and the DOT Docket Clerk. This change would conform the paragraphs with § 242.511(a) and (f), and ensure that all filings, in any Part 240 FRA dispute resolution proceeding (*i.e.* the OCRB, the AHO, and the Administrator), are kept in the same docket. These paragraphs also maintain the requirement that a copy of the appeal must be served on each party, which means that the party filing the appeal should serve each person named on the service list of the decision issued by the AHO.

FRA also proposes to revise paragraph (f) of this section to clarify the review board's proposed new name (*i.e.*, the OCRB) and the updated citation for an appeal from an OCRB decision regarding timeliness of a petition. The existing citation is found at § 240.403(e), and this proposed rule would change that citation to paragraph (d) of that section. Consistent with existing § 240.411, proposed paragraph (f) also clarifies that such an appeal must be

filed within 35 days of the OCRB's issuance of its decision. By adding the time limit in this proposed paragraph, FRA intends to help readers understand that the time limit for filing such an appeal is the same as for filing other appeals to the Administrator under paragraph (a).

Appendix A

Currently appendix A to Part 240 (Appendix A) contains the schedule of civil penalties for violations of Part 240. In the final rule, Appendix A would contain a revised penalty schedule similar to the schedules that FRA has issued for all of its existing rules. Because such penalty schedules are statements of policy, notice and comment are not required prior to their issuance. *See* 5 U.S.C. 553(b)(3)(A). Nevertheless, FRA invites interested parties to submit comments regarding this revised penalty schedule.

One issue FRA is likely to address in the final rule is the penalty schedule description for § 240.231. The descriptions for paragraphs (a) and (b) are not sufficiently different that it can be confusing which is the proper citation and garden variety penalty. FRA reads the guideline as if paragraph (a) is the more significant violation and occurs when an engineer operates over a territory in violation of the railroad's certification program with no type of pilot. Paragraph (b) is read by FRA as the lesser violation, when the wrong type of pilot is provided. Thus, FRA intends to change the guideline for paragraph (b) from "Failure to have a pilot" to "Pilot provided, but the pilot is unqualified."

Appendix B

Existing Appendix B provides both the organization requirements and a narrative description of the submission required under §§ 240.101 and 240.103. FRA proposes a number of revisions to update job titles and clarify requirements in Appendix B and FRA proposes to revise the Appendix to provide railroads with the option to file their Part 240 program submissions electronically. The option to file programs electronically is currently provided to railroads submitting conductor certification programs. *See* Part 242, Appendix B.

As it did for Part 242, FRA intends to create a secure document submission site and will need basic information from each railroad before setting up the railroad's account. In order to provide secure access, FRA requires information on a railroad's appropriate points of contact. FRA anticipates being able to approve or disapprove all or part of a

program and generate automated notifications by email to a railroad's points of contact. Thus, FRA wants each point of contact to understand that by providing any email addresses, the railroad is consenting to receive approval and disapproval notices from FRA by email. Railroads allowing FRA to provide notice by email would gain the benefit of receiving such notices quickly and efficiently.

Railroads choosing to submit printed materials to FRA must deliver them directly to the specified address. FRA would discourage railroads from delivering removable media such as a CD, DVD, memory stick, or other electronic storage format to FRA rather than requesting access to upload the documents directly to the secure electronic database. CDs or DVDs may become damaged in the mail or mail scanning process. Rather, FRA will encourage railroads to utilize the electronic submission capabilities of the system. Of course, if FRA does not have the capability to read the type of electronic storage format sent, FRA can reject the submission.

Given the nature of the information required in a railroad's Part 240 program and the proposed requirement for railroads to share their program submissions, resubmissions, and material modifications with the relevant labor organization(s) representing each railroad's certified engineers (*see* § 240.103(b)), FRA does not believe it is necessary to develop a secure document submission system to handle confidential materials because FRA does not meaningfully expect there to be confidential materials. A railroad's program required by this part is not likely to contain copies of training materials that a railroad might want to keep confidential. If a railroad believes it must submit information that FRA should keep confidential, it may request confidential treatment under FRA's general procedures at 49 CFR 209.11.

Appendix C

Existing appendix C to Part 240 (Appendix C) provides a narrative discussion of the procedures that a person seeking certification or recertification will have to follow to furnish a railroad with information concerning his or her motor vehicle driving record. FRA proposes revisions to Appendix C to acknowledge that a driver's license may be issued by a state agency or a foreign country and to remove language about the number of state licensing agencies that have the capacity to make a direct NDR inquiry.

Appendix D

Existing Appendix D to Part 240 (Appendix D) addresses Part 240's requirements that each person seeking certification or recertification as a locomotive engineer must request that a check of the NDR be conducted and that the resulting information be furnished to his or her employer or prospective employer. Some RSAC Working Group members recommended adding a sentence to Appendix D stating that once an employee makes a valid request for the information required by § 240.111, his or her duty to comply with this requirement is satisfied. FRA declines to propose this recommendation because it would interfere with the requirements of § 240.111(a)(2) and (f)(2), which require employees to take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to a railroad.

Appendix G

FRA proposes to add appendix G to Part 240 to provide a table that explains in spreadsheet-style form, when an individual certified as both an engineer and conductor will be permitted to work following a certification revocation. The same table is found in appendix E to Part 242.

III. Additional Issues

A. Additional Amendments

Although the Section-By-Section Analysis contains descriptions of many minor revisions proposed in this NPRM, the descriptions may not have captured every specific change. In addition to the proposed changes discussed above, FRA is proposing to make some minor revisions to fix grammatical errors, typographical errors, reference errors, and superfluous language and citations. These revisions, provided in "The Proposed Rule" section of this rulemaking, include the following sections: 240.11(d); 240.207(b); 240.209(b) and (c); 240.211(b); 240.215(e); 240.217(a) and (d); 240.225(b); 240.305(b)(2); 240.307(g); 240.307(i); 240.309(b)(4); 240.309(e)(1), (2), (8), and (9); and Appendix D.

B. Implementation Date

FRA understands railroads will require some time to incorporate into their Part 240 programs the changes proposed in this rulemaking and submit their entire revised programs to FRA for

review.¹¹ FRA is also aware that it would not be fair to change the time limits for a filing (e.g., changing the time limits for filing a denial of certification petition with the OCRB from 180 days to 120 days in § 240.403) in cases whose time limits have already started to run. Accordingly, FRA invites comments on what an effective date for the final rule should be that will treat all parties affected by this rule fairly.

IV. Regulatory Impact and Notices

A. Executive Orders 12866 and 13771 and DOT Regulatory Policies and Procedures

This proposed rule is a non-significant regulatory action and has been evaluated in accordance with existing policies and procedures under Executive Order 12866 and DOT policies and procedures. 44 FR 11034, Feb. 26, 1979; 58 FR 51735, Oct. 4, 1993. The rule is non-significant

because the economic effects of this proposed regulatory action would not exceed the \$100 million annual threshold defined by E.O. 12866 and the effects of this proposed regulatory action would not be of substantial public interest in transportation safety. This proposed rule is expected to be an E.O. 13771 deregulatory action. Details on the estimated costs and costs savings of this proposed rule can be found in the rule's economic analysis.

The primary purpose of the proposed rule is to reduce the differences between FRA's two operating crew certification regulations. The proposed rule would amend Part 240 by adopting processes that are more efficient. Some of the proposed amendments address the Part 240 certification review and program submission processes. Other proposed changes reduce the burden on the regulated community by addressing compliance difficulties noted through experience enforcing Part 240.

Furthermore, some proposed changes would codify long-standing agency interpretations of whether a railroad or individual meets and maintains compliance with Part 240 requirements.

FRA has prepared and placed in the docket (Docket No. FRA-2018-0053) a regulatory evaluation. The regulatory evaluation details estimated costs and costs savings that the railroads regulated by the proposed rule are likely to incur over a twenty-year period. The table below summarizes the costs, cost savings, and net cost savings that would come from issuing the proposed rule. The total cost of the proposed rule over 20 years would be \$166,054 (PV 7%), and \$194,843 (PV 3%). The total cost savings of the proposed rule over 20 years would be \$6.1 million (PV 7%), and \$8.6 million (PV 3%). The net cost savings of the proposed rule over 20 years would be \$6.0 million (PV 7%), and \$8.4 million (PV 3%).

TABLE 1—SUMMARY OF THE PROPOSED RULE'S TOTAL NEW COSTS, TOTAL COST SAVINGS, NET COST SAVINGS (TWENTY-YEAR PERIOD), PV, 7-PERCENT AND PV 3-PERCENT

Cost of proposed rule	Present value 7%	Annualized 7%	Present value 3%	Annualized 3%
New Costs:				
Review amendments	\$104,929	\$9,905	\$109,003	\$7,327
Serve copy of part 240 plan on labor	1,199	113	1,683	5,657
Maintain service records	59,927	5,657	84,157	5,657
Total new costs	166,054	15,675	194,843	13,097
Cost Savings:				
Conforming part 240 to part 242	5,947,136	561,368	8,351,732	561,368
Former employee paperwork	59,927	5,657	84,157	5,657
Removing waiver requirement	58,066	5,481	81,543	5,481
Petition submission process	3,602	340	5,058	340
Plan submission process	59,927	5,657	84,157	5,657
Total cost savings	6,128,658	578,502	8,606,648	578,502
Net Cost Savings	5,962,604	562,828	8,411,804	565,405

The proposed rule would create benefits, though FRA did not monetize them. Some non-quantifiable benefits include: Affording railroads with additional time and flexibility to comply with some regulatory requirements, and creating certain provisions that allow for temporary locomotive engineer certificates. For example, the amendments to § 240.103 would afford railroads with an additional 30 days, increasing from 30 days to 60 days, for which a railroad would have to submit a description of its intended material modification to its Part 240 plan. This additional time to respond to FRA amounts to an

unquantified benefit to the railroad. In addition, the amendments to § 240.115 would allow for a temporary certification lasting 60 days for individuals who have properly requested motor vehicle operator information needed to certify or recertify as a locomotive engineer. Such temporary certifications amount to an unquantified benefit to workers and railroads. That is, under the amendments to § 240.115, workers may begin work as a locomotive engineer sooner and railroads would have available a larger pool of workers who would be qualified to work as locomotive engineers.

The regulatory evaluation compares the proposed rule's costs and benefits, and estimates the proposed rule would be cost beneficial because the rule is expected to provide net cost savings and benefits, though the benefits are not quantified.

B. Regulatory Flexibility Act and Executive Order 13272; Initial Regulatory Flexibility Assessment

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to examine their impacts on small entities. An agency must prepare an initial regulatory flexibility

¹¹ As discussed above, FRA is considering requiring the railroads to file their complete Part

240 programs, with modifications, with FRA and serve the programs on the president of each labor

organization that represents the railroad's certified locomotive engineers.

analysis (IRFA) unless it determines and certifies that a rule, if issued, would not have a significant economic impact on a substantial number of small entities. As discussed below, FRA does not believe this proposed rule would have a significant economic impact on a substantial number of small entities. However, FRA is publishing this IRFA to obtain public comments about the potential small business impacts that would follow from issuing this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all information, including comments received in the public comment process, to determine whether the rule will have a significant the economic impact on small entities.

For the railroad industry over a 20-year period, FRA estimates that issuing the proposed rule would result in new costs of \$166,054 (PV 7%) and \$194,843 (PV 3%). Based on information currently available, FRA estimates that \$94,062 (PV 7%) and \$102,183 (PV 3%) of the total costs associated with implementing the proposed rule would be borne by small entities. Therefore, less than 60 percent of the proposed rule's total cost would be borne by small businesses. In addition, FRA estimate that the proposed rule would result in cost savings over 20 years of \$6.1 million (PV 7%), and \$8.6 million (PV 3%). In total, FRA estimates that the proposed rule would result in net cost savings of \$6.0 million (PV 7%), and \$8.4 million (PV 3%). FRA expects that small entities would accrue 94 percent of the cost savings associated with implementing the proposed rule.

Any railroad who employs locomotive engineers and does business on the general railroad system would be affected by the proposed rule. The regulatory evaluation, which has been placed in the docket for this rulemaking, estimates that the proposed rule would affect approximately 696 railroads including 7 Class I railroads, 11 Class II railroads, 33 passenger railroads, and 645 Class III railroads that perform services on the general railroad system. FRA estimates that approximately 645 out of 696 of these railroads are considered small entities for the purpose of this analysis. However, FRA believes that the issuing proposed rule, as measured by total employees, would impact a minor percentage of a railroad's operations. In addition, issuing the proposed rule is expected to result in cost savings that would exceed costs.

In accordance with the Regulatory Flexibility Act, this IRFA must contain:

1. A description of the reasons why action by the agency is being considered.
2. A succinct statement of the objectives of, and the legal basis for, the proposed rule.
3. A description—and, where feasible, an estimate of the number—of small entities to which the proposed rule will apply.
4. A description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.
5. Identification, to the extent practicable, of all relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

1. Reasons for Considering Agency Action

FRA is considering action to reduce burden on industry stakeholders. The existing locomotive engineer certification regulation includes dated processes such as requiring paper document submissions. For example, the existing Part 240 prohibits use of electronic submissions. In addition, FRA's two operating crew certification regulations (Part 240 and Part 242) lack similarity regarding compliance requirements, which adds a layer of complexity for railroads related to maintaining compliance with both regulations. In direct response to the current lack of conformity between these two regulations, the proposed rule would amend the Part 240 regulation by adopting the Part 242 regulation's streamlined processes developed 20 years after the Part 240 regulation. Therefore, an important purpose of the proposed amendments is to add clarity and conformance between FRA's two operating crew certification regulations and address existing inefficiencies related to the Part 240 program submission process.

Other proposed changes would reduce the burden on the regulated community by addressing compliance difficulties noted through experience enforcing the locomotive engineer certification rule. The proposed rule would codify long-standing agency interpretations of whether a railroad or individual meets and maintains compliance with FRA's locomotive engineer certification requirements. Therefore, the proposed rule would result in consistency in the process, procedure, and criteria between Part 240

and Part 242, which would lead to an overall reduction in the burden on the railroad industry. The proposed rule would create provisions that would allow railroads to issue temporary locomotive engineer certificates, which would increase labor market flexibility. The proposed rule would also extend the time railroads may rely on an employee's visual and hearing examinations.

2. A Succinct Statement of the Objectives of, and Legal Basis for, the Proposed Rule

The primary purpose of the proposed rule is to reduce burden on industry stakeholders by reducing the differences between FRA's two operating crew certification regulations. The proposed rule would amend Part 240 by adopting processes that are more efficient. Some of the proposed amendments address the Part 240 certification review and program submission processes. Other proposed changes reduce the burden on the regulated community by addressing compliance difficulties noted through experience enforcing Part 240.

Furthermore, some proposed changes would codify long-standing agency interpretations of whether a railroad or individual meets and maintains compliance with Part 240 requirements.

The Secretary of Transportation (Secretary) has broad statutory authority to "prescribe regulations and issue orders for every area of railroad safety." See 49 U.S.C. 20103. The Secretary delegated these authorities to the Federal Railroad Administrator (Administrator). See 49 CFR 1.89(a). Under this same authority, FRA would issue the proposed rule to further amend the locomotive engineer certification requirements.

President Trump issued E.O. 13771 on January 30, 2017. E.O. 13771 seeks to "manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations" and directs each executive department or agency to identify for elimination two existing regulations for every new regulation issued. In response to E.O. 13771, FRA initiated a review of its existing regulations with the goal of identifying those it could amend or eliminate to reduce the overall regulatory, paperwork, and cost burden on entities subject to FRA jurisdiction. FRA identified Part 240 as a regulation that FRA could amend and thereby reduce the railroad industry's overall regulatory, paperwork, and cost burden without affecting safety on the nation's railroad system and, at the same time, benefit individual locomotive engineers.

3. Descriptions and Estimates of Small Entities to Which the Proposed Rule Would Apply

The proposed rule would affect approximately 696 railroads including 7 Class I railroads, 11 Class II railroads, 645 Class III railroads, and 33 passenger railroads.¹² The universe of the entities considered in an IRFA generally includes only those small entities that can reasonably expect to be directly regulated by the proposed action. Based on FRA's established size standards, only Class III railroads (645) are small entities, which may be potentially affected by this proposed rule.

A "small entity" is defined in 5 U.S.C. 601(3) as having the same meaning as "small business concern" under sec. 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. Title 49 U.S.C. 601(4) likewise includes within the definition of small entities non-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 "for-profit" railroad business firm 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 as 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. This definition is what FRA is proposing to use for the rulemaking.

All railroads that do business on the general railroad system would have to comply with the proposed amendments to Part 240. FRA believes that the amount of effort to comply with the proposed rule, or new costs borne on railroads, is positively correlated with the size of the entity. In addition, FRA concluded that the proposed rule is expected to be deregulatory, which means issuing the proposed rule should result in each affected entity, including small entities, accruing cost savings greater than any new costs.

4. Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule

There are reporting, recordkeeping, and compliance costs associated with the proposed regulation. FRA believes that the added burden is marginal due to the proposed NPRM requirements. The total 20-year cost of this proposed rulemaking is \$166,054 (PV 7%), and \$194,843 (PV 3%), of which FRA estimates \$94,062 (PV 7%), and \$102,183 (PV 3%), will be attributable to Class III railroads (small entities).¹³ Based on FRA's regulatory evaluation, which has been placed in the docket for this proposed rulemaking, the average Class III railroad would incur a burden of \$146 (PV 7%), and 158 (PV 3%). Most of this burden falls in the first year of analysis, where the average Class III railroad would incur a burden of \$129 (PV 7%), and \$134 (PV 3%). In each subsequent year, the average Class III railroad would incur no burden or a marginal burden that comes from serving the labor union president with a material modification of a railroad's Part 240 plan or maintaining service records. For example, each year about 20 Class III railroads would incur a burden of 5 minutes related to serving the labor union president with a material modification of the railroad's Part 240 plan. For each of these 20 Class III railroads, the quantified burden amounts to \$5 (PV 7%) and \$5 (PV 3%) in year two, \$5 (PV 7%) and \$5 (PV 3%) in year three, and a similar amount in each subsequent year during the period of analysis. In addition, each year about 200 Class III railroads would incur a burden of 5 minutes related to maintaining service records. For each of

these 200 Class III railroads, the quantified burden amounts to \$5 (PV 7%) and \$5 (PV 3%) in year two and \$5 (PV 7%) and \$5 (PV 3%) in year three. Collectively, Class III railroads would incur a similar burden in each subsequent year thereafter during the period of analysis.

Previously, FRA sampled small railroads and found that revenue averaged approximately \$4.7 million (undiscounted) in 2006. One percent of average annual revenue per small railroad, or \$47,000, is more than 5,222 times the average annual cost that these railroads would incur because of this proposed rule. FRA realizes that some railroads would have lower revenue than \$4.7 million. However, FRA believes that this average provides a good representation of the small railroads, in general.

In addition, FRA estimates that the proposed rule would result in cost savings of \$6.1 million (PV 7%), and \$8.6 million (PV 3%). Based on FRA's regulatory evaluation the average Class III railroad (small entity) would accrue a cost savings of \$7,248 (PV 7%), and \$10,178 (PV 3%), over the 20-year period of analysis.

Overall, FRA believes that the proposed regulation would not be a significant economic burden for small entities. FRA expects that most of the skills necessary to comply with the proposed regulation would be recordkeeping and reporting personnel.

The following section outlines the potential additional burden on small railroads for each amendment of the proposed rule:

- Familiarization of Amendment to Part 240 Regulation (All Sections)

Because the proposed rule would amend Part 240, each locomotive engineer certification manager would need to review these amendments to ensure their railroad maintains compliance with the amended Part 240. This analysis estimates that on average each of the 645 Class III railroads employ one locomotive engineer certification manager. This analysis estimates that each locomotive certification manager would spend two hours reviewing the amendments to Part 240. This cost would be a one-time cost that would occur in the first year following the proposed rule's effective date. For the 20-year period of analysis, the cost for locomotive certification managers who are employed by a Class III railroad (small entity) to become familiar with amendments to Part 240 is

¹² Estimates are based on the FRA 2017 Railroad Classification Data. Class III numbers include railroads on the general railroad system.

¹³ Class III railroads, total new costs (undiscounted) = familiarization of amendments + serve labor representative + maintain service records = \$87,565 + \$453 + \$22,627 = \$110,645 (as described later in this section).

\$81,837 (PV 7%), and \$85,015 (PV 3%).¹⁴

- Amending the Part 240 Program Submission Process To Require Railroads To Serve Program Submissions on Relevant Labor Organization Presidents (§§ 240.101 Through 240.103)

FRA proposes revising paragraphs (b) and (c) of this section to require railroads to serve a copy of their program submissions, resubmissions, and material modifications on the president of each labor organization that represents the railroad's certified locomotive engineers. The proposed rule would require railroads to serve program submissions on relevant labor organization presidents, while the current locomotive engineer certification rule does not. Therefore, the proposed rule would create a new cost associated with requiring each railroad to contact the president of each labor organization related to Part 240 program submission.

This analysis assumes the number of locomotive engineer labor representatives for which a railroad interacts with depends on a railroad's size. FRA assumes that on average each Class III railroad interacts with one labor representative. This analysis assumes that railroads can simultaneously serve presidents of labor organizations by carbon copying the labor organization president(s) when emailing their Part 240 program to FRA. As such, this analysis estimates the time burden to serve a president of a labor organization is five minutes. Based on a review of Part 240 submissions, this analysis estimates that each year Class III railroads will serve four plan submissions on a president of a labor organization. Therefore, the cost for railroads to notify the president of labor organizations is \$21 (PV 7%), and \$22 (PV 3%), in year one, and 20 (PV 7%), and \$21 (PV 3%), in year two. Collectively, Class III railroads would incur a similar burden in each subsequent year thereafter during the period of analysis. For the 20-year period of analysis, the cost for Class III railroads (small entity) to serve Part 240 programs on the presidents of labor organizations is \$240 (PV 7%), and \$337 (PV 3%).

¹⁴ Familiarization cost for Class III railroads, year one (PV 7%) = [(number of Class III railroads (645) * average number of certification managers per Class III railroad (1) * average review time per certification manager (2 hours) * certification manager compensation rate (\$67.88)]/(7% discount rate in year 1) = [645 * 1 * 2 * \$67.88]/(1.07) = \$87,565/(1.07) = \$81,837.

- Maintain Certification Records of Certified Locomotive Engineers not Performing Service Requiring Locomotive Engineer Certification (§ 240.129)

Proposed § 240.129(b)(2) would require a railroad intending to avoid conducting an operational monitoring observation or an unannounced compliance test on a certified engineer not performing service requiring certification to retain a written record documenting certain dates regarding a locomotive engineer's service to prove that the locomotive engineer met the exception in proposed paragraph (h). This is the same recordkeeping requirement as in § 242.123(b)(2). FRA believes that most railroads already maintain such locomotive engineer service records. Therefore, there are no costs associated with this requirement.

Existing § 240.129 requires a railroad to have procedures for monitoring the operational performance of locomotive engineers. Specifically, in each calendar year, § 240.129 requires railroads to administer both an operational monitoring observation and an unannounced compliance test to each locomotive engineer. The proposed rule would amend § 240.129 to provide the same flexibility as in Part 242 to conduct monitoring outside of the calendar year requirement when a certified person is not performing service requiring certification. *See* § 242.123(f). For example, a certified engineer may be on furlough, in military service, on leave with an extended illness, or working in another capacity for the railroad. Existing § 240.129 requires railroads to seek a waiver from FRA for each locomotive engineer who is not available to complete testing requirements within a calendar year. In other words, the proposed amendments would remove the requirement for railroads to seek a waiver from FRA from the requirement for railroads to administer unannounced compliance tests or operational monitoring observations to locomotive engineers who are not performing service requiring locomotive engineer certification. However, the proposed § 240.129(b)(2) would require a railroad intending to avoid conducting an operational monitoring observation or an unannounced compliance test on a certified engineer who is not performing service requiring certification to retain a written record documenting certain dates regarding a locomotive engineer's service to prove that the locomotive engineer met the exception in proposed paragraph (h). This is the same recordkeeping requirement as in

§ 242.123(b)(2) and amounts to a new time burden.

Because railroads already maintain detailed employment records, this new time burden due to documenting certain dates of a locomotive engineer's service is one line in a database, *i.e.*, a time burden of about five minutes per engineer. This analysis estimates that each year there will be approximately 200 certified locomotive engineers who are on the payroll of a Class III railroads, but not currently working or not performing service that would require locomotive engineer certification. The cost for Class III railroads to document locomotive engineers who are not performing service requiring locomotive engineer certification is \$1,057 (PV 7%), and \$1,098 (PV 3%), in year two, and \$988 (PV 7%), and \$1,066 (PV 3%), in year three.¹⁵ For the 20-year period of analysis, the cost for Class III railroads to document locomotive engineers who are not performing service requiring locomotive engineer certification is \$11,985 (PV 7%), and \$16,831 (PV 3%).

- Market and Competition Considerations

The railroad industry has several significant barriers to entry, such as the need to own or otherwise obtain access to rights-of-way and the high capital expenditure needed to purchase a fleet, as well as track and equipment. Furthermore, the small railroads under consideration would potentially be competing only with the trucking industry and typically deal with the transport of commodities or goods that are not truck-friendly. Thus, while this proposed rule would have an economic impact on all railroads doing business on the general railroad system, it should not have an impact on the competitive position of small railroads.

FRA requests comment on these findings and conclusions.

5. Identification of Any Duplicative, Overlapping, or Conflicting Federal Rules

FRA is not aware of any relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule.

FRA invites all interested parties to submit data and information regarding the potential economic impact that would result from adoption of the

¹⁵ Class III railroad cost for maintaining certification records given break in service, year one (PV 7%) = [average annual number of locomotive engineers with break in service (200) * time burden to maintain record (5 minutes or 0.083 hours) * certification manager compensation rate (\$67.88)] (year 1 present value 7% discount rate) = \$1,131/(1.07) = \$1,057.

proposals in this NPRM. FRA will consider all comments received in the public comment process when making a determination.

C. Paperwork Reduction Act

The information collection requirements in this proposed rule are being 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 are duly designated, and the estimated time to fulfill each requirement is as follows:

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours dollar cost equivalent
240.9—Waivers—Petitions for Waiver	696 railroads	3 petitions	90 minutes	5	\$339
240.101/103—Certification Program: Written program for certifying qualifications of locomotive engineers—amendments.	696 railroads	150 amended programs.	1 hour	150	10,182
—Certification programs for new railroads	20 railroads	20 new programs	40 hours	800	54,304
—New railroads final review and submission of certification program.	20 railroads	20 reviews	1 hour	20	1,358
—RR provision of copy of certification program submission or resubmission to president of labor organizations representing employees simultaneously with filing with FRA (Revised Requirement).	696 railroads	750 copies	5 minutes	63	4,276
—RR affirmative statement that it has served certification program copy to labor organizations (Revised Requirement).	696 railroads	750 averred statements.	20 minutes	250	16,970
—Employee comment on submission, resubmission or material modification of RR certification program (Revised Requirement).	696 railroads	25 comments	40 hours	1,000	55,250
—FRA determination that program does not conform and RR revision of certification program.	696 railroads	25 revised programs.	4 hours	100	6,788
—RR submission of revised program within 30 days of FRA notice of deficiencies and FRA disapproval of revised program.	696 railroads	5 resubmitted programs.	4 hours	20	1,358
—RR material modifications to program after initial FRA approval.	696 railroads	75 modified programs.	45 minutes	56	3,801
240.105—Selection criteria for designated supervisors of locomotive engineers (DSLEs)—examinations of DSLEs.	696 railroads	50 exams	1 hour	50	2,894
—Written report by railroad Chief Operating Officer of testing of DSLE.	10 railroads	10 reports	1 hour	10	679
240.109—Candidate's review and written comments on prior safety conduct data.	26,000 candidates.	40 responses	1 hour	40	2,210
240.111—Request for state driving data and National Driver Register Data (NDR): Driver's license data requests from chief of driver licensing agency of any jurisdiction, including foreign countries (Revised Requirement).	26,000 candidates.	26,000 requests	15 minutes	6,500	441,220
—Employee written request for a copy of available information after being advised by RR that additional information on person's driving history may exist in files of a State agency or foreign government (Revised Requirement).	696 railroads	125 notices + 125 requests.	2 hours + 1 hour	375	20,719
—RR Notification of NDR match and employee request to State agency for relevant data.	696 railroads	260 notices + 260 requests.	15 minutes + 15 minutes.	130	8,003
—Written response to RR from candidate on driver's license record.	696 railroads	20 comments	30 minutes	10	553
—Notice to Railroad of Absence of License	696 railroads	6 letters	15 minutes	2	136
—Phone calls by locomotive engineer to RR to report a conviction or a completed State action to cancel, revoke, suspend, or deny motor vehicle driver's license.	80,000 candidates.	300 calls	10 minutes	50	2,763
240.113—Certification candidate request to former employing railroad of service record and railroad response concerning compliance or non-compliance with §§ 240.111/117/119 (Revised Requirement).	26,000 candidates.	520 requests + 520 resp.	15 min.; 30 min.	390	24,832
240.115—RR temporary recertification of locomotive engineer for 60 days after having requested the motor vehicle information specified in paragraph (h) of this section (New Requirements).	696 railroads	25 documents	5 minutes	2	136
—RR drug and alcohol counselor request of employee's record of prior counseling or treatment.	26,000 candidates.	200 requests + 200 records.	2 hours + 60 minutes.	600	40,728

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours dollar cost equivalent
240.115—Conditional certification based on recommendation by drug and alcohol counselor of employee aftercare and/or follow-up testing for alcohol or drugs.	26,000 candidates.	100 DAC testing directions.	60 minutes	100	6,788
—Employee is evaluated as having an active substance abuse disorder by RR drug and alcohol counselor (DAC).	26,000 candidates.	100 DAC evaluations.	60 minutes	100	6,788
240.117—RR adoption & compliance with a program that meets this section's requirement (Revised Requirement).	696 railroads	170 programs	60 minutes	170	11,540
—Designated supervisor of locomotive engineers (DSLE) evaluation that employee has received adequate remedial training to be eligible for grant of reinstatement of certificate after certification was denied or revoked.	80,000 locomotive engineers.	1,600 DSLE evaluations.	60 minutes	1,600	108,608
—Employee successful completion of mandatory remedial training or retraining.	80,000 locomotive engineers.	400 trained crew members.	8 hours	3,200	176,800
240.119—Certified engineers determined to have an active substance abuse disorder and thus is ineligible to hold certification.	80,000 locomotive engineers.	400 decisions	60 minutes	400	27,152
—Employee Self-Referral to EAP Counselor for Substance Abuse Disorder.	80,000 locomotive engineers.	50 self-referrals ..	5 minutes	4	221
—RR review of certification to determine whether a person may be or remain certified as a locomotive engineer in light of conduct relating to a violation of section 219.101 or 219.102 that occurred within 60 months prior to review.	696 railroads	400 reviews	30 minutes	200	13,576
—RR written determination that the most recent incident has occurred which begins period of ineligibility.	696 railroads	400 written determination.	30 minutes	200	13,576
—RR notification to person that certification has been denied or recertification revoked.	696 railroads	200 notices	45 minutes	150	10,182
—Waiver of investigation by locomotive engineer	80,000 locomotive engineers.	680 waivers	2 minutes	23	1,271
240.121—Criteria—hearing/vision acuity: Subsequent years—copies of Part 240 Appendix F to RR medical examiner.	20 new railroads.	20 copies	15 min.	5	339
—Medical examiner consultation with DSLE to issue conditional certification report.	696 railroads	20 reports	1 hour	20	1,358
—Notification—hearing/vision change by certified engineer to railroad.	696 railroads	10 notices	15 minutes	3	166
240.125—Criteria for knowledge testing: Consultation by employee being tested with a supervisory employee who possess territorial qualification for territory to explain question (New Requirement).	26,000 candidates.	8,000 worker consults.	5 minutes	667	36,852
240.127/129—Criteria for examining skill performance/operational perf.—Revision of RR certification program after engineer's failure/deficiencies in skills test and description of scoring system.	696 railroads	18 amended programs + 171 amended programs.	48 hours + 8 hours.	22,232	1,509,108
—Written records indicating dates that the engineer stopped performing/returned to certification service + compliance/observation tests (New Requirement).	696 railroads	1,000 records	5 minutes	83	5,634
240.201/221/223/301—List of DSLEs	696 railroads	696 updates	30 minutes	348	23,622
—List of designated qualified locomotive engineers (DQLEs).	696 railroads	696 updates/records.	60 minutes	696	47,244
240.201/217/223/301—Locomotive Engineers Certificate.	80,000 candidates.	26,000 paper certificates.	5 minutes	2,167	147,096
240.205—Furnishing of prior counseling or treatment records to DAC by candidate.	696 railroads	185 records	5 minutes	15	829
240.207—Medical certificate on hearing/vision acuity—tests and certificate issuance.	80,000 candidates.	26,000 paper certificates.	70 minutes	30,333	2,059,004
—Written document to RR from medical examiner stating professional opinion that candidate does not meet one or both acuity standards but nevertheless be certified under certain conditions.	696 railroads	20 written documents.	15 minutes	5	339

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours dollar cost equivalent
—Written document to RR from medical examiner stating person's acuity precludes operating a train even with conditions attached.	696 railroads	20 written documents.	15 minutes	5	339
—Written determination by medical examiner waiving necessity of wearing hearing/vision corrective device.	696 railroads	30 decisions	2 hours	60	4,073
240.219—Denial of certification—notification to employee of adverse information and employee response.	26,000 candidates.	45 letters + 45 responses.	1 hour	90	5,541
—RR provision of documents/records to candidate that support its pending denial decision (New Requirement).	696 railroads	45 documents	2 minutes	2	136
—Notification of adverse decision to person explaining RR basis for denial which addresses any explanation or rebuttal information provided by employee (Revised Requirement).	696 railroads	45 notices/explanations.	1 hour	45	3,055
240.221—Identification of qualified persons: RR provision of list/records of certified engineers to FRA upon request.	696 railroads	125 lists/record copies.	2 hours	250	16,970
240.223—RR written designation of person other than DSLE to sign locomotive engineers certificate.	696 railroads	100 written designations.	15 minutes	25	1,697
—RR inclusion of additional information on locomotive engineer's certificate or supplementing the certificate through other documents.	696 railroads	100 notations/ documents.	15 minutes	25	1,697
240.229—Joint operations territory requirements: RR determinations made that locomotive engineers working in joint operations are qualified under subpart C of this part or are certified by another railroad.	321 railroads	10,000 RR determination.	10 minutes	1,667	113,156
—Notification by engineer of non-qualification to operate train on track segment.	321 railroads	260 calls	5 minutes	22	1,216
240.301—Replacement of lost, mutilated, or stolen certificates.	696 railroads	2,000 new certificates.	30 minutes	1,000	67,880
—Temporary replacement certificates valid for no more than 30 days (New Requirement).	696 railroads	2,000 temp. certificates.	30 minutes	1,000	67,880
240.305—Display of certificate upon request of authorized representatives of: FRA, State Part 212 inspectors, issuing railroad, or officer of another railroad during joint train operations (Revised Requirement).	696 railroads	2,500 request/ displayed certificates.	5 minutes	208	11,492
240.309—Railroad oversight responsibilities—instances of identified poor safety conduct and remedial/other actions taken.	15 railroads	6 annotations	15 minutes	2	136
TESTING REQUIREMENTS:					
240.209/213—Written test—Prior to certification or recertification.	80,000 candidates.	26,000 tests	2 hours	52,000	2,873,000
—Test failures and retests of persons	80,000 candidates.	26 retests	2 hours	52	2,873
240.211/213—Performance Test—Prior to certification or recertification.	80,000 candidates.	26,000 tests	2 hours	52,000	2,873,000
—Test failures and retests of persons	80,000 candidates.	26 retests	2 hours	52	2,873
240.303—Annual operational monitoring observation test of locomotive engineers prior to certification or recertification.	80,000 candidates.	80,000 tests	2 hours	160,000	8,840,000
—Annual unannounced operating rules compliance test.	80,000 candidates.	80,000 tests	1 hour	80,000	4,420,000
RECORDKEEPING REQUIREMENTS:					
240.215—Recordkeeping—Certification of locomotive engineers.	696 railroads	26,000 cert. records.	30 minutes	13,000	882,440
240.305—Engineer notice to RR that he/she is not qualified to perform anticipated service.	80,000 candidates.	150 notices	5 minutes	13	718
—Notice to engineer holding two or more certificates that he/she has been denied certification by another RR or that he/she has had certification revoked.	1,060 candidates.	3 letters	30 minutes	2	111
240.307—Written notification to engineer by RR of reasons that it is suspending or revoking certification and mention of opportunity for hearing before impartial presiding officer.	696 railroads	1,358 written notices.	1 hour	1,358	92,181

CFR section/subject	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden hours dollar cost equivalent
—Convening of hearing within deadline stipulated in (c)(1) of this section.	696 railroads	690 hearings/ records.	4 hours	2,760	187,349
—RR provision to employee of copy of written information and list of witnesses that it will present at hearing (New Requirement).	696 railroads	690 copies/lists ..	5 minutes	58	3,937
—RR determination on hearing record whether person no longer meets the certification requirements of this part stating explicitly reasons for the conclusion reached.	696 railroads	1,600 hearing determination.	1 hour	1,600	108,608
—RR written decision after close of hearing containing findings of fact and whether a revocable event occurred.	696 railroads	690 written decisions.	2 hours	1,380	93,675
—RR service of written decision on employee and employee's representative (Revised Requirement).	696 railroads	3,750 copies	30 minutes	1,875	127,275
—Person written waiver of right to hearing under this section.	26,000 candidates.	750 written waivers.	15 minutes	188	10,387
—RR revocation of certification after acquiring information that another RR has revoked person's certification.	696 railroads	50 revoked certifications.	2 hours	100	6,788
—RR updating of records to include relevant information meeting criteria of paragraph (i) of this section.	696 railroads	50 updated records.	15 minutes	8	543
—RR good faith determination after reasonable inquiry that the course of conduct provided for in paragraph (i) of this section is appropriate.	696 railroads	50 good faith determination.	60 minutes	50	3,394
240.308—Person must be certified as both conductor and locomotive engineer when operating locomotive without an assigned certified conductor (New Requirement).	26,000 candidates.	8,666 dual certifications.	5 minutes	722	49,009
—Communication to locomotive engineer on passenger railroad that certified conductor has been removed for a medical, police, or other such emergency after train departs from initial terminal (New Requirement).	51 railroads	200 messages	15 minutes	50	3,394
—Notification to RR by person holding more than one current conductor and/or locomotive certificate that another RR had denied recertification.	26,000 candidates.	100 notices	30 minutes	50	2,763
240.309—RR Oversight Responsibilities: Performance of Annual Reviews/Analysis.	51 railroads	51 reviews	40 hours	2,040	138,475
—RR Report of Findings	51 railroads	12 reports	1 hour	12	815
Appendix B—Railroad request to FRA for electronic submission of required materials.	696 railroads	170 requests	1 hour	170	11,540
Total	N/A	372,123	N/A	445,013	25,784,983

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.

Organizations and individuals wishing to obtain a copy of the agency information collection request submitted to OMB or desiring to transmit comments on the collection of information requirements should direct them to Mr. Robert Brogan, Information Collection Clearance Officer, or Ms. Kimberly Toone, Records Management Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, 3rd Floor, Washington, DC 20590. Also, requests for a copy of the information collection request or comments on the information collection request requirements may be transmitted via email to Mr. Brogan at Robert.Brogan@dot.gov, or to Ms. Toone at Kim.Toone@dot.gov. Additionally, Mr. Brogan and Ms. Toone may be contacted by phone at 202-493-6292,

and 202-493-6139, respectively. (These numbers are not toll-free.)

OMB is required to make a decision concerning the collection of information requirements contained in this proposed 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. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

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**.

D. 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 having “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 NPRM under the principles and criteria contained in Executive Order 13132. FRA has determined this proposed rule would not have a substantial direct effect on the States or their political subdivisions; on the relationship between the Federal government and the States or their political subdivisions, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined this rule does not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply.

This proposed rule could have preemptive effect by the operation of law under a provision of the former Federal Railroad Safety Act of 1970, repealed and recodified at 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 “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. As explained above, FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Accordingly, FRA has determined that preparation of a federalism summary impact statement for this proposed rule is not required.

E. International Trade Impact Assessment

The Trade Agreement Act of 1979 prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this rule under 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 proposed rule is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA’s Procedures. See 64 FR 28547 (May 26, 1999).

Consistent with section 4(c) and (e) of FRA’s Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this proposed rule is not a major Federal

action significantly affecting the quality of the human environment.

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 expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 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. For the year 2016, this monetary amount has been adjusted to \$156,000,000 to account for inflation.¹⁶ This proposed rule will not result in the expenditure of more than \$156,000,000 by the public sector 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.” 66 FR 28355 (May 22, 2001). FRA has evaluated this NPRM under Executive Order 13211 and determined that this NPRM is not a “significant energy action” within the meaning of Executive Order 13211.

Executive Order 13783 requires Federal agencies to review regulations to determine whether they potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. 82 FR 16093 (Mar. 31, 2017). FRA has evaluated this NPRM under Executive Order 13783 and determined

¹⁶ Monetary value based on most recent DOT guidance. U.S. Department of Transportation, Office of Secretary of Transportation, Monje, Carlos and Thomson, Kathryn, “Department Guidance: Threshold of Significant Regulatory Action Under the Unfunded Mandate Reform Act of 1995. April 4, 2016. <https://www.transportation.gov/office-policy/transportation-policy/threshold-significant-regulatory-actions-under-unfunded-mandate-0>.

that this proposed rule would not burden the development or use of domestically produced energy resources.

I. Privacy Act

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

List of Subjects in 49 CFR Part 240

Administrative practice and procedure, Locomotive engineer, Penalties, Railroad employees, Railroad operating procedures, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

For the reasons discussed in the preamble, FRA proposes to amend part 240 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

PART 240—[AMENDED]

- 1. The authority citation for part 240 is revised to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*; 49 U.S.C. 20103, 20107, 20135, 20138, 20162, 20163, 21301, 21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

- 2. Section 240.1 is amended by revising paragraph (c) to read as follows:

§ 240.1 Purpose and scope.

* * * * *

(c) The locomotive engineer certification requirements prescribed in this part apply to any person who meets the definition of locomotive engineer contained in § 240.7, regardless of the fact that the person may have a job classification title other than that of locomotive engineer.

- 3. Section 240.3 is revised to read as follows:

§ 240.3 Application and responsibility for compliance.

(a) This part applies to all railroads, except:

(1) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 240.7);

(2) Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation as defined in § 240.7; or

(3) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, including a contractor for a railroad, who performs any function covered by this part must perform that function in accordance with this part.

- 4. Section 240.5 is revised to read as follows:

§ 240.5 Effect and construction.

(a) FRA does not intend, by use of the term locomotive engineer in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person authorized by a railroad to operate a locomotive.

(b) FRA does not intend by issuance of these regulations to alter the authority of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 240.308, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

(d) Nothing in this part shall be deemed to abridge any additional procedural rights or remedies not inconsistent with this part that are available to the employee under a collective bargaining agreement, the Railway Labor Act, or (with respect to employment at will) at common law with respect to removal from service or other adverse action taken as a consequence of this part.

- 5. Section 240.7 is amended by:

- a. Adding in alphabetical order definitions for “conductor” and “drug and alcohol counselor”;
- b. Removing the definition of “EAP counselor”;

- c. Revising the definitions of “file, filed and filing” and “FRA Representative”;

- d. Adding in alphabetical order a definition for “ineligible or ineligibility”;

- e. Revising the definitions of “instructor engineer”, “main track”, and “medical examiner”;

- f. Removing the definition of “newly hired employee”;

- g. Adding in alphabetical order definitions for “on-the-job training (OJT)”, “physical characteristics”, and “plant railroad”;

- h. Revising the definitions of “qualified” and “railroad rolling stock”;

- i. Adding in alphabetical order definitions for “remote control operator” and “serve or service”;

- j. Removing the definition of “service”;

- k. Revising the definition of “substance abuse disorder”; and

- l. Adding in alphabetical order definitions for “substance abuse professional”, “territorial qualifications”, and “tourist, scenic, historic, or excursion operations that are not part of the general system of transportation”.

The additions and revisions read as follows:

§ 240.7 Definitions.

* * * * *

Conductor means the crewmember in charge of a “train or yard crew” as defined in part 218 of this chapter.

* * * * *

Drug and alcohol counselor (DAC) means a person who meets the credentialing and qualification requirements of a “Substance Abuse Professional” (SAP), as provided in 49 CFR part 40.

* * * * *

File, filed and filing mean submission of a document under this part on the date when the DOT Docket Clerk or FRA receives it, or if sent by mail, the date mailing was completed.

* * * * *

FRA Representative means the FRA Associate Administrator for Railroad Safety/Chief Safety Officer and the Associate Administrator’s delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified state railroad safety inspector acting under part 212 of this chapter.

Ineligible or ineligibility means that a person is legally disqualified from serving as a certified locomotive engineer. The term covers a number of circumstances in which a person may not serve as a certified locomotive

engineer. Revocation of certification pursuant to § 240.307 and denial of certification pursuant to § 240.219 are two examples in which a person would be ineligible to serve as a certified locomotive engineer. A period of ineligibility may end when a condition or conditions are met. For example, a period of ineligibility may end when a person meets the conditions to serve as a certified locomotive engineer following an alcohol or drug violation pursuant to § 240.119.

Instructor engineer means

(1) A person who has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction and, where applicable, has the necessary operating experience to effectively instruct in the field, and has the following qualifications:

(i) Is a certified locomotive engineer under this part; and

(ii) Has been selected as such by a designated railroad officer, in concurrence with the designated employee representative, where present, to teach others proper train handling procedures, or

(iii) In absence of concurrence provided in paragraph (1)(ii) of this definition, has a minimum of 12 months service working in the class of service for which the person is designated to instruct.

(2) If a railroad does not have designated employee representation, then a person employed by the railroad need not comply with paragraph (1)(ii) or (iii) of this definition to be an instructor engineer.

* * * * *

Main track means a track upon which the operation of trains is governed by one or more of the following methods of operation: Timetable; mandatory directive; signal indication; positive train control as defined in part 236 of this chapter; or any form of absolute or manual block system.

Medical examiner means a person licensed as a doctor of medicine or doctor of osteopathy. A medical examiner can be a qualified full-time salaried employee of a railroad, a qualified practitioner who contracts with the railroad on a fee-for-service or other basis, or a qualified practitioner designated by the railroad to perform functions in connection with medical evaluations of employees. As used in this rule, the medical examiner owes a duty to make an honest and fully informed evaluation of the condition of an employee.

On-the-job training (OJT) means job training that occurs in the workplace,

i.e., the employee learns the job while doing the job.

Operator control unit (OCU) means a mobile unit that communicates via a radio link the commands for a movement (direction, speed, braking) or for operations (bell, horn, sand) to an RCL.

* * * * *

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes both main track physical characteristics (*see* definition of "main track" in this section) and other than main track physical characteristics.

Plant railroad means a plant or installation that owns or leases a locomotive, uses that locomotive to switch cars throughout the plant or installation, and is moving goods solely for use in the facility's own industrial processes. The plant or installation could include track immediately adjacent to the plant or installation if the plant railroad leases the track from the general system railroad and the lease provides for (and actual practice entails) the exclusive use of that trackage by the plant railroad and the general system railroad for purposes of moving only cars shipped to or from the plant. A plant or installation that operates a locomotive to switch or move cars for other entities, even if solely within the confines of the plant or installation, rather than for its own purposes or industrial processes, will not be considered a plant railroad because the performance of such activity makes the operation part of the general railroad system of transportation.

Qualified means a person who has successfully completed all instruction, training and examination programs required by the employer and the applicable parts of this chapter, and that the person therefore may reasonably be expected to be proficient on all safety-related tasks the person is assigned to perform.

* * * * *

Railroad rolling stock is on-track equipment that is either a "railroad freight car" (as defined in § 215.5 of this chapter) or a "passenger car" (as defined in § 238.5 of this chapter).

Remote control locomotive (RCL) means a remote control locomotive that, through use of a radio link can be operated by a person not physically within the confines of the locomotive cab. For purposes of this part, the term RCL does not refer to a locomotive or group of locomotives remotely

controlled from the lead locomotive of a train, as in a distributed power arrangement.

* * * * *

Serve or service, in the context of serving documents, has the meaning given in Rule 5 of the Federal Rules of Civil Procedure as amended. Similarly, the computation of time provisions in Rule 6 of the Federal Rules of Civil Procedure as amended are also applicable in this part. *See also* the definition of "filing" in this section.

* * * * *

Substance abuse disorder refers to a psychological or physical dependence on alcohol or a drug, or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation. A substance abuse disorder is "active" within the meaning of this part if the person is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a DAC or SAP.

Substance abuse professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in part 40 of this title.

Territorial qualifications means possessing the necessary knowledge concerning a railroad's operating rules and timetable special instructions, including familiarity with applicable main track and other than main track physical characteristics of the territory over which the locomotive or train movement will occur.

Tourist, scenic, historic, or excursion operations that are not part of the general railroad system of transportation means a tourist, scenic, historic, or excursion operation conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operation on the track).

* * * * *

■ 6. Section 240.11 is amended by revising paragraph (d) to read as follows:

§ 240.11 Penalties and consequences for noncompliance.

* * * * *

(d) In addition to the enforcement methods referred to in paragraphs (a), (b), and (c) of this section, FRA may also address violations of this part by use of the emergency order, compliance order, and/or injunctive provisions of the Federal rail safety laws.

■ 7. Section 240.103 is amended by revising paragraphs (b) through (e) and adding paragraphs (f), (g), and (h) to read as follows:

§ 240.103 Approval of design of individual railroad programs by FRA.

* * * * *

(b) Each railroad shall:

(1) Simultaneous with its filing with the FRA, serve a copy of the submission filed pursuant to paragraph (a) of this section, a resubmission filed pursuant to paragraph (f) of this section, or a material modification filed pursuant to paragraph (g) of this section on the president of each labor organization that represents the railroad's employees subject to this part; and

(2) Include in its submission filed pursuant to paragraph (a) of this section, a resubmission filed pursuant to paragraph (f) of this section, or a material modification filed pursuant to paragraph (g) of this section a statement affirming that the railroad has served a copy on the president of each labor organization that represents the railroad's employees subject to this part, together with a list of the names and addresses of persons served.

(c) Not later than 45 days from the date of filing a submission pursuant to paragraph (a) of this section, a resubmission pursuant to paragraph (f) of this section, or a material modification pursuant to paragraph (g) of this section, any designated representative of railroad employees subject to this part may comment on the submission, resubmission, or material modification:

(1) Each comment shall set forth specifically the basis upon which it is made, and contain a concise statement of the interest of the commenter in the proceeding;

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

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

(d) The submission required by paragraph (a) of this section shall state the railroad's election either:

(1) To accept responsibility for the training of student engineers and thereby obtain authority for that railroad to initially certify a person as an engineer in an appropriate class of service, or

(2) To recertify only engineers previously certified by other railroads.

(e) A railroad that elects to accept responsibility for the training of student engineers shall state in its submission

whether it will conduct the training program or employ a training program conducted by some other entity on its behalf but adopted and ratified by that railroad.

(f) A railroad's program is considered approved and may be implemented 30 days after the required filing date (or the actual filing date) unless the Administrator notifies the railroad in writing that the program does not conform to the criteria set forth in this part.

(1) If the Administrator determines that the program does not conform, the Administrator will inform the railroad of the specific deficiencies.

(2) If the Administrator informs the railroad of deficiencies more than 30 days after the initial filing date, the original program may remain in effect until 30 days after approval of the revised program is received so long as the railroad has complied with the requirements of paragraph (g) of this section.

(g) A railroad shall resubmit its program within 30 days after the date of such notice of deficiencies. A failure to resubmit the program with the necessary revisions will be considered a failure to implement a program under this part.

(1) The Administrator will inform the railroad in writing whether its revised program conforms to this part.

(2) If the program does not conform, the railroad shall resubmit its program.

(h) A railroad that intends to materially modify its program after receiving initial FRA approval shall submit a description of how it intends to modify the program in conformity with the specific requirements of this part at least 60 days prior to implementing such a change.

(1) A modification is material if it would affect the program's conformance with this part.

(2) The modification submission shall contain a description that conforms to the pertinent portion of the procedures contained in appendix B.

(3) The modification submission will be handled in accordance with the procedures of paragraphs (b) and (c) of this section as though it were a new program.

■ 8. Section 240.105 is amended by adding paragraph (d) to read as follows:

§ 240.105 Criteria for selection of designated supervisors of locomotive engineers.

* * * * *

(d) Each railroad is authorized to designate a person as a designated supervisor of locomotive engineers with additional conditions or operational

restrictions on the service the person may perform.

■ 9. Section 240.107 is amended by:

■ a. Revising the section heading and paragraphs (a), (b)(2) and (3);

■ b. Adding paragraphs (b)(4) and (5);

■ c. Revising paragraphs (c)(2) and (3); and

■ d. Adding paragraph (c)(4).

The revisions and additions read as follows:

§ 240.107 Types of service.

(a) Each railroad's program shall state which of the classes of service, provided for in paragraph (b) of this section, that it will cover.

(b) * * *

(2) Locomotive servicing engineers,

(3) Remote control operators,

(4) Student engineers, and

(5) Student remote control operators.

(c) * * *

(2) Locomotive servicing engineers may operate locomotives singly or in multiples but may not move them with cars coupled to them;

(3) Remote control operators may operate an RCL singly or attached to multiple locomotives, and may move an RCL with or without cars coupled to the RCL or locomotives, but in all instances the movement must be controlled using an OCU; and

(4) Student engineers and student remote control operators may operate only under direct and immediate supervision of an instructor engineer.

* * * * *

■ 10. Section 240.111 is amended by revising paragraph (a)(2), republishing paragraph (c) introductory text, and revising paragraphs (c)(1) and (2), (d), (e), (f), and (h) to read as follows:

§ 240.111 Individual's duty to furnish data on prior safety conduct as motor vehicle operator.

(a) * * *

(2) Take any additional actions, including providing any necessary consent required by State, Federal, or foreign law to make information concerning his or her driving record available to that railroad.

* * * * *

(c) Each person shall request the information required under paragraph (b)(1) of this section from:

(1) The chief of the driver licensing agency of any jurisdiction, including a state or foreign country, which last issued that person a driver's license; and

(2) The chief of the driver licensing agency of any other jurisdiction, including states or foreign countries, that issued or reissued him or her a driver's license within the preceding five years.

(d) Each person shall request the information required under paragraph (b)(2) of this section from the Chief, National Driver Register, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590 in accordance with the procedures contained in appendix C unless the person's motor vehicle driving license was issued by a state or the District of Columbia.

(e) If the person's motor vehicle driving license was issued by one of the driver licensing agencies of a state or the District of Columbia, the person shall request the chief of that driver licensing agency to perform a check of the National Driver Register for the possible existence of additional information concerning his or her driving record and to provide the resulting information to the railroad.

(f) If advised by the railroad that a driver licensing agency or the National Highway Traffic Safety Administration has informed the railroad that additional information concerning that person's driving history may exist in the files of a state agency or foreign country not previously contacted in accordance with this section, such person shall:

(1) Request in writing that the chief of the driver licensing agency which compiled the information provide a copy of the available information to the prospective certifying railroad; and

(2) Take any additional action required by State, Federal, or foreign law to obtain that additional information.

* * * * *

(h) Each certified locomotive engineer or person seeking initial certification shall report motor vehicle incidents described in § 240.115(b)(1) and (2) to the employing railroad within 48 hours of being convicted for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, such violations. For purposes of this paragraph and § 240.115(h), "state action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For the purposes of engineer certification, no railroad shall require reporting earlier than 48 hours after the conviction, or completed state action to cancel, revoke, or deny a motor vehicle driver's license.

■ 11. Section 240.113 is amended by revising paragraphs (a) introductory text and (a)(1) and removing and reserving paragraph (b).

The revisions read as follows:

§ 240.113 Individual's duty to furnish data on prior safety conduct as an employee of a different railroad.

(a) Except for persons covered by § 240.109(h), each person seeking certification or recertification under this part shall, within 366 days preceding the date of the railroad's decision on certification or recertification:

(1) Request, in writing, that the chief operating officer or other appropriate person of the former employing railroad provide a copy of that railroad's available information concerning his or her service record pertaining to compliance or non-compliance with §§ 240.111, 240.117, and 240.119 to the railroad that is considering such certification or recertification; and

* * * * *

■ 12. Section 240.115 is revised to read as follows:

§ 240.115 Criteria for consideration of prior safety conduct as a motor vehicle operator.

(a) Each railroad shall adopt and comply with a program meeting the requirements of this section. When any person (including, but not limited to, each railroad, railroad officer, supervisor, and employee) violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Except as provided in paragraphs (c) through (f) of this section, each railroad, prior to initially certifying or recertifying any person as a locomotive engineer for any type of service, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(c) A railroad shall initially certify a person as a locomotive engineer for 60 days if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to certify that person; and

(2) Otherwise meets the eligibility requirements provided in § 240.109.

(d) A railroad shall recertify a person as a locomotive engineer for 60 days from the expiration date of that person's certification if the person:

(1) Requested the information required by paragraph (h) of this section at least 60 days prior to the date of the decision to recertify that person; and

(2) Otherwise meets the eligibility requirements provided in § 240.109.

(e) Except as provided in paragraph (f) of this section, if a railroad who certified or recertified a person pursuant to paragraph (c) or (d) of this section

does not obtain and evaluate the information required pursuant to paragraph (h) of this section within 60 days of the pertinent dates identified in paragraph (c) or (d) of this section, that person will be ineligible to perform as a locomotive engineer until the information can be evaluated.

(f) If a person requests the information required pursuant to paragraph (h) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (b) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 240.109.

(g) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred more than 36 months before the month in which the railroad is making its certification decision or at a time other than that specifically provided for in § 240.111, § 240.117, § 240.119, or § 240.205.

(h) A railroad shall only consider information concerning the following types of motor vehicle incidents:

(1) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, operating a motor vehicle while under the influence of or impaired by alcohol or a controlled substance; or

(2) A conviction for, or completed state action to cancel, revoke, suspend, or deny a motor vehicle driver's license for, refusal to undergo such testing as is required by State or foreign law when a law enforcement official seeks to determine whether a person is operating a vehicle while under the influence of alcohol or a controlled substance.

(i) If such an incident is identified,

(1) The railroad shall provide the data to the railroad's DAC, together with any information concerning the person's railroad service record, and shall refer the person for evaluation to determine if the person has an active substance abuse disorder;

(2) The person shall cooperate in the evaluation and shall provide any requested records of prior counseling or treatment for review exclusively by the DAC in the context of such evaluation; and

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC,

condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in § 240.119(d)(3) of this part.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 240.119(b) will apply.

(5) If the person fails to comply with the requirements of paragraph (i)(2) of this section, the person shall be ineligible to perform as a locomotive engineer until such time as the person complies with the requirements.

■ 13. Section 240.117 is amended by:

■ a. Revising paragraphs (a), (c)(1) and (3), and (e)(5) and (6);

■ b. Adding paragraph (f)(4);

■ c. Revising paragraphs (g)(3)(i) and (ii);

■ d. Redesignating paragraph (h) as paragraph (i); and

■ e. Adding new paragraph (h).

The revisions and additions read as follows:

§ 240.117 Criteria for consideration of operating rules compliance data.

(a) Each railroad shall adopt and comply with a program which meets the requirements of this section. When any person including, but not limited to, each railroad, railroad officer, supervisor, and employee violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(c)(1) A certified locomotive engineer who has demonstrated a failure to comply with railroad rules and practices described in paragraph (e) of this section shall have his or her certification revoked.

* * * * *

(3) A certified locomotive engineer who is called by a railroad to perform the duty of a train crew member other than that of locomotive engineer or conductor shall not have his or her certification revoked based on actions taken or not taken while performing that duty.

* * * * *

(e) * * *

(5) Failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized disabled safety device in the controlling locomotive. (See 49 CFR part 218, subpart D and appendix C to part 218); or

(6) Incidents of noncompliance with § 219.101 of this chapter; however such incidents shall be considered as a violation only for the purposes of paragraphs (g)(2) and (3) of this section.

(f) * * *

(4) A railroad shall not be permitted to deny or revoke an employee's certification based upon additional conditions or operational restrictions imposed pursuant to § 240.107(d).

(g) * * *

(3) * * *

(i) In the case of a single incident involving violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, the person shall have his or her certificate revoked for a period of 30 calendar days.

(ii) In the case of two separate incidents involving a violation of one or more of the operating rules or practices described in paragraphs (e)(1) through (e)(5) of this section, that occurred within 24 months of each other, the person shall have his or her certificate revoked for a period of 180 calendar days.

* * * * *

(h) Any or all periods of revocation provided in this section may consist of training.

* * * * *

■ 14. Section 240.119 is revised to read as follows:

§ 240.119 Criteria for consideration of data on substance abuse disorders and alcohol/drug rules compliance.

(a) *Program requirement.* Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) *Determination requirement.* Each railroad, prior to initially certifying or recertifying any person as a locomotive engineer for any type of service, shall determine that the person meets the eligibility requirements of this section.

(c) *Recordkeeping requirement.* In order to make the determination required under paragraph (d) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which states his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been

evaluated as affected by an active substance abuse disorder.

(d) *Fitness requirement.* (1) A person who has an active substance abuse disorder shall be denied certification or recertification as a locomotive engineer.

(2) Except as provided in paragraph (g) of this section, a certified locomotive engineer who is determined to have an active substance abuse disorder shall be ineligible to hold certification.

Consistent with other provisions of this part, certification may be reinstated as provided in paragraph (f) of this section.

(3) In the case of a current employee of the railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 240.115), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(e) *Prior alcohol/drug conduct;*

Federal rule compliance. (1) In determining whether a person may be or remain certified as a locomotive engineer, a railroad shall consider conduct described in paragraph (e)(2) of this section that occurred within a period of 60 consecutive months prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph.

(2) A railroad shall consider any violation of § 219.101 or § 219.102 of this chapter and any refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative.

(3) A period of ineligibility described in this paragraph shall begin:

(i) For a person not currently certified, on the date of the railroad's written determination that the most recent incident has occurred; or

(ii) For a person currently certified, on the date of the railroad's notification to the person that recertification has been denied or certification has been revoked; and

(4) The period of ineligibility described in this section shall be determined in accordance with the following standards:

(i) In the case of a single violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate during evaluation and any required primary treatment as described in paragraph (f) of this section. In the case of two violations of § 219.102 of this

chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

(ii) In the case of one violation of § 219.102 of this chapter and one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of three years.

(iii) In the case of one violation of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of 9 months (unless identification of the violation was through a qualifying referral program described in § 219.1001 of this chapter and the locomotive engineer waives investigation, in which case the certificate shall be deemed suspended during evaluation and any required primary treatment as described in paragraph (f) of this section). In the case of two or more violations of § 219.101 of this chapter, the person shall be ineligible to hold a certificate for a period of five years.

(iv) A refusal to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative shall be treated, for purposes of ineligibility under this paragraph, in the same manner as a violation of:

(A) Section 219.102 of this chapter, in the case of a refusal to provide a urine specimen for testing; or

(B) Section 219.101 of this chapter, in the case of a refusal to provide a breath sample for alcohol testing or a blood specimen for mandatory post-accident toxicological testing.

(f) *Future eligibility to hold certificate following alcohol/drug violation.* The following requirements apply to a person who has been denied certification or who has had certification suspended or revoked as a result of conduct described in paragraph (e) of this section:

(1) The person shall not be eligible for grant or reinstatement of the certificate unless and until the person has:

(i) Been evaluated by a SAP to determine if the person currently has an active substance abuse disorder;

(ii) Successfully completed any program of counseling or treatment determined to be necessary by the SAP prior to return to service; and

(iii) In accordance with the testing procedures of subpart H of part 219 of this chapter, has had an alcohol test with an alcohol concentration of less than .02 and presented a urine sample that tested negative for controlled substances assayed.

(2) A locomotive engineer placed in service or returned to service under the above-stated conditions shall continue in any program of counseling or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than 60 months following return to service. Follow-up tests shall include not fewer than 6 alcohol tests and 6 drug tests during the first 12 months following return to service.

(3) Return-to-service and follow-up alcohol and drug tests shall be performed consistent with the requirements of subpart H of part 219 of this chapter.

(4) This paragraph does not create an entitlement to utilize the services of a railroad SAP, to be afforded leave from employment for counseling or treatment, or to employment as a locomotive engineer. Nor does it restrict any discretion available to the railroad to take disciplinary action based on conduct described herein.

(g) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a locomotive engineer who is successfully assisted under the procedures of that section shall not be adversely affected.

However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified locomotive engineer or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

■ 15. Section 240.121 is amended by revising paragraphs (a) and (d) to read as follows:

§ 240.121 Criteria for vision and hearing acuity data.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(d) Except as provided in paragraph (e) of this section, each person shall have a hearing test or audiogram that shows the person's hearing acuity meets or exceeds the following thresholds: The person does not have an average hearing loss in the better ear greater than 40 decibels with or without use of a hearing aid, at 500 Hz, 1,000 Hz, and 2,000 Hz. The hearing test or audiogram shall meet the requirements of one of the following:

(1) As required in 29 CFR 1910.95(h) (OSHA);

(2) As required in § 227.111 of this chapter; or

(3) Conducted using an audiometer that meets the specifications of and are maintained and used in accordance with ANSI S3.6–2004 “Specifications for Audiometers.”

* * * * *

■ 16. Section 240.123 is amended by revising paragraphs (a), (c) introductory text, (c)(4)(ii) and (vi), and (c)(5) introductory text, and adding paragraphs (e) and (f) to read as follows:

§ 240.123 Training.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(c) A railroad that elects to train a previously untrained person to be a locomotive engineer shall provide initial training that, at a minimum, complies with the program requirements of § 243.101 of this chapter and:

* * * * *

(4) * * *

(ii) Railroad operating rules and procedures,

* * * * *

(vi) Compliance with Federal railroad safety laws, regulations, and orders;

(5) Is conducted so that the performance skill component shall meet the following conditions:

* * * * *

(e) A railroad shall designate in its program required by this section the time period in which a locomotive engineer must be absent from a territory or yard, before requalification on physical characteristics is required.

(f) A railroad's program shall include the procedures used to qualify or

requalify a person on the physical characteristics.

■ 17. Section 240.125 is amended by revising the section heading and paragraphs (a) and (c)(4)(v) and adding paragraphs (e), (f), and (g) to read as follows:

§ 240.125 Knowledge testing.

(a) Each railroad shall adopt and comply with a program that meets the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

(c) * * *

(4) * * *

(v) Compliance with Federal railroad safety laws, regulations, and orders;

* * * * *

(e) For purposes of paragraph (c) of this section, the railroad must provide the person(s) being tested with an opportunity to consult with a supervisory employee, who possesses territorial qualifications for the territory, to explain a question.

(f) The documentation shall indicate whether the person passed or failed the test.

(g) If a person fails to pass the test, no railroad shall permit or require that person to function as a locomotive engineer prior to that person's achieving a passing score during a reexamination of the person's knowledge.

■ 18. Section 240.127 is amended by revising paragraph (a) to read as follows:

§ 240.127 Criteria for examining skill performance.

(a) Each railroad shall adopt and comply with a program which complies with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program that complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

* * * * *

■ 19. Section 240.129 is amended by revising paragraphs (a), (b), (c) introductory text, (c)(2), (d) introductory text, (e) introductory text, and (e)(1) and adding paragraph (h) to read as follows:

§ 240.129 Criteria for monitoring operational performance of certified engineers.

(a) Each railroad shall adopt and comply with a program which complies

with the requirements of this section. When any person, including, but not limited to, each railroad, railroad officer, supervisor, and employee, violates any requirement of a program which complies with the requirements of this section, that person shall be considered to have violated the requirements of this section.

(b) Each railroad shall have a program to monitor the operational performance of those it has determined as qualified as a locomotive engineer in any class of service. The program shall include procedures to address the testing of certified engineers who are not given both an operational monitoring observation and an unannounced compliance test in a calendar year pursuant to paragraph (h) of this section. At a minimum, such procedures shall include the following:

(1) A requirement that an operational monitoring observation and an unannounced compliance test must be conducted within 30 days of a return to service as a locomotive engineer; and

(2) The railroad must retain a written record indicating the date that the engineer stopped performing service that requires certification pursuant to this part, the date that the engineer returned to performing service that requires certification pursuant to this part, and the dates that the operational monitoring observation and the unannounced compliance test were performed.

(c) The procedures for the operational monitoring observation shall:

* * * * *

(2) Be designed so that each engineer shall be monitored each calendar year by a Designated Supervisor of Locomotive Engineers, who does not need to be qualified on the physical characteristics of the territory over which the operational monitoring observation will be conducted;

* * * * *

(d) The operational monitoring observation procedures may be designed so that the locomotive engineer being monitored either:

* * * * *

(e) The unannounced compliance test program shall:

(1) Be designed so that, except for as provided in paragraph (h) of this section, each locomotive engineer shall be given at least one unannounced compliance test each calendar year;

* * * * *

(h) A certified engineer who is not performing a service that requires certification pursuant to this part need not be given an unannounced compliance test or operational

monitoring observation. However, when the certified engineer returns to a service that requires certification pursuant to this part, that certified engineer must be tested pursuant to this section and § 240.303 within 30 days of his or her return.

■ 20. Section 240.205 is revised to read as follows:

§ 240.205 Procedures for determining eligibility based on prior safety conduct.

(a) Each railroad, prior to initially certifying or recertifying any person as an engineer for any class of service other than student, shall determine that the person meets the eligibility requirements of § 240.115 involving prior conduct as a motor vehicle operator, § 240.117 involving prior conduct as a railroad worker, and § 240.119 involving substance abuse disorders and alcohol/drug rules compliance.

(b) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file documents pertinent to the determinations referred to in paragraph (a) of this section, including a written document from its DAC either reflecting his or her professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder and is ineligible for certification.

■ 21. Section 240.207 is amended by revising paragraphs (b)(2) introductory text and (b)(2)(i) to read as follows:

§ 240.207 Procedures for making the determination on vision and hearing acuity.

* * * * *

(b) * * *

(2) A written document from its medical examiner documenting his or her professional opinion that the person does not meet one or both acuity standards and stating the basis for his or her determination that:

(i) The person can nevertheless be certified under certain conditions; or

* * * * *

■ 22. Section 240.209 is amended by revising paragraphs (b) and (c) to read as follows:

§ 240.209 Procedures for making the determination on knowledge.

* * * * *

(b) In order to make the determination required by paragraph (a) of this section, a railroad shall have written documentation showing that the person either:

(1) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part; or

(2) Did not achieve a passing grade in such testing.

(c) If a person fails to achieve a passing score under the testing procedures required by this part, no railroad shall permit or require that person to operate a locomotive as a locomotive or train service engineer prior to that person's achieving a passing score during a reexamination of his or her knowledge.

■ 23. Section 240.211 is amended by revising paragraph (b) to read as follows:

§ 240.211 Procedures for making the determination on performance skills.

* * * * *

(b) In order to make this determination, a railroad shall have written documentation showing the person either:

(1) Exhibited his or her knowledge by achieving a passing grade in testing that complies with this part; or

(2) Did not achieve a passing grade in such testing.

* * * * *

■ 24. Section 240.215 is amended by revising paragraph (e)(2), republishing paragraph (j) introductory text, revising paragraphs (j)(1) through (3), and adding paragraphs (j)(4) through (6) to read as follows:

§ 240.215 Retaining information supporting determinations.

* * * * *

(e) * * *

(2) If a railroad relies on the use of a locomotive operations simulator to conduct the performance skills testing required under this part, the relevant data from the railroad's records concerning the person's success or failure on the performance skills test(s) that documents the relevant operating facts on which the determination was based including the observations and evaluation of the designated supervisor of locomotive engineers; and

* * * * *

(j) Nothing in this section precludes a railroad from maintaining the information required to be retained under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or individual records;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish

appropriate levels of program access meeting all of the following standards:

(i) No two individuals have the same electronic identity; and

(ii) A record cannot be deleted or altered by any individual after the record is certified by the employee who created the record;

(3) Any amendment to a record is either:

(i) Electronically stored apart from the record that it amends; or

(ii) Electronically attached to the record as information without changing the original record;

(4) Each amendment to a record uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

■ 25. Section 240.217 is amended by republishing paragraph (a) introductory text, revising paragraphs (a)(1) through (4), adding paragraph (a)(5), and revising paragraph (d) to read as follows:

§ 240.217 Time limitations for making determinations.

(a) A railroad shall not certify or recertify a person as a qualified locomotive engineer in any class of train or engine service, if the railroad is making:

(1) A determination concerning eligibility and the eligibility data being relied on was furnished more than 366 days before the date of the railroad's certification decision;

(2) A determination concerning visual and hearing acuity and the medical examination being relied on was conducted more than 450 days before the date of the railroad's recertification decision;

(3) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 366 days before the date of the railroad's certification decision;

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than 24 months before the date of the railroad's

certification decision if the railroad administers a knowledge testing program pursuant to § 240.125 at intervals that do not exceed 24 months; or

(5) A determination concerning demonstrated performance skills and the performance skill testing being relied on was conducted more than 366 days before the date of the railroad's certification decision.

* * * * *

(d) A railroad shall issue each person designated as a certified locomotive engineer a certificate that complies with § 240.223 no later than 30 days from the date of its decision to certify or recertify that person.

■ 26. Section 240.219 is amended by revising paragraphs (a) and (c) and adding paragraph (d) to read as follows:

§ 240.219 Denial of certification.

(a) A railroad shall notify a candidate for certification or recertification of information known to the railroad that forms the basis for denying the person certification and provide the person a reasonable opportunity to explain or rebut that adverse information in writing prior to denying certification. A railroad shall provide the locomotive engineer candidate with any written documents or records, including written statements, related to failure to meet a requirement of this part that support its pending denial decision.

* * * * *

(c) If a railroad denies a person certification or recertification, it shall notify the person of the adverse decision and explain, in writing, the basis for its denial decision. The basis for a railroad's denial decision shall address any explanation or rebuttal information that the locomotive engineer candidate may have provided in writing pursuant to paragraph (a) of this section. The document explaining the basis for the denial shall be served on the person within 10 days after the railroad's decision and shall give the date of the decision.

(d) A railroad shall not deny the person's certification for failing to comply with a railroad operating rule or practice that constitutes a violation under § 240.117(e)(1) through (5) of this part if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the engineer's ability to comply with that railroad operating rule or practice.

■ 27. Section 240.221 is amended by revising paragraphs (d), (e), and (f) to read as follows:

§ 240.221 Identification of qualified persons.

* * * * *

(d) The listing required by paragraphs (a), (b), and (c) of this section shall:

- (1) Be updated at least annually;
- (2) Be available at the divisional or regional headquarters of the railroad; and
- (3) Be available for inspection or copying by FRA during regular business hours.

(e) It shall be unlawful for any railroad to knowingly or any individual to willfully:

- (1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or
- (2) Otherwise falsify such list through material misstatement, omission, or mutilation.

(f) Nothing in this section precludes a railroad from maintaining the list required under this section in an electronic format provided that:

(1) The railroad maintains an information technology security program adequate to ensure the integrity of the electronic data storage system, including the prevention of unauthorized access to the program logic or the list;

(2) The program and data storage system must be protected by a security system that utilizes an employee identification number and password, or a comparable method, to establish appropriate levels of program access meeting all of the following standards:

- (i) No two individuals have the same electronic identity; and
- (ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;
- (3) Any amendment to the list is either:

- (i) Electronically stored apart from the entry on the list that it amends; or
- (ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Each amendment to the list uniquely identifies the person making the amendment;

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information in usable format when requested to furnish data by FRA representatives; and

(6) Information retrieved from the system can be easily produced in a printed format which can be readily provided to FRA representatives in a timely manner and authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by FRA representatives.

■ 28. Section 240.223 is amended by revising paragraph (a)(3) and (5) to read as follows:

§ 240.223 Criteria for the certificate.

(a) * * *

(3) Identify the person to whom it is being issued (including the person's name, employee identification number, the year of birth, and either a physical description or photograph of the person);

* * * * *

(5) Show the effective date of each certification held;

* * * * *

■ 29. Section 240.225 is revised to read as follows:

§ 240.225 Reliance on qualification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a qualified engineer may rely on determinations made by another railroad concerning that person's qualifications. The railroad's certification program shall address how the railroad will administer the training of previously uncertified engineers with extensive operating experience or previously certified engineers who have had their certification expire. If a railroad's certification program fails to specify how it will train a previously certified engineer hired from another railroad, then the railroad shall require the newly hired engineer to take the hiring railroad's entire training program.

(b) A railroad relying on another's certification shall determine that:

(1) The prior certification is still valid in accordance with the provisions of §§ 240.201, 240.217, and 240.307;

(2) The prior certification was for the same classification of locomotive or train service as the certification being issued under this section;

(3) The person has received training on and visually observed the physical characteristics of the new territory in accordance with § 240.123;

(4) The person has demonstrated the necessary knowledge concerning the railroad's operating rules in accordance with § 240.125;

(5) The person has demonstrated the necessary performance skills concerning the railroad's operating rules in accordance with § 240.127.

Subpart D—Administration of the Certification Program

■ 30. Revise the heading of Subpart D to read as set forth above.

■ 31. Section 240.301 is revised to read as follows:

§ 240.301 Replacement of certificates.

(a) A railroad shall have a system for the prompt replacement of lost, stolen or mutilated certificates at no cost to engineers. That system shall be reasonably accessible to certified locomotive engineers in need of a replacement certificate or temporary replacement certificate.

(b) At a minimum, a temporary replacement certificate must identify the person to whom it is being issued (including the person's name, identification number and year of birth); indicate the date of issuance; and be authorized by a supervisor of locomotive engineers or other individual designated in accordance with § 240.223(b). Temporary replacement certificates may be delivered electronically and are valid for a period no greater than 30 days.

■ 32. Section 240.303 is amended by revising paragraphs (b) and (c) to read as follows:

§ 240.303 Operational monitoring requirements.

* * * * *

(b) The program shall be conducted so that each locomotive engineer, except as provided in § 240.129(h), shall be given at least one operational monitoring observation by a qualified supervisor of locomotive engineers in each calendar year.

(c) The program shall be conducted so that each locomotive engineer, except for as provided in § 240.129(h), shall be given at least one unannounced, compliance test each calendar year.

* * * * *

■ 33. Section 240.305 is amended by republishing paragraph (b) introductory text, revising paragraphs (b)(2) introductory text and (b)(2)(ii), redesignating paragraph (b)(2)(iii) as paragraph (b)(2)(iv), and adding new paragraph (b)(2)(iii) to read as follows:

§ 240.305 Prohibited conduct.

* * * * *

(b) Each locomotive engineer who has received a certificate required under this part shall:

* * * * *

(2) Display that certificate upon the receipt of a request to do so from:

* * * * *

(ii) A State inspector authorized under part 212 of this chapter,

(iii) An officer of the issuing railroad, or

* * * * *

■ 34. Section 240.307 is amended by:

■ a. Revising paragraph (a);

■ b. Republishing paragraphs (b);

■ c. Revising paragraphs (b)(1) and (4);

- d. Redesignating paragraph (b)(5) as paragraph (b)(6);
- e. Adding a new paragraph (b)(5) and paragraph (b)(7);
- f. Revising paragraphs (c)(2) and (9);
- g. Republishing paragraph (c)(11);
- h. Revising paragraphs (c)(11)(i) and (ii);
- i. Adding paragraph (c)(11)(iii)
- i. Revising paragraph (g);
- j. Republishing paragraph (i) introductory text;
- k. Revising paragraphs (i)(1) and (2) and (j)(2);

The revisions and additions read as follows:

§ 240.307 Revocation of certification.

(a) Except as provided for in § 240.119(e), a railroad that certifies or recertifies a person as a qualified locomotive engineer and, during the period that certification is valid, acquires reliable information regarding violation(s) of § 240.117(e) or § 240.119(c) of this chapter shall revoke the person's engineer certificate.

(b) Pending a revocation determination under this section, the railroad shall:

(1) Upon receipt of reliable information regarding violation(s) of § 240.117(e) or § 240.119(c) of this chapter, immediately suspend the person's certificate;

(4) No later than the convening of the hearing and notwithstanding the terms of an applicable collective bargaining agreement, the railroad convening the hearing shall provide the person with a copy of the written information and list of witnesses the railroad will present at the hearing. If requested, a recess to the start of the hearing will be granted if that information is not provided until just prior to the convening of the hearing. If the information was provided through statements of an employee of the convening railroad, the railroad will make that employee available for examination during the hearing required by paragraph (b)(3) of this section. Examination may be telephonic where it is impractical to provide the witness at the hearing.

(5) Determine, on the record of the hearing, whether the person no longer meets the certification requirements of this part stating explicitly the basis for the conclusion reached;

(7) Retain the record of the hearing for 3 years after the date the decision is rendered.

(c) * * *

(2) The hearing shall be conducted by a presiding officer, who can be any

proficient person authorized by the railroad other than the investigating officer.

* * * * *

(9) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of information. In such instances, the record shall be left open for such time as the presiding officer grants for that purpose.

* * * * *

(11) The decision shall:

(i) Contain the findings of fact as well as the basis therefor, concerning all material issues of fact presented on the record and citations to all applicable railroad rules and practices;

(ii) State whether the railroad official found that a revocable event occurred and the applicable period of revocation with a citation to § 240.117 or § 240.119; and

(iii) Be served on the employee and the employee's representative, if any, with the railroad to retain proof of that service.

* * * * *

(g) A railroad that has relied on the certification by another railroad under the provisions of § 240.227 or § 240.229, shall revoke its certification if, during the period that certification is valid, the railroad acquires information that convinces it that another railroad has revoked its certification in accordance with the provisions of this section. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing and no additional hearing is required prior to a revocation by more than one railroad arising from the same facts.

* * * * *

(i) A railroad:

(1) Shall not revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the locomotive engineer's ability to comply with the railroad operating rule or practice that constitutes a violation under § 240.117(e)(1) through (5) of this part; or

(2) May decide not to revoke the person's certification as provided for in paragraph (a) of this section if sufficient evidence exists to establish that the violation of § 240.117(e)(1) through (5) of this part was of a minimal nature and had no direct or potential effect on rail safety.

(j) * * *

(2) Prior to the convening of the hearing provided for in this section.

* * * * *

■ 35. Section 240.308 is added to read as follows:

§ 240.308 Multiple certifications.

(a) A person may hold both conductor and locomotive engineer certification.

(b) A railroad that issues multiple certificates to a person, shall, to the extent possible, coordinate the expiration date of those certificates.

(c) Except as provided in paragraph (d) of this section, a locomotive engineer, including a remote control operator, who is operating a locomotive without an assigned certified conductor must either be:

(1) Certified as both a locomotive engineer under this part and as a conductor under part 242 of this chapter; or

(2) Accompanied by a person certified as a conductor under part 242 of this chapter but who will be attached to the crew in a manner similar to that of an independent assignment.

(d) Passenger railroad operations: If the conductor is removed from a train for a medical, police or other such emergency after the train departs from an initial terminal, the train may proceed to the first location where the conductor can be replaced without incurring undue delay without the locomotive engineer being a certified conductor. However, an assistant conductor or brakeman must be on the train and the locomotive engineer must be informed that there is no certified conductor on the train prior to any movement.

(e) During the duration of any certification interval, a person who holds a current conductor and/or locomotive engineer certificate from more than one railroad shall immediately notify the other certifying railroad(s) if he or she is denied conductor or locomotive engineer recertification under § 240.219 or § 242.401 of this chapter or has his or her conductor or locomotive engineer certification revoked under § 240.307 or § 242.407 of this chapter by another railroad.

(f) A person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under § 242.407 of this chapter for a violation of § 242.403(e)(1) through (5) or (e)(12) may not work as a locomotive engineer during the period of revocation.

However, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked under

§ 242.407 of this chapter for a violation of § 242.403(e)(6) through (11) may work as a locomotive engineer during the period of revocation.

(1) For purposes of determining the period for which a person may not work as a certified locomotive engineer due to a revocation of his or her conductor certification, only violations of § 242.403(e)(1) through (5) or (e)(12) will be counted. Thus, a person who holds a current conductor and locomotive engineer certificate and who has had his or her conductor certification revoked three times in less than 36 months for two violations of § 242.403(e)(6) and one violation of § 242.403(e)(1) would have his or her conductor certificate revoked for 1 year, but would not be permitted to work as a locomotive engineer for one month (*i.e.*, the period of revocation for one violation of § 242.403(e)(1)).

(g) A person who holds a current conductor and locomotive engineer certificate and who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not work as a conductor during the period of revocation.

(h) A person who has had his or her locomotive engineer certification revoked under § 240.307 of this chapter may not obtain a conductor certificate pursuant to part 242 of this chapter during the period of revocation.

(i) A person who had his or her conductor certification revoked under § 242.407 of this chapter for violations of § 242.403(e)(1) through (5) or (e)(12) may not obtain a locomotive engineer certificate pursuant to part 240 of this chapter during the period of revocation.

(j) A railroad that denies a person conductor certification or recertification under § 242.401 of this chapter shall not, solely on the basis of that denial, deny or revoke that person's locomotive engineer certification or recertification.

(k) A railroad that denies a person locomotive engineer certification or recertification under § 240.219 shall not, solely on the basis of that denial, deny or revoke that person's conductor certification or recertification.

(l) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified as a conductor and a locomotive engineer. The certificate must comply with § 240.223 and § 242.207 of this chapter.

(m) A person who holds a current conductor and locomotive engineer certification and who is involved in a revocable event under § 242.407 or § 240.307 of this chapter may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke for the revocable event must be based on the

work the person was performing at the time the event occurred.

■ 36. Section 240.309 is amended by revising paragraphs (b)(4), (e)(1) and (2), (e)(8) and (9), and (f) through (h) and adding paragraph (i) to read as follows:

§ 240.309 Railroad oversight responsibilities.

* * * * *

(b) * * *

(4) If the railroad conducts joint operations with another railroad, the number of locomotive engineers employed by the other railroad(s) that: Were involved in events described in this paragraph and were determined to be certified and to have possessed the necessary territorial qualifications for joint operations purposes by the controlling railroad.

* * * * *

(e) * * *

(1) Incidents involving noncompliance with part 218 of this chapter;

(2) Incidents involving noncompliance with part 219 of this chapter;

* * * * *

(8) Incidents involving the failure to comply with prohibitions against tampering with locomotive mounted safety devices, or knowingly operating or permitting to be operated a train with an unauthorized or disabled safety device in the controlling locomotive; and

(9) Incidents involving noncompliance with the railroad's operating practices (including train handling procedures) resulting in excessive in-train force levels.

(f) For reporting purposes, an instance of poor safety conduct involving a person who holds both conductor certification pursuant to part 242 of this chapter and locomotive engineer certification pursuant to this part need only be reported once (either under 49 CFR 242.215 of this chapter or this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

(g) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The nature of the remedial action taken and the number of events subdivided so as to reflect which of the following actions was selected:

- (i) Imposition of informal discipline;
- (ii) Imposition of formal discipline;
- (iii) Provision of informal training; or
- (iv) Provision of formal training; and

(2) If the nature of the remedial action taken was formal discipline, the number of events further subdivided so as to reflect which of the following punishments was imposed by the railroad:

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

(iii) The person was issued demerits. If more than one form of punishment was imposed only that punishment deemed the most severe shall be shown.

(h) For reporting purposes, each category of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition of formal or informal discipline shall be annotated to reflect the following:

(1) The number of instances in which the railroad's internal appeals process reduced the punishment initially imposed at the conclusion of its hearing; and

(2) The number of instances in which the punishment imposed by the railroad was reduced by any of the following entities: The National Railroad Adjustment Board, a Public Law Board, a Special Board of Adjustment or other body for the resolution of disputes duly constituted under the provisions of the Railway Labor Act.

(i) For reporting purposes each category of detected poor safety conduct identified in paragraph (b) of this section shall be capable of being annotated to reflect the following:

(1) The total number of incidents in that category;

(2) The number of incidents within that total which reflect incidents requiring an FRA accident/incident report under part 225 of this chapter; and

(3) The number of incidents within that total which were detected as a result of a scheduled operational monitoring effort.

■ 37. Section 240.401 is revised to read as follows:

§ 240.401 Review board established.

(a) Any person who has been denied certification, denied recertification, or has had his or her certification revoked and believes that a railroad incorrectly determined that he or she failed to meet the certification requirements of this regulation when making the decision to deny or revoke certification, may petition the Federal Railroad Administrator to review the railroad's decision.

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Operating Crew Review Board.

(c) The Operating Crew Review Board shall be composed of employees of the Federal Railroad Administration selected by the Administrator.

■ 38. Section 240.403 is amended by revising paragraph (b)(2), adding paragraph (b)(7), revising paragraphs (c) and (d), and removing paragraph (e).

The revisions and addition read as follows:

§ 240.403 Petition requirements.

* * * * *

(b) * * *

(2) Be filed with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. The form of such request may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its website at <http://www.regulations.gov>.

* * * * *

(7) Be supplemented, if requested by the Operating Crew Review Board, with a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees. The petitioner must provide written explanation in response to an Operating Crew Review Board request if written documents that should be reasonably available to the petitioner are not supplied.

(c) A petition seeking review of a railroad's decision to deny certification or recertification or revoke certification in accordance with the procedures required by § 240.307 filed with FRA more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner will be denied as untimely except that the Operating Crew Review Board for cause shown may extend the petition filing period at any time in its discretion:

(1) Provided the request for extension is filed before the expiration of the period provided in this paragraph; or

(2) Provided that the failure to timely file was the result of excusable neglect.

(d) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 240.411.

■ 39. Section 240.405 is revised to read as follows:

§ 240.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The

acknowledgment shall contain the docket number assigned to the petition and a statement of FRA's intention that the Board will attempt to render a decision on this petition within 180 days from the date that the railroad's response is received or from the date upon which the railroad's response period has lapsed pursuant to paragraph (c) of this section.

(b) Upon receipt of the petition, FRA will notify the railroad that it has received the petition and where the petition may be accessed.

(c) Within 60 days from the date of the notification provided in paragraph (b) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition. Late filings will only be considered to the extent practicable.

(d) A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number of the review proceeding and provide the railroad's email address (if available);

(2) Serve a copy of the information being submitted to FRA to the petitioner and petitioner's representative, if any; and

(3) File the information with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. The form of such information may be in written or electronic form consistent with the standards and requirements established by the Federal Docket Management System and posted on its website at <http://www.regulations.gov>.

(e) Each petition will then be referred to the Operating Crew Review Board for a decision.

(f) Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition.

(g) If the Board finds that there is insufficient basis for granting or denying the petition, the Board shall issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(h) Standard of review for factual issues: When considering factual issues, the Board will determine whether there is substantial evidence to support the railroad's decision, and a negative finding is grounds for granting the petition.

(i) Standard of review for procedural issues: When considering procedural issues, the Board will determine whether substantial harm was caused the petitioner by virtue of the failure to adhere to the dictated procedures for

making the railroad's decision. A finding of substantial harm is grounds for reversing the railroad's decision. To establish grounds upon which the Board may grant relief, Petitioner must show:

(1) That procedural error occurred, and

(2) The procedural error caused substantial harm.

(j) Standard of review for legal issues: Pursuant to its reviewing role, the Board will consider whether the railroad's legal interpretations are correct based on a *de novo* review.

(k) The Board will determine whether the denial or revocation of certification or recertification was improper under this regulation (*i.e.*, based on an incorrect determination that the person failed to meet the certification requirements of this regulation) and grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision, *i.e.*, it will not consider whether the railroad properly applied its own more stringent requirements.

(l) The Board's written decision shall be served on the petitioner, including the petitioner's representative, if any, and the railroad.

■ 40. Section 240.407 is amended by revising paragraphs (a) and (c), republishing paragraph (d) introductory text, and revising paragraph (d)(1) to read as follows:

§ 240.407 Request for a hearing.

(a) If adversely affected by the Operating Crew Review Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 240.409.

* * * * *

(c) If a party fails to request a hearing within the period provided in paragraph (b) of this section, the Operating Crew Review Board's decision will constitute final agency action.

(d) If a party elects to request a hearing, that person shall submit a written request to the Docket Clerk containing the following:

(1) The name, address, telephone number, and email address (if available) of the respondent and the requesting party's designated representative, if any;

* * * * *

■ 41. Section 240.409 is amended by revising paragraphs (a), (p), and (q) to read as follows:

§ 240.409 Hearings.

(a) An administrative hearing for a locomotive engineer certification petition shall be conducted by a presiding officer, who can be any person

authorized by the Administrator, including an administrative law judge.

* * * * *

(p) The petitioner before the Operating Crew Review Board, the railroad involved in taking the certification action, and FRA shall be parties at the hearing. All parties may participate in the hearing and may appear and be heard on their own behalf or through designated representatives. All parties may offer relevant evidence, including testimony, and may conduct such cross-examination of witnesses as may be required to make a record of the relevant facts.

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence. Hence, if the hearing petitioner is the railroad involved in taking the certification action, that railroad will have the burden of proving that its decision to deny certification, deny recertification, or revoke certification was correct. Conversely, if the petitioner before the Operating Crew Review Board is the hearing petitioner, that person will have the burden of proving that the railroad's decision to deny certification, deny recertification, or revoke certification was incorrect. Between the petitioner before the Operating Crew Review Board and the railroad involved in taking the certification action, the party who is not the hearing petitioner will be a respondent.

* * * * *

■ 42. Section 240.411 is amended by revising paragraphs (a) and (f) to read as follows:

§ 240.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal. The appeal must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue SE, Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

* * * * *

(f) An appeal from an Operating Crew Review Board decision pursuant to § 240.403(d) must be filed within 35 days of issuance of the decision with the Federal Railroad Administrator, 1200 New Jersey Avenue SE, Washington, DC 20590 and with the Docket Clerk, U.S. Department of Transportation, Docket Operations (M-30), West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE, Washington, DC 20590. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision, and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

■ 43. Revise Appendix B to part 240 to read as follows:

Appendix B to Part 240—Procedures for Submission and Approval of Locomotive Engineer Qualification Programs

This appendix establishes procedures for the submission and approval of a railroad's program concerning the training, testing, and evaluating of persons seeking certification or recertification as a locomotive engineer in accordance with the requirements of this part (see §§ 240.101, 240.103, 240.105, 240.107, 240.123, 240.125, 240.127 and 240.129). It also contains guidance on how FRA will exercise its review and approval responsibilities.

Submission by a Railroad

As provided for in § 240.101, each railroad must have a program for determining the certification of each person it permits or requires to operate a locomotive. In designing its program a railroad must take into account the trackage and terrain over which it operates, the system(s) for train control that are employed, the operational design characteristics of the track and equipment being operated including train length, train makeup, and train speeds. Each railroad must submit its individual program to FRA for approval as provided for in § 240.103. Each program must be accompanied by a request for approval organized in accordance with this appendix. Requests for approval must contain appropriate references to the relevant portion of the program being discussed. Requests should be submitted in writing on standard sized paper (8-1/2x11) and can be in letter or narrative format. The railroad's submission shall be sent to the Associate Administrator for Railroad Safety/Chief Safety Officer, FRA. The mailing address for FRA is 1200 New Jersey Avenue SE, Washington, DC 20590. Simultaneous with its filing with the FRA, each railroad must serve a copy of its submission on the president of each labor organization that represents the railroad's employees subject to this part.

Each railroad is authorized to file by electronic means any program submissions required under this part. Prior to any person

submitting a railroad's first program submission electronically, the person shall provide the Associate Administrator with the following information in writing:

- (1) The name of the railroad;
- (2) The names of two individuals, including job titles, who will be the railroad's points of contact and will be the only individuals allowed access to FRA's secure document submission site;
- (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; and
- (6) The daytime telephone numbers for the railroad's points of contact.

A request for electronic submission or FRA review of written materials shall be addressed to the Associate Administrator for Railroad Safety/Chief Safety Officer, Federal Railroad Administration, 1200 New Jersey Avenue SE, Washington, DC 20590. Upon receipt of a request for electronic submission that contains the information listed above, FRA will then contact the requestor with instructions for electronically submitting its program.

A railroad that electronically submits an initial program or new portions or revisions to an approved program required by this part shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email. FRA may electronically store any materials required by this part regardless of whether the railroad that submits the materials does so by delivering the written materials to the Associate Administrator and opts not to submit the materials electronically. A railroad that opts not to submit the materials required by this part electronically, but provides one or more email addresses in its submission, shall be considered to have provided its consent to receive approval or disapproval notices from FRA by email or mail.

Organization of the Submission

Each request should be organized to present the required information in the following standardized manner. Each section must begin by giving the name, title, telephone number, and email and mailing addresses of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

Section 1 of the Submission: General Information and Elections

The first section of the request must contain the name of the railroad, the person to be contacted concerning the request (including the person's name, title, telephone number, and email and mailing addresses) and a statement electing either to accept responsibility for educating previously untrained persons to be qualified locomotive engineers or recertify only engineers previously certified by other railroads. See § 240.103(b).

If a railroad elects not to provide initial locomotive engineer training, the railroad is

obligated to states so in its submission. A railroad that makes this election will be limited to recertifying persons initially certified by another railroad. A railroad that makes this election can rescind it by obtaining FRA approval of a modification of its program. See § 240.103(e).

If a railroad elects to accept responsibility for training persons not previously trained to be locomotive engineers, the railroad is obligated to submit information on how such persons will be trained but has no duty to actually conduct such training. A railroad that elects to accept the responsibility for the training of such persons may authorize another railroad or a non-railroad entity to perform the actual training effort. The electing railroad remains responsible for assuring that such other training providers adhere to the training program the railroad submits.

This section must also state which class or classes of service the railroad will employ. See § 240.107.

Section 2 of the Submission: Selection of Supervisors of Locomotive Engineers

The second section of the request must contain information concerning the railroad's procedure for selecting the person or persons it will rely on to evaluate the knowledge, skill, and ability of persons seeking certification or recertification. As provided for in § 240.105, each railroad must have a procedure for selecting supervisors of locomotive engineers which assures that persons so designated can appropriately test and evaluate the knowledge, skill, and ability of individuals seeking certification or recertification.

Section 240.105 provides a railroad latitude to select the criteria and evaluation methodology it will rely on to determine which person or persons have the required capacity to perform as a supervisor of locomotive engineers. The railroad must describe in this section how it will use that latitude and evaluate those it designates as supervisors of locomotive engineers so as to comply with the performance standard set forth in § 240.105(b). The railroad must identify, in sufficient detail to permit effective review by FRA, the criteria for evaluation it has selected. For example, if a railroad intends to rely on one or more of the following, a minimum level of prior experience as an engineer, successful completion of a course of study, or successful passage of a standardized testing program, the submission must state which criteria it will employ.

Section 3 of the Submission: Training Persons Previously Certified

The third section of the request must contain information concerning the railroad's program for training previously certified locomotive engineers. As provided for in § 240.123(b) each railroad must have a program for the ongoing education of its locomotive engineers to assure that they maintain the necessary knowledge concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical

characteristics), and relevant Federal safety rules.

Section 240.123(b) provides a railroad latitude to select the specific subject matter to be covered, duration of the training, method of presenting the information, and the frequency with which the training will be provided. The railroad must describe in this section how it will use that latitude to assure that its engineers remain knowledgeable concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.123(b). This section must contain sufficient detail to permit effective evaluation of the railroad's training program in terms of the subject matter covered, the frequency and duration of the training sessions, the type of formal training employed (including, but not limited to, classroom, computer-based, correspondence, OJT, simulator, or laboratory training) and which aspects of the program are voluntary or mandatory.

Without assistance from automation, safe train handling involves both abstract knowledge about the appropriate use of engine controls and the application of that knowledge to trains of differing composition traversing varying terrain. Time and circumstances have the capacity to diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances also have the capacity to alter the value of previously obtained knowledge and the application of that knowledge. In formulating how it will use the discretion being afforded, each railroad must design its program to address both loss of retention of knowledge and changed circumstances, and this section of the submission to FRA must address these matters.

For example, locomotive engineers need to have their fundamental knowledge of train operations refreshed periodically. Each railroad needs to advise FRA how that need is satisfied in terms of the interval between attendance at such training, the nature of the training being provided, and methods for conducting the training. A matter of particular concern to FRA is how each railroad acts to ensure that engineers remain knowledgeable about safe train handling procedures if the territory over which a locomotive engineer is authorized to operate is territory from which the engineer has been absent. The railroad must have a plan for the familiarization training that addresses the question of how long a person can be absent before needing more education and, once that threshold is reached, how the person will acquire the needed education. Similarly, the program must address how the railroad responds to changes such as the introduction of new technology, new operating rule books, or significant changes in operations including alteration in the territory engineers are authorized to operate over.

Section 4 of the Submission: Testing and Evaluating Persons Previously Certified

The fourth section of the request must contain information concerning the railroad's program for testing and evaluating previously certified locomotive engineers. As provided for in § 240.125 and § 240.127, each railroad

must have a program for the ongoing testing and evaluating of its locomotive engineers to ensure that they have the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules. Similarly, each railroad must have a program for ongoing testing and evaluating to ensure that its locomotive engineers have the necessary vision and hearing acuity as provided for in § 240.121.

Sections 240.125 and 240.127 require that a railroad rely on written procedures for determining that each person can demonstrate his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.125 directs that, when seeking a demonstration of the person's knowledge, a railroad must employ a written test that contains objective questions and answers and covers the following subject matters: (i) Personal safety practices; (ii) operating practices; (iii) equipment inspection practices; (iv) train handling practices (including familiarity with the physical characteristics of the territory); and (v) compliance with relevant Federal safety rules. The test must accurately measure the person's knowledge of all of these areas.

Section 240.125 provides a railroad latitude in selecting the design of its own testing policies (including the number of questions each test will contain, how each required subject matter will be covered, weighting (if any) to be given to particular subject matter responses, selection of passing scores, and the manner of presenting the test information). The railroad must describe in this section how it will use that latitude to ensure that its engineers will demonstrate their knowledge concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.125.

Section 240.127 directs that, when seeking a demonstration of the person's skill, a railroad must employ a test and evaluation procedure conducted by a designated supervisor of locomotive engineers that contains an objective evaluation of the person's skills at applying the railroad's rules and practices for the safe operation of trains. The test and evaluation procedure must examine the person's skills in terms of all of the following subject matters: (i) Operating practices; (ii) equipment inspection practices; (iii) train handling practices (including familiarity with the physical characteristics of the territory); and (iv) compliance with relevant Federal safety rules. The test must be sufficient to effectively examine the person's skills while operating a train in the most demanding type of service which the person is likely to encounter in the normal course of events once he or she is deemed qualified.

Section 240.127 provides a railroad latitude in selecting the design of its own testing and evaluation procedures (including the duration of the evaluation process, how each required subject matter will be covered, weighting (if any) to be given to particular

subject matter response, selection of passing scores, and the manner of presenting the test information). However, the railroad must describe the scoring system used by the railroad during a skills test administered in accordance with the procedures required under § 240.211. The description shall include the skills to be tested and the weight or possible score that each skill will be given. The section should also provide information concerning the procedures which the railroad will follow that achieve the objectives described in FRA's recommended practices (see appendix E) for conducting skill performance testing. The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct the test and evaluation procedure. A railroad must describe in this section how it will use that latitude to assure that its engineers will demonstrate their skills concerning the safe discharge of their train operation responsibilities so as to comply with the performance standard set forth in § 240.127.

Section 240.121 provides a railroad latitude to rely on the professional medical opinion of the railroad's medical examiner concerning the ability of a person with substandard acuity to safely operate a locomotive. The railroad must describe in this section how it will ensure that its medical examiner has sufficient information concerning the railroad's operations to effectively form appropriate conclusions about the ability of a particular individual to safely operate a train.

Section 5 of the Submission: Training, Testing, and Evaluating Persons Not Previously Certified

Unless a railroad has made an election not to accept responsibility for conducting the initial training of persons to be locomotive engineers, the fifth section of the request must contain information concerning the railroad's program for educating, testing, and evaluating persons not previously trained as locomotive engineers. As provided for in § 240.123(c), a railroad that is issuing an initial certification to a person to be a locomotive engineer must have a program for the training, testing, and evaluating of its locomotive engineers to ensure that they acquire the necessary knowledge and skills concerning personal safety, operating rules and practices, mechanical condition of equipment, methods of safe train handling (including familiarity with physical characteristics), and relevant Federal safety rules.

Section 240.123 establishes a performance standard and gives a railroad latitude in selecting how it will meet that standard. A railroad must describe in this section how it will use that latitude to ensure that its engineers will acquire sufficient knowledge and skill and demonstrate their knowledge and skills concerning the safe discharge of their train operation responsibilities. This section must contain the same level of detail concerning initial training programs as that described for each of the components of the overall program contained in sections 2 through 4 of this appendix. A railroad that plans to accept responsibility for the initial

training of locomotive engineers may authorize another railroad or a non-railroad entity to perform the actual training effort as long as the other entity complies with the requirements for training organizations and learning institutions in § 243.111 of this chapter. The authorizing railroad may submit a training program developed by that authorized trainer but the authorizing railroad remains responsible for ensuring that such other training providers adhere to the training program submitted. Railroads that elect to rely on other entities, to conduct training away from the railroad's own territory, must indicate how the student will be provided with the required familiarization with the physical characteristics for its territory.

Section 6 of the Submission: Monitoring Operational Performance by Certified Engineers

The final section of the request must contain information concerning the railroad's program for monitoring the operation of its certified locomotive engineers. As provided for in § 240.129, each railroad must have a program for the ongoing monitoring of its locomotive engineers to ensure that they operate their locomotives in conformity with the railroad's operating rules and practices including methods of safe train handling and relevant Federal safety rules.

Section 240.129 requires that a railroad annually observe each locomotive engineer demonstrating his or her knowledge of the railroad's rules and practices and skill at applying those rules and practices for the safe operation of a locomotive or train. Section 240.129 directs that the observation be conducted by a designated supervisor of locomotive engineers but provides a railroad latitude in selecting the design of its own observation procedures (including the duration of the observation process, reliance on event recorder downloads that record the specifics of train operation, and the specific aspects of the engineer's performance to be covered). The section also gives a railroad the latitude to employ either a Type 1 or a Type 2 simulator (properly programmed) to conduct monitoring observations. A railroad must describe in this section how it will use that latitude to assure that the railroad is monitoring that its engineers demonstrate their skills concerning the safe discharge of their train operation responsibilities. A railroad must also describe the scoring system used by the railroad during an operational monitoring observation or unannounced compliance test administered in accordance with the procedures required under § 240.303. A railroad that intends to employ train operation event recorder tapes to comply with this monitoring requirement shall indicate in this section how it anticipates determining what person was at the controls and what signal indications or other operational constraints, if any, were applicable to the train's movement.

Section 7 of the Submission: Procedures for Routine Administration of the Engineer Certification Program

The final section of the request must contain a summary of how the railroad's

program and procedures will implement the various specific aspects of the regulatory provisions that relate to routine administration of its certification program for locomotive engineers. At a minimum this section needs to address the procedural aspects of the rule's provisions identified in the following paragraph.

Section 240.109 provides that each railroad must have procedures for review and comment on adverse prior safety conduct, but allows the railroad to devise its own system within generalized parameters. Sections 240.115, 240.117 and 240.119 require a railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as railroad workers, yet leave selection of many details to the railroad. Sections 240.203, 240.217, and 240.219 place a duty on the railroad to make a series of determinations but allow the railroad to select what procedures it will employ to assure that all of the necessary determinations have been made in a timely fashion; who will be authorized to conclude that person is or is not qualified; and how it will communicate adverse decisions. Documentation of the factual basis the railroad relied on in making determinations under §§ 240.205, 240.207, 240.209, 240.211, and 240.213 is required, but these sections permit the railroad to select the procedures it will employ to accomplish compliance with these provisions. Sections 240.225 and 240.227 permit reliance on qualification determinations made by other entities and permit a railroad latitude in selecting the procedures it will employ to ensure compliance with these provisions. Similarly, § 240.229 permits use of railroad selected procedures to meet the requirements for certification of engineers performing service in joint operations territory. Sections 240.301 and 240.307 allow a railroad a certain degree of discretion in complying with the requirements for replacing lost certificates or the conduct of certification revocation proceedings.

This section of the request should outline in summary fashion the manner in which the railroad will implement its program so as to comply with the specific aspects of each of the rule's provisions described in preceding paragraph.

FRA Review

The submissions made in conformity with this appendix will be deemed approved within 30 days after the required filing date or the actual filing date whichever is later. No formal approval document will be issued by FRA. The brief interval for review reflects FRA's judgment that railroads generally already have existing programs that will meet the requirements of this part. FRA has taken the responsibility for notifying a railroad when it detects problems with the railroad's program. FRA retains the right to disapprove a program that has obtained approval due to the passage of time as provided for in section § 240.103.

Rather than establish rigid requirements for each element of the program, FRA has given railroads discretion to select the design of their individual programs within a specified

context for each element. The rule, however, provides a good guide to the considerations that should be addressed in designing a program that will meet the performance standards of this rule. In reviewing program submissions, FRA will focus on the degree to which a particular program deviates from the norms set out in its rule. To the degree that a particular program submission materially deviates from the norms set out in its rule, FRA's review and approval process will be focused on determining the validity of the reasoning relied on by a railroad for selecting its alternative approach and the degree to which the alternative approach is likely to be effective in producing locomotive engineers who have the knowledge, skill, and ability to safely operate trains.

■ 44. Revise appendix C to part 240 is to read as follows:

Appendix C to Part 240—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the requirements of section 4(a) of the Railroad Safety Improvement Act of 1988 and §§ 240.109, 240.111, and 240.205 of this part. Those provisions require that railroads consider the motor vehicle driving record of each person prior to issuing him or her certification or recertification as a locomotive engineer.

To fulfill that obligation, a railroad must review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the state agency that issued the candidate's current license. However, it can include multiple records if the candidate has been issued a motor vehicle driving license by more than one state agency or foreign country. In addition, the railroad must determine whether the certification candidate is listed in the National Driver Register and, if so listed, to review the data that caused the candidate to be so listed.

Access to State Motor Vehicle Driving Record Data

The right of railroad workers, their employers, or prospective employers to have access to a state motor vehicle licensing agency's data concerning an individual's driving record is controlled by state law. Although many states have mechanisms through which employers and prospective employers such as railroads can obtain such data, there are some states in which privacy concerns make such access very difficult or impossible. Since individuals generally are entitled to obtain access to driving record data that will be relied on by a state motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places responsibility on individuals, who want to serve as locomotive engineers to request that their current state drivers licensing agency or agencies furnish such data directly to the railroad considering certifying them as a locomotive operator. Depending on the procedures adopted by a particular state agency, this will involve the

candidate's either sending the state agency a brief letter requesting such action or executing a state agency form that accomplishes the same effect. It will normally involve payment of a nominal fee established by the state agency for such a records check. In rare instances, when a certification candidate has been issued multiple licenses, it may require more than a single request.

The National Driver Register

In addition to seeking an individual state's data, each engineer candidate is required to request that a search and retrieval be performed of any relevant information concerning his or her driving record contained in the National Driver Register (NDR). The NDR is a system of information created by Congress in 1960. In essence it is a nationwide repository of information on problem drivers that was created in an effort to protect motorists. It is a voluntary State/Federal cooperative program that assists motor vehicle driver licensing agencies in gaining access to data about actions taken by other state agencies concerning an individual's motor vehicle driving record. The NDR is designed to address the problem that occurs when chronic traffic law violators, after losing their license in one State travel to and receive licenses in another State. Today, each State and the District of Columbia are required to send information on all revocations, suspensions, and license denials within 31 days of receipt of the convictions from the courts to the NDR and each of these driver licensing agencies have the capability to provide NDR's data. 49 U.S.C. 30304. The NDR data can also be obtained by contacting the National Highway Traffic Safety Administration (NHTSA) of the Department of Transportation directly.

The information submitted to NHTSA contains, at a minimum, three specific pieces of data: The identification of the state authority providing the information, the name of the person whose license is being affected, and the date of birth of that person. It may be supplemented by data concerning the person's height, weight, color of eyes, and social security account number, if a State collects such data.

Access to NDR Data

Essentially only individuals and state licensing agencies, including the District of Columbia, can obtain access to the NDR data. Since railroads have no direct access to the NDR data, FRA requires that individuals seeking certification as a locomotive engineer request that an NDR search be performed and direct that the results be furnished to the railroad. FRA requires that each person request the NDR information directly from NHTSA unless the prospective operator has a motor vehicle driver license issued by a state motor vehicle licensing agency or the District of Columbia. Participating states and the District of Columbia can directly access the NDR data on behalf of the prospective engineer.

Requesting NHTSA To Perform the NDR Check

The procedures for requesting NHTSA performance of an NDR check are as follows:

1. Each person shall submit a written request to the National Highway Traffic Safety Administration at the following address: Chief, National Driver Register, National Highway Traffic Safety Administration, 1200 New Jersey Avenue SE, Washington, DC 20590.

2. The request must contain:

- (a) The full legal name;
- (b) Any other names used by the person (e.g., nickname or professional name);
- (c) The date of birth;
- (d) Sex;
- (e) Height;
- (f) Weight;
- (g) Color of eyes; and
- (h) Driver's license number (unless that is not available).

3. The request must authorize NHTSA to perform the NDR check and to furnish the results of the search directly to the railroad.

4. The request must identify the railroad to which the results are to be furnished, including the proper name of the railroad, and the proper mailing address of the railroad.

5. The person seeking to become a certified locomotive engineer shall sign the request, and that signature must be notarized.

FRA requires that the request be in writing and contain as much detail as is available to improve the reliability of the data search. Any person may supply additional information to that being mandated by FRA. Furnishing additional information, such as the person's Social Security account number, will help to more positively identify any records that may exist concerning the requester. Although no fee is charged for such NDR checks, a minimal cost may be incurred in having the request notarized. The requirement for notarization is designed to ensure that each person's right to privacy is being respected and that records are only being disclosed to legally authorized parties.

Requesting a State Agency To Perform the NDR Check

As discussed earlier in connection with obtaining data compiled by the state agency itself, a person can either write a letter to that agency asking for the NDR check or can use the agency's forms for making such a request. If a request is made by letter the individual must follow the same procedures required when directly seeking the data from NHTSA. Since it would be more efficient for a prospective locomotive engineer to make a single request for both aspects of the information required under this rule, FRA anticipates that a state agency inquiry should be the predominant method for making these NDR checks. Requests to state agencies may involve payment of a nominal fee established by the state agency for such a records check.

State agencies normally will respond in approximately 30 days or less and advise whether there is or is not a listing for a person with that name and date of birth. If there is a potential match and the inquiry state was not responsible for causing that entry, the agency normally will indicate in writing the existence of a probable match and will identify the state licensing agency that suspended, revoked or canceled the relevant license or convicted the person of one of the violations referenced earlier in this appendix.

Actions When a Probable NDR Match Occurs

The response provided after performance of an NDR check is limited to either a notification that no potential record match was identified or a notification that a potential record match was identified. If the latter event occurs, the notification will include the identification of the state motor vehicle licensing authority which possesses the relevant record. If the NDR check results indicate a potential match and that the state with the relevant data is the same state which furnished detailed data (because it had issued the person a driving license), no further action is required to obtain additional data. If the NDR check results indicate a potential match and the state with the relevant data is different from the state which furnished detailed data, it then is necessary to contact the individual state motor vehicle licensing authority that furnished the NDR information to obtain the relevant record. FRA places responsibility on the railroad to notify the engineer candidate and on the candidate to contact the state with the relevant information. FRA requires the certification candidate to write to the state licensing agency and request that the agency inform the railroad concerning the person's driving record. If required by the state agency, the person may have to pay a nominal fee for providing such data and may have to furnish written evidence that the prospective operator consents to the release of the data to the railroad. FRA does not require that a railroad or a certification

candidate go beyond these efforts to obtain the information in the control of such a state agency, and a railroad may act upon the pending certification without the data if an individual state agency fails or refuses to supply the records.

If the non-issuing state licensing agency does provide the railroad with the available records, the railroad must verify that the record pertains to the person being considered for certification. It is necessary to perform this verification because in some instances only limited identification information is furnished for use in the NDR and this might result in data about a different person being supplied to the railroad. Among the available means for verifying that the additional state record pertains to the certification candidate are physical description, photographs and handwriting comparisons.

Once the railroad has obtained the motor vehicle driving record(s) which, depending on the circumstance, may consist of more than two documents, the railroad must afford the prospective engineer an opportunity to review that record and respond in writing to its contents in accordance with the provisions of § 240.219. The review opportunity must occur before the railroad evaluates that record. The railroad's required evaluation and subsequent decision making must be done in compliance with the provisions of this part.

■ 45. Revise appendix D to part 240 to read as follows:

Appendix D to Part 240—Identification of State Agencies That Perform National Driver Register Checks

Under the provisions of § 240.111 of this part, each person seeking certification or recertification as a locomotive operator must request that a check of the National Driver Register (NDR) be conducted and that the resulting information be furnished to his or her employer or prospective employer. Under the provisions of paragraphs (d) and (e) of § 240.111, each person seeking certification or recertification as a locomotive engineer must request that the National Highway Traffic Safety Administration (NHTSA) conduct the NDR check, unless he or she was issued a motor vehicle driver license by one of the state agencies that perform such checks, which today includes all state agencies and the District of Columbia. If the certification candidate received a license from one of the state agencies or the District of Columbia, he or she must request the state agency to perform the NDR check. Since these state agencies can more efficiently supply the desired data and, in some instances, can provide a higher quality of information, FRA requires that certification candidates make use of this method in preference to directly contacting NHTSA.

■ 46. Add appendix G to part 240 to read as follows:

Appendix G to Part 240—Application of Revocable Events

Part 240 and Part 242 Revocable Events	Application of Part 240 and Part 242 Revocable Events						
	Periods of Revocation					Employees with Multiple Certifications	
	Main Track				Other than Main Track Where Restricted Speed or the Operational Equivalent Is in	Main Track or Other than Main Track	
	1st Offense	2nd Within Months	3rd Offense Within 36 Months	4th Offense Within 36 Months	No Offense Within Previous 12 Months	Offense (as a Conductor)	Offense (as an Engineer)
1 Signal requiring complete stop before passing	30 Days	6 Months	1 Year	3 Years	Not Applicable	Employee May <u>Not</u> Work as an Engineer During the Period of Revocatio	Employee May <u>Not</u> Work as a Conductor During the Period of Revocation
2 Restricted Speed & Speed; 10 mph over							
3 Required Air Brake Test							
4 Occupying Main Track without Authority							
5 Disabling a Safety Device					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
6 Shoving Movements							
7 Equipment Fouling Adjacent Tracks							
8 Hand Operated Switches (Crossovers)					Not Applicable	Employee May Work as an Engineer During the Period of Revocation	Not applicable
9 Hand Operated Switches Connected to Main Track							
10 Hand Operated Crossover Switches (before & after movement)					Half Revocation Period	Employee May Work as an Engineer During the Period of Revocation	Not applicable
11 Hand Operated Derails							
12 Drug & Alcohol	Different periods of revocation may be applied (see 240.117, 240.119, 242.403, & 242.115)				Not Applicable	Employee May <u>Not</u> Work as an Engineer During the Period of Revocation	Employee May <u>Not</u> as a Conductor the Period of

Issued in Washington, DC.

Ronald L. Batory,
Administrator.

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