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SERVICE DATE - DECEMBER 24, 1998

DEPARTMENT OF TRANSPORTATION

FEDERAL RAILROAD ADMINISTRATION

49 CFR Part 244

FRA Docket No. SIP-1, Notice No. 1

STB EX PARTE NO. 574

SURFACE TRANSPORTATION BOARD

49 CFR Part 1106

REGULATIONS ON SAFETY INTEGRATION PLANS GOVERNING RAILROAD CONSOLIDATIONS, MERGERS, ACQUISITIONS OF CONTROL, AND START UP OPERATIONS; AND PROCEDURES FOR SURFACE TRANSPORTATION BOARD CONSIDERATION OF SAFETY INTEGRATION PLANS IN CASES INVOLVING RAILROAD CONSOLIDATIONS, MERGERS, AND ACQUISITIONS OF CONTROL

Agencies: Federal Railroad Administration, DOT, Surface Transportation Board.

Action: Notice of proposed rulemaking.

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**SUMMARY:** The Federal Railroad Administration (FRA) and the Surface Transportation Board (STB or Board), working in conjunction with each other, have developed complementary proposed regulations establishing procedures for the development and implementation of safety integration plans (SIPs) by railroads proposing to engage in certain specified merger, consolidation, or acquisition of control transactions with another railroad. The scope of the transactions covered under the two rules would be identical except that FRA would also require carriers engaged in “start up” transactions to prepare SIPs.

Under FRA’s proposed rule, railroads seeking to consummate a covered transaction would be required to file a proposed SIP with FRA. (A SIP is a written document explaining how each

step in implementing a contemplated transaction would be performed safely.) FRA would then review the SIP and advise the Board as to whether it provides a reasonable assurance of safety for the transaction. The rule would further require a railroad to have an approved SIP by FRA before it could execute operations over property subject to the transaction. Where the Board has been involved in authorizing the transaction, FRA would consult with the Board at all appropriate stages of implementation.

Likewise, rail carriers seeking to carry out a transaction within the Board's jurisdiction for which the Board has concluded such consideration is necessary, would be required to file a SIP with FRA and the Board when they file their application or exemption. FRA would review the SIP and file written comments with the Board's Section of Environmental Analysis (SEA). After reviewing the SIP, SEA's analysis, and comments provided by interested persons during the STB's environmental review process, the Board would then independently evaluate the transaction and decide whether to approve it. Should the Board approve the transaction, FRA would monitor the implementation of the SIP, consult with the Board at all appropriate stages of implementation, and advise the Board when the proposed integration has been safely completed. FRA would be authorized to exercise its full enforcement remedies should either FRA or the STB reject the proposed SIP or a railroad fails to implement the terms of an approved SIP.

The proposed rules are designed to enable the Board and FRA to ensure adequate and coordinated consideration of safety integration issues in covered rail transactions while minimizing the burdens on the participants. FRA and the STB believe that the joint rule will serve the public interest in promoting safety in the railroad industry, consistency in decisions, and efficiency in compliance, enabling the agencies to employ their areas of expertise to fulfill their statutory objectives.

**DATES:** Submit written comments on or before 60 days from date of publication in the FEDERAL REGISTER. Neither FRA nor the STB intends to hold a public hearing at this time on its respective proposed rules. Nevertheless, anyone who desires that either of the two agencies hold a public hearing must notify both the FRA Docket Clerk (either by telephone (202-493-6030) or by mail) and the STB Secretary ((202) 565-1650 or by mail), on or before 30 days from date of publication in the FEDERAL REGISTER, specifying which of the two agencies it wants to hold a public hearing, and explaining why a hearing should be required.

**ADDRESSES:** Because of the close interrelationship between FRA and the STB on these proposed rules, copies of any comments on the proposed rules should be served on both FRA and the STB. However, commenters should clearly identify the rule on which they are commenting by using the FRA Docket No. SIP-1 for comments on FRA's proposed rule, and STB Ex Parte No. 574 for comments on STB's proposed rule.

Procedures for written comments to FRA: Submit one copy to the Department of Transportation Central Docket Management Facility located in room PL-401 at the Plaza level of the Nassif Building, 400 Seventh Street, S.W., Washington, D.C., 20590. All docket material on the FRA rule will be available for inspection at this address and on the Internet at <http://doms.dot.gov>. (Docket hours at the Nassif Building are Monday-Friday, 10 a.m. to 5 p.m., excluding Federal holidays.) Persons desiring to be notified that their comments have been received by FRA should submit a stamped, self-addressed postcard with their comments. The FRA Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee.

Procedures for written comments to the STB: Send an original and 10 paper copies referring to STB Ex Parte No. 574 to Office of the Secretary, Case Control Unit, Surface

Transportation Board, 1925 K Street, N.W., Washington D.C., 20423. In addition to paper copies, the parties must also submit their pleadings to the Board on a 3.5-inch diskette formatted for WordPerfect 7.0 (or in a format readily convertible into WordPerfect 7.0). All pleadings submitted on diskettes will be posted on the Board's website ([www.stb.dot.gov](http://www.stb.dot.gov)).

**FOR FURTHER INFORMATION CONTACT:**

Jon Kaplan, Trial Attorney, Office of Chief Counsel, FRA, 1120 Vermont Avenue, Mailstop 10, Washington, D.C., 20590 (telephone: (202) 493-6053); and Evelyn G. Kitay, Office of the General Counsel, STB, 1925 K Street, N.W., Washington, D.C., 20423 (telephone: (202) 565-1563) [TDD for the hearing impaired: (202) 565-1695].

**SUPPLEMENTARY INFORMATION:**

**Joint FRA/STB Introduction**

FRA and STB are jointly responsible for promoting a safe rail transportation system.

Under Federal law, primary jurisdiction, expertise and oversight responsibility in rail safety matters are vested in the Secretary of the Department of Transportation, and delegated to the Federal Railroad Administrator. 49 U.S.C. 20101 *et seq.*; 49 CFR 1.49. FRA has authority to issue regulations to promote safety in every area of railroad operations and reduce railroad-related accidents and injuries. 49 U.S.C. 20101 and 20102. FRA has exercised its jurisdiction to protect the safety of railroad operations through the issuance and enforcement of regulations, partnering with railroad labor organizations and management of particular railroads to identify and develop solutions to safety problems, actively participating in STB rail proceedings, and monitoring railroad operations during the implementation of STB-approved transactions.

The Board is also responsible for promoting a safe rail transportation system. The rail transportation policy (RTP), 49 U.S.C. 10101, which was adopted in the Staggers Rail Act of

1980, Pub. L. No. 96-448, 94 Stat. 1895, and amended in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995), establishes the basic policy directive against which all of the statutory provisions the Board administers must be evaluated. The RTP provides, in relevant part, that, “[i]n regulating the railroad industry, it is the policy of the United States Government . . . to promote a safe and efficient rail transportation system” . . . [by allowing rail carriers to] “operate transportation facilities and equipment without detriment to the public health and safety . . . .” 49 U.S.C. 10101(8). The rail transportation policy applies to all transactions subject to the Board’s jurisdiction.

Thus, both FRA and STB are vested with authority to ensure safety in the railroad industry. Each agency, however, recognizes the other agency’s expertise in regulating the industry. FRA has expertise in the safety of all facets of railroad operations. Concurrently, the Board has expertise in economic regulation and assessment of environmental impacts in the railroad industry. Together, the agencies appreciate that their unique experience and oversight of railroads complement each other’s interest in promoting a safe and viable industry.

In the Conrail Acquisition proceeding,<sup>1</sup> the two agencies recognized the need to work together to ensure that the proposed transaction would be safely implemented. Both agencies took a proactive role in analyzing the complex transaction involving two large railroads — Norfolk Southern Railway Company (NS) and CSX Transportation, Inc. (CSXT) — in their acquisition of a third large railroad, Consolidated Rail Corporation (Conrail). FRA conducted a formal safety assessment and recommended to the STB that the railroads be required to file SIPs explaining how they intended to safely integrate their operations if the transaction were approved. The Board

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<sup>1</sup> CSX Corporation and CSXT Transportation, Inc., Norfolk Southern Corporation and Norfolk Southern Railway Company — Control and Operating Leases/Agreements — Conrail Inc. and Consolidated Rail Corporation, STB Finance Docket No. 33388 (Conrail Acquisition).

agreed with FRA's suggestion, and directed NS and CSXT to file SIPs. NS and CSXT subsequently filed SIPs detailing each step of the integration process in their operating plans. Since then, both railroads have continued to coordinate with FRA in implementing the SIPs consistent with the agency's guidelines, and FRA has advised the Board on each carrier's progress in executing the plans. The lessons learned from this process are that safety plays a significant role in a regulated transaction and must be addressed before integration commences.

Based on this experience, FRA and STB have decided to formalize this partnership in regulating future rail consolidation transactions among Class I, Class II, commuter, and intercity passenger railroads by issuing a joint notice of proposed rulemaking. The proposed rules are intended to accomplish the safety objectives of both agencies, avoid gaps and inconsistencies in the two agencies' regulatory requirements, and impose as little burden as possible on the participating parties.

### **Joint Discussion of Framework of the Proposed Rules**

FRA's proposed rule. FRA proposes to require certain railroads seeking to merge, consolidate, or acquire control of another railroad, or "start up" operations as a railroad to file proposed SIPs with FRA before consummating the regulated transaction. The transactions covered would be as follows: (1) a Class I railroad, a railroad providing intercity passenger service such as the National Railroad Passenger Corporation (Amtrak), or a commuter railroad seeking to acquire, merge, or consolidate with a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad; (2) a Class II railroad proposing to consolidate, merge, or acquire another Class II railroad with which it connects so as to involve the integration of operations; (3) any merger, consolidation, or acquisition resulting in operations that would generate revenue in excess of the Class I railroad threshold, except those transactions involving Class III freight only

railroads; and (4) all start up operations involving the establishment of a new line for passenger or freight service generating revenue that would exceed the Class II railroad threshold.

Such SIPs must systematically describe how each applicant railroad would integrate its operations in all areas of rail safety. FRA would then review the proposed SIPs to ensure that they provide a reasonable assurance of safety. Should the plans be approved, FRA would monitor the applicants' implementation of the SIPs until integration of operations is complete. Each railroad must carry out the specific measures addressed in an approved SIP at all times during the integration phase. The rule proposes authorizing FRA to exercise its enforcement remedies should a railroad conduct operations either without an approved SIP or in violation of the same. Enforcement may involve legal or equitable remedies, authorizing the agency to assess civil penalties or issue emergency or compliance orders against a recalcitrant railroad.

STB's proposed rule. The STB's proposed rule encompasses all of the transactions covered by FRA's proposed rule, other than "start up" operations. The STB's proposed rule builds on FRA's proposed rule by requiring a SIP containing information required under the FRA rule to be filed by an applicant railroad involved in a covered transaction with the STB as well as with FRA. The SIP would be required to be submitted to the STB, and FRA, no later than the date the application or exemption for authority to execute such a transaction is filed with the STB. The Board would conduct an environmental review of the application, and FRA would provide written comments on the adequacy of the SIP to the Board's SEA, which is responsible for preparing the Board's environmental documents. SEA would then include the SIP and any additions or revisions based on continued discussions with FRA in the draft environmental documentation. Should the Board approve the transaction and require compliance with a SIP, FRA, as contemplated by these rules, would work with the applicants to ensure safe integration of the applicants' operations in

accordance with the SIP, and any revisions or modifications agreed to by FRA. The rule proposes that FRA advise the Board on the status of implementation in accordance with an agreement reached between STB and FRA for each proceeding. FRA also has undertaken to advise the Board in writing when the proposed integration of applicants' operations has been safely completed.

Below are FRA's and STB's separate and independent statements of basis and purpose for the rules that each agency is proposing, including a section-by-section analysis and the text of each agency's proposed rules themselves.

#### **FRA's Statement of Basis**

Mergers and other rail transactions can result in safety problems if not carefully planned and implemented, as evidenced by recent mergers. The scope of rail mergers among, and acquisitions by, Class I railroads has changed dramatically in ways that present serious safety issues. As these carriers, and the consolidations in which they are involved, become larger and more complex, integrating operations, facilities, personnel, safety practices, and corporate culture while maintaining safe operations becomes more of a challenge. Two specific examples of shortcomings experienced by railroads carrying out "mega-mergers" are discussed below.

The mergers of the Union Pacific Railroad Company (UP) and the Southern Pacific Transportation Company (SP) (collectively referred to as UP/SP) and Burlington Northern Railroad Company (BN) and the Atchison, Topeka and Santa Fe Railway Company (ATSF) (collectively referred to as the BNSF) have demonstrated that integrating railroads into an even larger carrier present significant challenges in a great many areas, including: harmonizing information systems; coordinating marketing; training dispatchers; modifying operational practices and procedures; implementing personnel policies and bargaining agreements; integrating corporate cultures; determining appropriate staffing needs; and providing adequate rail facilities,

infrastructure and equipment. The following is a summary of the safety problems FRA identified with respect to these two mergers. FRA refers interested persons to the agency's regulatory evaluation for a more detailed discussion of these problems, a copy of which has been placed in the docket for FRA's proposed rule.

UP/SP, for instance, experienced severe congestion and related rail service difficulties in integrating the two railroads with their different histories, cultures, and operating practices. The post-merger force reductions of 1,500 or more employees, coupled with inadequate rail facilities, infrastructure and equipment, and increased traffic led to service delays and disruptions, and congestion of lines in Texas, as well as increased exposure to incidents and injuries as overworked supervisors and train crew employees tried to cope with the dilemma. As a result, the company suffered substantial financial losses and safety problems surfaced.

FRA believes that this spike in UP/SP accidents and incidents is attributed to management decisions that focused on reducing or consolidating existing labor resources and reaching operating efficiencies and productivity goals. For example, UP/SP offered voluntary separation awards to seasoned SP employees and authorized former UP employees to conduct operations on territory in which they lacked the training on operating rules or practices governing such operations. During its post-merger safety survey, FRA identified other deficiencies, including incompatible computer database systems, inadequate training of train dispatchers, and a failure to conduct alcohol and drug testing consistent with UP's program. These deficiencies culminated in a fundamental breakdown in sound railroad safety practices, exposing unforeseen problems.

Likewise, BNSF encountered operational and safety problems when it implemented its merger. FRA attributes the Cajon Pass freight train derailment in February 1996, which was shortly after the merger, to a lack of communication between railroad officials in the field and top

management officials in the corporate headquarters about the fact that two-way end-of-train telemetry devices (EOT) on BNSF trains operating over the pass did not function properly. Had the EOT device on the derailed train functioned properly, the accident may have been averted. See National Transportation Safety Board Accident Report PB96-916305 (Feb.1, 1996); FRA's final rule on Two-Way End-of-Train Telemetry Devices, 62 FR 278, 279, Jan. 2, 1997. The derailment of 4 locomotives and 45 freight cars (including 4 cars containing hazardous materials) resulted in the death of the conductor and brakeman, serious injury to the engineer, the burning of hazardous materials carried on the train, the evacuation of the surrounding community, and the closing of Interstate 15 for two days. Although BNSF was one of the first of the major railroads to equip its trains with EOT devices in response to a similar accident in 1994, pre-merger operating practices at BN did not ensure for correct use of the equipment. In many cases the rear-end device could not communicate with the head-end device. This fact was never reported to top management for correction. In other instances, train crews failed to use or activate the EOT equipment because of a lack of instruction or training. A properly prepared and implemented safety plan would have promoted communication that may have remedied these conditions.

FRA has identified other safety problems attributed to the BNSF merger. These include incompatible electronic database systems used by BN and ATSF, resulting in terminal offices generating inaccurate and incomplete train consist lists, which compromised the safety of train crews hauling the shipments; a lack of coordination between the train dispatching systems used by BN and ATSF when the merger was implemented, resulting in a breakdown in many functional areas endangering employees; following the merger, instructions were issued to identify trains by using the initials "BNSF" before the locomotive number, causing a potentially dangerous situation whereby two locomotives (one BN and the other ATSF) could be identified as the same

locomotive; and BNSF's failure to communicate operational and safety policies and procedures on the entire system when the merger went into effect. Rather, the railroad continued to use the individual standards established by the separate rail entities, thereby confusing dispatchers, train crews, and roadway workers when working on or operating equipment in unfamiliar territory. FRA believes that BNSF's inadequate safety planning before implementing this complex transaction contributed to these operational difficulties.

"Mega-mergers," consolidations, or acquisitions of control clearly present implementation challenges that necessitate careful planning to ensure safety. FRA believes that other rail transactions covered by its rule, each of which involves significant changes to existing rail operations, also pose serious challenges to rail safety. These challenges include establishing a uniform corporate safety culture, harmonizing information systems, training employees responsible for moving trains and maintaining equipment and infrastructure, and implementing standard operating practices and procedures governing railroad operations.

FRA has found that even small railroads experience difficulties when they attempt to integrate operations of an acquired property. To illustrate, the Wisconsin Central, Limited, the parent company of the Wisconsin Central Railroad (WC), a large regional railroad, purchased the Fox Valley and Western Railroad Company (FVW) in 1995. Before the merger, FVW lost many of its covered service employees due to buyouts, retirement, or other employment opportunities. Recognizing that the FVW had a shortage of available employees, WC migrated its managers to repair track, inspect rolling stock, and operate trains and engines on the FVW property. As a result, WC's accident rate remained static in 1995 and 1996, declining only from 13.79 to 10.54 per 1,000,000 train miles.

FRA attributes WC's lack of progress in reducing its accident rate to the migration directive. Managers were preoccupied with carrying out railroad operations instead of overseeing the workforce. WC's failure to conduct effective efficiency testing of employees or monitor closely field personnel on operating rules governing railroad operations jeopardized the integrity of the railroad system, and may have contributed to the elevated accident rate. Although WC, in partnership with FRA, has made tremendous advances regarding this issue, the agency believes that advance planning would have identified this shortcoming, necessitating the parent company to hire employees to meet this labor shortage and enable the managers to execute their traditional tasks.

Based on lessons learned from the UP/SP and BNSF mergers, the Board, with FRA assistance, has taken steps to ensure the safe implementation of rail transactions subject to its jurisdiction. As a result of safety and operational problems associated with the UP/SP and BNSF mergers that could have been avoided with sufficient advance planning, FRA carefully examined the filings of the applicants Norfolk Southern Railway Company's (NS) and CSX Transportation, Incorporated's (CSXT) submissions in the Conrail Acquisition proceeding before the Board. FRA's initial findings were not encouraging. After reviewing the applicants' safety plans, the agency determined that the railroads had not submitted comprehensive assessments of the safety effects of the proposed acquisition. Neither railroad presented a systematic plan explaining the manner in which it intended to implement the transaction. As a result, FRA requested the Board to require the carriers to provide detailed information on how they proposed to provide for the safe integration of their corporate cultures and operating systems, if the Board were to approve the proposed transaction.

The Board followed FRA's recommendation and required the applicants to file detailed SIPs pursuant to guidelines developed by FRA.<sup>2</sup> The railroads' submissions were made part of the environmental record in that proceeding and addressed in the ongoing environmental review process in that case. The SIPs were included in the Draft Environmental Impact Statement, to enable review and comment by interested persons. The Board's SEA also independently reviewed the plans.

FRA and SEA (in its Final Environmental Impact Statement (Final EIS)) concluded that applicants had satisfactorily addressed the safety implementation concerns presented by the transaction to date. Moreover, shortly before the Final EIS was issued, the Board entered into a Memorandum of Understanding (MOU) with FRA, to establish an ongoing monitoring process while the proposed Conrail Acquisition was being implemented.<sup>3</sup> The MOU clarifies the actions FRA and the Board will take to ensure that the SIPs are successfully implemented. Under the terms of the MOU, FRA will monitor, evaluate, and review NS's and CSXT's progress. The MOU provides that FRA may request action by the Board in exercising its oversight over the applicants to correct identified safety deficiencies resulting from the transaction. When requesting Board action, FRA will provide recommendations to remedy the deficiencies. FRA will also report periodically to the Board on the safety integration of the Conrail Acquisition, but not less than biennially. FRA will also report significant integration issues to the Board if and when they are identified. FRA's

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<sup>2</sup> Conrail Acquisition, STB Decision No. 52, served Nov. 3, 1997.

<sup>3</sup> In the Board's decision approving the Conrail Acquisition, the Board imposed environmental mitigation conditions requiring the applicants to (1) comply with their SIPs (and any modifications or updates needed to respond to evolving conditions) and (2) participate and fully cooperate with the ongoing regulatory activities associated with the ongoing safety integration process described in the MOU.

reporting will continue until FRA advises the Board in writing that the proposed integration has been safely completed.

Having developed a vehicle by which to evaluate safety integration issues in Conrail Acquisition, the Board issued an advanced notice of proposed rulemaking (ANPRM) requesting comments on the advisability of promulgating rules to extend this process to other rail transactions subject to the Board's jurisdiction.<sup>4</sup> 62 FR 64193, Dec. 4, 1997.

Based on the comments received in response to the ANPRM and the Board's experience with the SIP process in Conrail Acquisition, the Board issued a decision on July 27, 1998, finding sufficient merit to warrant further exploration of establishing regulations addressing the safe implementation of Board-approved transactions. The Board directed the Board staff to develop a joint notice of proposed rulemaking, addressing the issues that have arisen in this proceeding and that are of concern to FRA, and to submit the proposed rule for the Board's evaluation and approval before publishing the proposal.<sup>5</sup>

Following the issuance of the July 27, 1998, decision, the STB staff met informally with FRA staff and developed this joint rulemaking document. The proposed rules are designed to establish procedures to enable the Board and FRA to ensure adequate and coordinated

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<sup>4</sup> The Board has required the same type of showing in the proposed merger between Canadian National Railway Company and Illinois Central Railroad Company, which is now pending before the Board. Canadian National Railway Company, Grand Trunk Corporation, and Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central and Pacific Railroad Company, and Cedar River Railroad Company, STB Finance Docket No. 33556 (STB Decision Nos. 5 and 6, served June 23, 1998, and Aug. 14, 1998).

<sup>5</sup> This joint approach was predicated upon assurances by DOT that a joint process would not subject the exercise by the Board of its rulemaking authority in this proceeding to review by the Office of Management and Budget, in contravention of the STB's Congressionally mandated independence.

consideration of safety integration issues in rail transactions, while minimizing the burdens on the participants.

### **FRA's Section-by-Section Analysis For Its Proposed Rule**

FRA proposes to add part 244 to title 49, Code of Federal Regulations, prescribing regulations on safety integration plans governing railroad consolidations, mergers, acquisitions of control, and start up operations. Below is an analysis of the regulatory propositions proposed in the rule.

#### § 244.1 Scope, Application, and Purpose.

Section 244.1(a) states the types of transactions and the parties involved in such transactions that would require the filing of a SIP. Section 244.1(a)(1) provides that a Class I railroad, a railroad providing intercity passenger service, or a commuter railroad seeking to acquire, merge, or consolidate with a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad would be subject to this part. A Class II railroad proposing to consolidate, merge, or acquire another Class II railroad with which it would connect so as to involve the integration of operations would require the filing of a plan. Also, any merger, consolidation, or acquisition, excluding a transaction involving a Class III freight only railroad, resulting in operations that would generate revenue in excess of the Class I railroad threshold would be governed by part 244. Finally, all start up operations as defined by this rule would trigger part 244.

FRA intends to regulate significant transactions that left unregulated, may compromise railroad safety. The agency believes that railroads generating operating revenue, measured in 1991 dollars, in excess of \$250 million per year, *i.e.*, the Class I railroad threshold, are entities transporting a large volume of freight that need to be scrutinized when they want to join with

another large-scale carrier. Given the problems identified with recent Class I mergers, FRA proposes regulating Class I transactions.

Correspondingly, FRA believes that passenger railroads, whether they are intercity or commuter operations, that participate in a regulated transaction are sophisticated operations requiring Federal Government oversight. Class II railroads seeking to execute a transaction in which they would directly interchange traffic and all transactions, excluding Class III freight only railroads, in which the consummation of operations would produce revenue in excess of the Class I revenue threshold, irrespective of geographic limitations, would also be regulated. Class II railroads have operating revenues, measured in 1991 dollars, between \$20 million and \$250 million per year and include such carriers as WC, Florida East Coast Railway, and Montana Rail Link, Inc. FRA posits that these entities seeking to directly interchange freight with each other present a complex transaction involving the transfer or sharing of employees or equipment. Similarly, large-scale transactions generating revenue in excess of \$250 million per year would create a railroad of complex magnitude. Again, the rule proposes requiring plans from these applicants, setting out the manner and methods in integrating such transactions.

The proposed rule would also govern start up railroads. “Start ups” involve the establishment of a new rail line for intercity or commuter passenger service or freight service generating revenue that would exceed the Class II railroad threshold. See proposed Section 244.9 for the definition of “start up operation.” Commencing railroad operations present the development and deployment of an infrastructure system never before tried or tested. The use of rail equipment, track, and signals, and the employment of operating rules governing the movement of trains and designation of roadway work demands familiarity with the new system and advance planning of

operations scheduled to be conducted. A SIP captures the need to forecast the step-by-step implementation of a new line from construction to completion.

At this time, FRA does not intend to regulate the merger of Class II railroads that do not directly interchange traffic or transactions involving terminal railroads; rail line sales; or trackage rights requests. The proposed rule further does not cover Class III freight only railroads, *i.e.*, those railroads that generate revenue, measured in 1991 dollars, of less than \$20 million per year. The agency believes that these railroads engage in transactions that are not so complex or hazardous as to warrant regulation. Nevertheless, FRA solicits comments from interested parties as to whether the final rule should cover these transactions, including transactions involving Class III railroads over which passenger service would be provided, and whether the railroads involved should prepare “full blown” SIPs or meet lesser safety informational requirements. The comments should articulate a detailed rationale for regulating these transactions and the types of information that should be required together with evidence of any consequences in leaving these transactions unregulated.

Paragraph (b) of this section explains the basis for the rule. SIPs are designed to achieve a reasonable level of safety while regulated transactions are being implemented. The source of the rule is premised on the complexity of large transactions and the need to plan ahead before carrying out such activities. FRA is confident that plans setting out how railroads will merge, consolidate, acquire another railroad, or start up business will promote efficiency, economy, and safety in the railroad industry.

Section 244.1(c) advises applicants that part 244 applies only to FRA’s disposition of a regulated transaction. It does not apply to the Board’s process in reviewing transactions subject to its jurisdiction. See 49 CFR part 1106 for regulations governing transactions regulated by STB.

The rule proposes that transactions within the Board's purview would require a SIP process involving both FRA and STB before a railroad may consummate a proposed transaction and conduct operations over the affected property.

#### § 244.3 Preemptive Effect.

Section 244.3 informs the public as to FRA's views regarding the preemptive effect of the its proposed rule. Section 20106 of title 49, United States Code, provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard, 49 U.S.C. 20106 preempts any State regulatory agency rule covering the same subject matter as these regulations proposed.

#### § 244.5 Penalties.

Section 244.5 identifies the penalties that FRA may assess upon any person, including a railroad, or employees of a carrier, that violates any requirements of this part. The penalty provision, which parallels penalty provisions contained in other FRA-issued regulations, is authorized by 49 U.S.C. 21301, 21304, and 21311. In essence, any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500 and not more than \$11,000 per violation. FRA may assess civil penalties against individuals only for willful violations, and it may assess a penalty of up to \$22,000 per violation where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury. Each day a violation continues constitutes a

separate offense. A person may be also subject to criminal penalties for knowingly and willfully falsifying entries or reports required by these regulations.

Paragraph (b) of § 244.5 provides that FRA may invoke any of its other enforcement remedies available under the safety laws if a railroad fails to comply with this part. In particular, the agency advises the regulated community that it is authorized to issue an emergency or compliance order or seek the issuance of an injunction prohibiting certain conduct should a railroad violate § 244.21 of this part. See, e.g., 49 CFR part 209, Appendix A. For example, should FRA reject a proposed SIP and an applicant commence railroad operations on property subject to the plan anyway, the agency may order the railroad to cease operations until it receives approval of the plan.

FRA believes that the inclusion of penalty provisions for failure to comply with the regulations is important to ensure that applicants obtain agency approval of a proposed SIP before implementing a regulated transaction and execute all measures provided in an approved plan. The final rule will include a schedule of civil penalties in Appendix A to 49 CFR part 244, to be used in connection with this part. Because such penalty schedules are statements of policy, notice and comment are not required before their issuance. See 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to recommend the appropriate penalties corresponding to the relative seriousness of each type of violation.

#### § 244.7 Waivers.

Proposed § 244.7 sets forth the procedures for seeking a waiver of compliance with the requirements of FRA's rule. A request for such a waiver may be filed by any party subject to part 244. FRA will conduct its own independent investigations to determine if an exception to the general criteria can be made without compromising or diminishing rail safety.

In filing a petition for a waiver, FRA respectfully refers an interested party to the requirements enunciated at 49 CFR part 211 for the procedures that must be followed. FRA recognizes that certain transactions may arise that the agency did not intend to regulate. FRA would thus entertain such a petition, provided that the petitioner can show that the transaction at issue involves an incidental impact on rail operations that would not pose a risk to rail safety. The burden rests with the entity requesting the waiver to meet this criterion.

FRA may grant the petition should it determine that it is in the public interest and is consistent with rail safety. FRA also reserves the right to institute any conditions on the petition as it believes are necessary to promote rail safety. The agency advises the regulated community that it enjoys plenary authority to approve or reject any petition for a waiver of this rule and its decision is “agency discretion by law.” 5 U.S.C. 701(a)(2); see also Heckler v. Chaney, 470 U.S. 821 (1985).  
§ 244.9 Definitions.

This section contains an extensive set of definitions introducing the regulations. FRA promulgates these definitions to clarify the meaning of important terms as they are used in the text of the proposed rule. The proposed definitions are carefully worded to minimize any possible misinterpretation of the rule. Several terms introduce new concepts not published in any other FRA regulations. These definitions require further discussion as set forth below.

The term “amalgamation of operations” is intended to cover the migration, combination, or unification of one set of railroad operations with another set of railroad operations. For example, if a purchasing railroad intends to change personnel responsible for conducting field operations, or replace, rehabilitate, refurbish, or renovate existing track, bridges, radio, or signal and train control systems, then it is amalgamating operations as defined. Similarly, an applicant deploying, relocating, or transferring roadway equipment or rolling stock from one railroad property to

another is conducting activities within the purview of this definition. In other words, amalgamation is triggered when a railroad allocates human or capital resources that impact operations from one entity to another.

The definitions of “applicant” and “Class I or Class II railroad” are self-explanatory. “Applicant” covers a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad that seeks to consummate a regulated transaction. “Class I or Class II railroad” is defined by regulations issued by the Board, which are found at 49 CFR 1201; General Instructions 1-1. Generally, STB classifies a Class I railroad as having an annual carrier operating revenue of \$250 million or more, and a Class II railroad as having an annual carrier operating revenue between \$20 million and \$250 million. (A Class III railroad has an annual carrier operating revenue of less than \$20 million.) In accordance with the Board’s regulations, the annual carrier operating revenue is measured in 1991 dollars.

The term “best practices” means the safest and most efficient rules or instructions governing rail operations that are issued by a railroad. FRA does not intend to substitute its judgment for that of a railroad in determining safety and efficiency. Rather, the agency will defer to an applicant’s understanding and application of its operating rules and practices that promote these interests.

The definition of “corporate culture” is new. As proposed, the term means the attitudes, commitments, directives, and practices of railroad management with respect to safe railroad operations. FRA intends corporate culture to encompass a railroad management’s attitudes, directives, planning and resource allocations on the subject of safety. Corporate culture thus represents a company’s attitude toward safety as identified in its operating rules and practices, and its policies in eliminating individual deficiencies and planning for a harmonious integration of railroad operations. FRA solicits comments whether persons agree with this definition.

“Control,” “consolidation,” “merger,” and “start up” are terms describing the types of transactions governed by this part. The definition of “control” is borrowed from the statutory definition at 49 U.S.C. 10102. FRA intends to regulate a proposed transaction in which one or more railroads seek to acquire or exercise control of property. One example is NS’s and CSXT’s acquisition of Consolidated Rail Corporation (Conrail) in 1998, which involved the dividing up of an existing Class I railroad by two separate Class I railroads. NS and CSXT will now own and operate over property that was once possessed by an independent carrier. Such a transaction fits within the meaning of “control.”

As defined in this part, “merger” means an equity purchase of a Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad by another Class I or Class II railroad, a railroad providing intercity passenger service, or a commuter railroad. The transaction must involve the purchase of assets and shareholder equity, and assumption of liabilities held by the railroad acquired. Similarly, “consolidation” exists when a railroad takes over another railroad’s assets and/or liabilities with the resulting entity having the combined capital, powers, and subsidiaries and affiliates, if applicable, of all of its individual constituents.

Put another way, a merger occurs when a corporation, known as the surviving corporation, buys another corporation, with the result that the former company’s existence continues whereas the latter company’s existence ceases. This principle is best expressed in the following equation: A Corporation + B Corporation = A Corporation. In contrast, a consolidation occurs when two or more constituent corporations cease to exist and a new consolidated corporation emerges. This principle is best expressed in the following equation: A Corporation + B Corporation = C Corporation. In either transaction, the surviving or consolidated corporation takes over the assets of the former constituent corporation and assumes its liabilities.

A “start up operation” exists when an entity initiates railroad operations on a rail line or lines involving intercity or commuter passenger service or freight service in excess of the Class II railroad threshold, i.e., revenue in excess of \$20 million per year.

The definition of “railroad” is based on 49 U.S.C. 20102(1) and (2), and encompasses any person providing railroad transportation directly or indirectly, including a commuter rail authority that provides railroad transportation by contracting out the operation of the railroad to another person, as well as any form of nonhighway ground transportation that runs on rails or electromagnetic guideways, but excludes urban rapid transit not connected to the general system.

The term “Safety Integration Plan” means a comprehensive written plan submitted to and approved by FRA in compliance with this part that details the measures for ensuring safe railroad operations during implementation of a proposed transaction and assures compliance with the safety laws. FRA intends a SIP to be a formal written document that systematically describes how each element set out in § 244.13 will be integrated safely into the operations of the applicant railroad. The SIP must comprehensively consider and analyze all significant sources of increased safety risk, and discuss the sound procedures to be adopted for implementing the transaction.

Finally, FRA borrows the definitions of “environmental documentation” and “Section of Environmental Analysis” from the definitions enumerated in the Surface Transportation Board’s portion of the joint rule. The meaning and application of these definitions may be found at 49 CFR part 1106, which is the Board’s counterpart of this rule.

#### § 244.11 Contents of a Safety Integration Plan.

Proposed § 244.11 sets out the structure of the SIP an applicant must file. The litany identifies elements that must be addressed in each subject matter area provided in § 244.13. In general, the regulatory proposition requires a railroad to prepare a roadmap or play book

explaining the practices and procedures, financial commitment, and time frame for integrating or commencing field operations subject to the transaction.

Paragraph (a) of § 244.11 is bifurcated based on the type of transaction proposed. A railroad proposing to start up operations must address the physical and operational characteristics of the new line or lines and the best practices to be adopted. For instance, an applicant intending to construct a new line must provide information about the terrain over which operations will commence and the establishment of divisions and districts governing rail operations. In contrast, an applicant seeking to merge, consolidate, or acquire control of another railroad will be required to explain the different characteristics between itself and the other railroads subject to the transaction. In either case, the applicant must address the best practices of the resulting transaction, meaning the safest and most efficient rules employed in the railroad industry.

Next, the regulation requires a specific description of the manner and method of operations proposed in a step-by-step chronology. Again, an applicant must anticipate how it will safely implement the proposed transaction for each subject matter area defined. The plan must also describe the human and capital resources appropriated to carry out the proposed transaction, the measures to comply with the safety laws, and a proposed timetable, from start to finish, to implement the transaction. FRA believes that the contents serve as a foundation for implementing the plan. The contents must be descriptive, coherent, and logical to lend credibility to the plan. FRA posits that a well organized proposal setting out a plan of execution of detailed action items will serve the agency's and railroad's interest in safely integrating operations.

§ 244.13 Subjects to be Addressed in a Safety Integration Plan Involving an Amalgamation of Operations or Start Up Operations

This section contains the substantive information that must be discussed in a SIP when a railroad seeks to amalgamate operations in a regulated transaction. As explained above, a transaction in which a railroad intends to transfer employees or rolling equipment from one entity to another, or make changes in existing infrastructure, precipitates an amalgamation under this part. FRA believes that these operational changes are complex in nature and require thoughtful analysis before they are carried out. A comprehensive assessment of certain subject matter areas serves to direct applicants to focus on instituting a safe transition of railroad operations. Again, the premises are that advance planning, systematic thinking, and a written plan promote safe implementations.

The subject matter areas are divided into two categories — physical safety and cultural environment. The physical safety rubric contains seven functional areas, which are track, bridges, and structures; dispatching centers; operating practices; car and equipment maintenance and inspection; signals and train control; hazardous materials; and highway-rail grade crossings. FRA has identified these areas as critical disciplines that are impacted by a regulated transaction when operations are amalgamated. To protect the integrity of rail operations, FRA proposes that these elements be addressed in a plan.

Paragraph 244.13(a) requires each applicant to explain the basis for its safety culture. Specifically, the rule proposes requiring a railroad to identify and describe differences in corporate cultures for each safety-related area; describe how these cultures lead to different practices governing rail operations; and explain how the proposed integration of corporate cultures will result in a system of “best practices” when the proposed transaction is implemented.

Historically, each railroad has possessed distinctive ways of conducting its business that its employees identify as its way of managing affairs, and that they are usually inclined to consider the correct or best way of executing tasks. Mergers, consolidations, acquisitions, and start up

operations are complicated transactions, requiring management and labor to embrace a culture that powerfully emphasizes safety and good communications among management, employees, and the employees' union representatives. It is imperative that the applicant describe how it intends to produce the desired corporate culture that underscores safe railroad operations.

FRA believes safety culture is an instrumental element in achieving rail safety. For purposes of the proposed rule, the term "corporate culture" means management's attitudes, directives, planning, and resource allocations on the subject of safety. These elements ultimately provide the vision and direction for all levels of railroad employees and influence their training, health, morale, and safety practices and habits. The safety culture of U.S. railroad companies, especially the major Class I railroads, is established by the railroad's chief executive officer and permeates throughout the entire rank-and-file of employees. Management's attitudes, directives, planning, and resource allocations all reflect the mission and vision of a company, and influence the training, morale, and safety practices of carrier employees. Successful integration requires a railroad to evaluate its underlying priorities, practices, and philosophies during the transition phase. For example, FRA views UP's and BNSF's immediate post-merger reduction in employment to reach financial efficiencies created a loss of talent and institutional knowledge for the two railroads. This shortcoming led to a lack of familiarity with railroad operations, employee misunderstandings, and communication gaps, increasing the railroads' exposure to accidents, incidents, and fatalities. FRA anticipates that a SIP addressing an applicant's attitudes and practices toward safety will enhance the harmonious integration of a unified system of operations.

Against this background, a railroad is required to discuss the different cultures within the various disciplines and explain how it will adopt the "best practices" when the proposed transaction is implemented. Besides reviewing the safest practices to be instituted, FRA is interested in

learning the methodology employed in developing the final work product. An applicant is thus encouraged to trace the steps taken to reach the ultimate measures to be adopted.

Most important, an applicant must designate safety as its highest priority. Although productivity and efficiency drive the transaction, there must be commitment to rail safety at all levels of a corporate organization. Evidence has shown that when productivity eclipses safety, congestion and service difficulties arise, leading to operational hazards and increases in derailments and collisions. FRA believes that a systematic analysis of a railroad's safety culture will center the applicant's attention on safety, eliminating the "root cause" of accidents and incidents.

Communications patterns about safety matters are especially important. When safety information is not communicated clearly and promptly both up and down the corporate hierarchy, safety problems ensue. That said, FRA invites the regulated community to comment on whether the agency should regulate "corporate culture" at all, and an applicant's ability to apply this element to its business practices and the manner necessary to comply with this requirement.

Section 244.13(b) requires each applicant to discuss its training and educational programs to ensure that its employees and supervisors responsible for field operations are proficient and qualified. The specific employees include train and engine service employees, dispatchers and operators, roadway workers, signal employees, mechanical officials, and hazardous materials personnel. These employees are on the "front lines" of the industry and need to be familiar with all aspects of their occupations. A plan should include details identifying the scope and depth of the type of training operating personnel will receive. Training should also discuss the resources allocated to conduct and complete training, and a proposed schedule for accomplishing this task.

Proposed paragraph 244.13(c) provides the operating practices information that must be contained in a SIP. There are five elements that are within the discipline — operating rules,

accidents/incidents, hours of service laws, and the alcohol and drug and locomotive engineer qualification and certification programs. Each requirement is self-explanatory as enumerated in the regulatory text and must be addressed in a plan.

FRA is convinced that railroad safety is best ensured by the strict adherence to operating rules established by a railroad. Given that many railroads either issued their own independent operating rules or adopted operating rules published by the Northeast Operating Rules Advisory Committee or General Code of Operating Rules, operations are being governed by different sets of rules. To ensure that operations are properly executed, an applicant must specify the operating rules, timetables, and timetable special instructions that will govern these activities.

A railroad must also identify the reporting procedures for any reportable accident under 49 CFR part 225, and its policy on harassment and intimidation, including a copy of its internal control plan as required by 49 CFR 225.33. The applicant must address measures it will take to comply with the Railroad Accidents/Incidents regulations found at 49 CFR part 225, administer the monthly reporting requirements as mandated by law, and inform employees about procedures available for those who perceive intimidation and harassment under part 225.

The rule would further require a railroad to identify its post-accident toxicological testing, reasonable cause testing, and random alcohol and drug testing programs as required under 49 CFR part 219 and how it intends to integrate operations subject to the transaction with the existing programs. An applicant would also be required to set out the qualification and certification program of locomotive engineers to be employed and the manner in which it will integrate the new divisions with the program. Finally, the plan must discuss an applicant's proposed measures to comply with the hours of service laws and hours of service recordkeeping regulations and FRA's interpretations of the same. The plan must also address efforts taken to minimize fatigue of covered

service employees, i.e., employees who perform train and engine, dispatching, or signal system service. FRA believes that employee fatigue has caused or contributed to accidents and incidents precipitated by human error. Employees who are well rested and refreshed are less likely to commit errors affecting rail operations. Thus, initiatives taken to minimize fatigue enhance safety in the field, necessitating its inclusion in a SIP.

Section 244.13(d) would require a railroad to identify the qualification standards for employees who inspect, maintain, or repair rolling stock and designate the facilities that will repair the rolling equipment. A plan must provide adequate assurances that mechanical officials who are responsible for performing required inspections and tests of the equipment are proficient in mechanical practices to safeguard the use of freight or passenger cars and locomotives on a railroad. The plan must further disclose the inspection facilities to be employed for repairing rolling stock. This provision will ensure that an applicant plans which roundhouses will be retained to maintain equipment in compliance with the safety laws while efficiently using an existing engine or car fleet. Paragraph (e) of § 244.13 states that a railroad must identify the signal and train control systems employed, and maintenance, capital improvement, and research and development projects planned for signal and train control operations. FRA is interested in reviewing a SIP proposing to migrate or integrate an acquired property or line segment system with an existing signal system. Where an incompatibility between signal and train control systems is found, safety may be jeopardized. The plan should discuss a railroad's proposal to reconcile or harmonize dissimilar signal practices and standards to avoid any possible misunderstandings or miscommunications that may impact safety. Likewise, § 244.13(f) requires a railroad to identify the maintenance and inspection programs for track and bridges. The plan should provide

assurances that the structures are safe or will be repaired, rehabilitated, or replaced, if necessary, to ensure the integrity of the property.

Section 244.13(g) proposes requiring an applicant to address hazardous materials in a SIP. There are two parts to this requirement. First, an applicant must set out a hazardous materials inspection program covering field inspection practices, communication standards (i.e., shipping descriptions, certification, marking, labeling, placarding, and emergency response information), and emergency response procedures. Second, the railroad must explain its development and delivery of an automated system for records of hazardous materials shipments. FRA asserts that a SIP must include this information to enable the agency to assess the safety of the railroad's hazardous materials transportation system. A plan quantifying inspections of hazardous materials shipments, shipping papers, and emergency response measures provides a baseline to evaluate the integrity of the program. Concurrently, information about the computer software system retaining hazardous materials data is vital to determine the reliability and accuracy of the data entered and retained. FRA expects railroads embracing the latest technology to install automated systems offering "fail-safe" features to prevent the entry of "freight all kinds" for hazardous materials shipments or incorrect waybills generated from electronic data interchange or Standard Transportation Commodity Codes (STCC) information received from a shipper. The program deployed must make information on hazardous materials shipments immediately available for inspection and photocopying by FRA officials during normal business hours. Above all, an applicant must ensure that the automated system provides timely availability of hazardous materials shipping papers to train crews, clerical personnel, and agency officials.

Paragraph 244.13(h) sets out four criteria on dispatching operations that a plan must address. They are the dispatching system to be adopted, the migration of the existing system to the

adopted one, if applicable, the qualifications for determining duties performed by dispatchers or operators, and the volume of work assigned to dispatchers or operators. Undoubtedly, train dispatching is an integral element in moving trains, engines, and rolling equipment in a safe and efficient manner. To accomplish this task, a railroad must discuss which dispatching system or systems will direct traffic on the property subject to the transaction. The plan should address how a dispatching system will be integrated in a deliberate manner to prevent service disruptions and the measures to be taken to combat excess service. Excess service fatigues dispatchers and operators, and railroads are encouraged to develop initiatives reducing workload capacities to further reduce the risk of dispatcher error.

Highway-rail grade crossing safety is another element that a SIP must address. The plan must provide a program discussing grade crossing signal system safety, emergency response measures, public education initiatives, and proposals to improve grade crossings and grade crossing system warning devices. Statistics show that the vast majority of fatalities and injuries during railroad operations occur at grade crossings due to collisions or trespass incidents. It has been FRA's experience that a railroad consummating a transaction will increase traffic on certain designated lines. Before increasing traffic density in a territory, the carrier needs to consider its impact on safety at grade crossings. Accordingly, an applicant should discuss its commitment to improve existing grade crossing signal systems and warning devices and educate the public about grade crossing safety in its plan. FRA believes that a prevention program will elevate rail safety by reducing accidents and injuries occurring at crossings.

Section 244.13(j) covers personnel staffing. A SIP must provide data on the number of employees, both current and proposed, for certain occupations associated with railroad operations. The eight specific tasks are enumerated in the regulation. FRA believes that immediate staff

reductions in these areas may be detrimental to safety. Institutional knowledge is essential to ensure a smooth transition in operations. Unilateral dismissals will adversely impact certain crafts by placing more responsibility on less trained or experienced personnel. This feature, coupled with an increased workload, may place undue pressure on these employees to execute tasks. Consequently, there is a greater likelihood of human error, thereby compromising safety in the field. Therefore, a railroad needs to plan the number of employees necessary to carry out the assignments. The proposed rule in no way establishes a guideline or yardstick for staffing purposes. Rather, the rule requires an applicant to contemplate staffing levels and their impact on discharging operations. A plan should simply provide a nexus between staffing needs and adequate rail safety.

Paragraph 244.13(k) requires an applicant to set out its capital investment program. The program must describe the railroad's intended investments in the company's infrastructure, including its track and structures, signals and train control systems, and locomotives, freight cars, and other forms of rolling stock. The plan must also address changes to existing investment forecasts and explain those differences.

Capital investment requires advance planning, which is the root of this proposed rule. Transition in operations necessitates improvement in existing infrastructure to increase capacity, volume, and efficiency, and enhance safety. The rule would require an applicant to identify a blueprint for allocating resources serving these objectives. FRA anticipates that a SIP directing a railroad to appropriate capital for infrastructure needs would improve performance while eliminating systemic deficiencies that impair a transportation network.

Proposed section 244.13(l) provides that an applicant must describe the relationship of freight and passenger service on railroad lines subject to a regulated transaction. For instance, if an

intercity passenger or a commuter railroad operates on property that is within the terms and conditions of a proposed merger, consolidation, or acquisition, the railroad must address the manner in which it will coordinate passenger and rail service to maintain a safe co-existence between the two services. A SIP should explain the level of communication between a freight railroad and a passenger railroad about the operating rules and practices that will govern these operations should the transaction be approved. FRA encourages applicants to discuss their emergency response programs, joint safety exercises, and efforts to coordinate automated systems programs in their plans. The SIP, in short, must identify the potential safety impact on the services and the measures directed to minimize any consequences.

Proposed paragraph 244.13(m) identifies the final element that must be discussed in a plan. That element — information systems compatibility — is essential for integrating an applied technology system and providing continuity in an information database network that ensures safe operations and protects customer service. An applicant must address the steps it intends to execute to provide data on train consists, freight car and locomotive movements and movement history, dispatching operations, accident/incident reporting and recordkeeping requirements, and emergency cessation of operations. The information system must provide a single interface of data with a railroad's customers, transmitting and receiving information without interruption. Such planning requires the coordination and consensus of the parties in a regulated transaction, enabling interested persons and FRA officials to track the movement of shipments and equipment and download information to determine compliance with the safety laws. Thoughtful and careful planning will ensure a smooth and safe transition of operations in the technology area.

§ 244.15 Subjects to be Addressed in a Safety Integration Plan Not Involving an Amalgamation of Operations or Start Up Operations.

The rule proposes requiring a railroad engaging in a transaction that does not involve an amalgamation of operations or start up operations to file a more limited SIP. Those subject matter areas are training (§ 244.13(b)), personnel staffing (§ 244.13(j)), and capital investment (§ 244.13(k)).

FRA submits that these transactions do not involve a change in rail operations because there is little, if any, migration of personnel or equipment. FRA's principal interest in reviewing and approving SIPs is to secure commitments from a railroad when infrastructure changes are expected, which impact operations and correspondingly, safety. The transactions described under this proposed section are akin to "paper transactions" rather than "operational transactions," meaning that aside from revisions to corporate letterhead, any changes in operations are minimal. In an abundance of caution, however, FRA believes that a plan addressing training, employment, and capital investment would be instructive for an applicant to be sensitive to topics that impact rail safety in general. FRA welcomes comments from interested persons as to whether railroads engaging in these transactions should be required to file a more limited SIP, or a SIP at all.

§ 244.17 Procedures.

Proposed § 244.17 sets out the procedures applicants must follow in filing a SIP with FRA. Paragraph 244.17(a) explains that a railroad must file a SIP with FRA and, for those transactions within the Board's jurisdiction, file the same with STB no later than the date it submits its application or exemption to the Board. FRA, however, intends to make itself available to work with an applicant before it files its proposed SIP on the elements that must be addressed in the plan. To illustrate, the agency extended its assistance to the Canadian National Railway Company (CN) before it filed its application to purchase the Illinois Central Railroad Company (IC). The agency met and conferred with CN corporate officials about its SIP and delineated specific subject matter

areas that the plan had to discuss to satisfy FRA's concerns. As a result, CN was better positioned to file an acceptable SIP with the agency and the Board within the STB's statutory time frame.

FRA will review the proposed SIP and provide comments, if any. The rule provides that the applicant must file additional information supporting its plan should FRA require the same. FRA expects that the applicant and agency will engage in an iterative process to resolve any questions about the foundation and implementation of the plan.

Paragraph 244.17(d) proposes requiring FRA to issue its findings of fact and conclusions on the proposed SIP to the STB for those transactions requiring Board approval. (FRA's standard of review of a proposed SIP is discussed below.) FRA (and STB in its proposed rule) propose requiring FRA to submit its report to the Board's SEA at a date sufficiently in advance of the Board's issuance of the draft environmental documentation in the case to permit incorporation in the draft environmental record. The schedule will enable STB to issue its draft environmental documentation, which will incorporate FRA's comments. If the rail carriers have not produced a SIP that is fully acceptable to FRA, FRA's filing to the Board will note the progress that has been made and the areas that the carriers still need to address. FRA intends to continue working with the applicants after the SEA files its draft environmental documentation, but before the Board disposes of the applications. This process was followed in the Conrail Acquisition case and the proposed merger of CN and IC. FRA believes that a flexible response is necessary to enable an applicant to complete an acceptable comprehensive plan.

Section 244.17(e) requires an applicant to coordinate with FRA in carrying out the transaction in accordance with the SIP, assuming FRA and, if applicable, STB approve the proposed plan. In other words, the rule proposes FRA to continue exercising oversight of a railroad after its proposed SIP is approved to ensure that it correctly implements the plan. FRA believes

that safety is a continuum that begins with the filing of a proposed SIP and continues until the transaction is implemented consistent with the plan. Therefore, FRA would monitor a railroad's performance in carrying out the plan until integration is complete. In furtherance of its role, FRA envisions consulting with the Board at all appropriate stages of the SIP implementation, and advising the Board on the status of the implementation process consistent with a MOU executed between FRA and STB. FRA's communication with the Board would continue until integration is complete. The interplay between FRA and the Board is set out in paragraph 244.17(f). These reports will enable the STB to exercise its oversight of transactions that it approves.

§ 244.19 Disposition.

Section 244.19 addresses FRA's review and approval process of a proposed SIP. Paragraph 244.19(a) enumerates the agency's standard of review. The plan must be thorough, complete, and clear, and detail a logical and workable transition from conditions existing before the proposed transaction to conditions intended to exist after the transaction is consummated. Put another way, the plan must explain in a comprehensive manner how the railroad intends to go from start to finish in carrying out the proposed transaction. FRA underscores the importance of addressing each of the subject matter elements within the framework of the SIP's contents as provided in § 244.11.

FRA then would evaluate the SIP to ensure that it provides a reasonable assurance of safety at every step of the proposed transaction. The plan must be sufficient to comply with the safety laws and otherwise provide for safe railroad operations, and rational to satisfy expectations of integration of operations. FRA emphasizes that it has no intention of operating the railroad or questioning management decisions implementing the SIP. Instead, the agency sees its role as conducting a rational basis review of the SIP, meaning that the plan must be reasonable. Should

the SIP prove satisfactory, FRA would issue its notice of approval. Approval is conditioned on the applicant's successful execution of all of the subject matter elements in the plan, including all later developments subject to FRA approval that could not be completed before the agency's approval of the plan.

Finally, the rule proposes authorizing a railroad to amend its SIP with FRA's approval or for FRA to require a railroad to amend its approved plan should circumstances dictate. Plan approval is contingent upon fulfillment of the elements enunciated in the plan and execution of operations that were unforeseen when the proposed SIP was filed. For example, NS and CSXT in the Conrail Acquisition, and CN and IC in their intended merger continue to update their respective plans when they identify resources, commitments, or schedules that were not anticipated when they filed their proposed SIPs. FRA perceives a SIP and its implementation as an evolutionary process requiring fine-tuning when conditions warrant. Should the agency identify a shortcoming of an approved SIP during implementation, it reserves the right to require the railroad to amend its plan consistent with rail safety.

#### § 244.21 Compliance and Enforcement.

Paragraph 244.21 explains FRA's role in enforcing the rule and ensuring compliance with the regulations. Each railroad seeking to carry out a regulated transaction must have an approved SIP before it may change its operations on the property subject to the transaction. FRA further notes that where the Board has been involved in authorizing the transaction, FRA would consult with the Board at all appropriate stages of SIP implementation. Additionally, each railroad must successfully execute each measure within its approved SIP. FRA reserves the right to exercise any of its enforcement remedies available under the safety laws should a railroad not comply with either one of these requirements. These legal and equitable remedies, which are more fully discussed in §

244.5 above, include civil or criminal prosecution of any violation identified. FRA expects to exercise its enforcement remedies in a judicious fashion.

### **Regulatory Impact of FRA's Proposed Rule**

#### Executive Order 12866 and DOT Regulatory Policies and Procedures

FRA's proposed rule has been evaluated in accordance with existing policies and procedures and is considered to be nonsignificant under Executive Order 12866 and significant under DOT policies and procedures (44 FR 11034, Feb. 26, 1979). The agency's proposal is deemed significant under DOT's policies and procedures because this rulemaking action embodies joint rules issued by independent regulatory agencies. FRA has prepared and placed in the docket a regulatory evaluation of the proposed rule. This evaluation estimates the costs and consequences of the proposed rule as well as its anticipated economic and safety benefits. It may be inspected and photocopied during normal business hours by visiting the FRA Docket Clerk at the Office of Chief Counsel, FRA, Seventh Floor, 1120 Vermont Avenue, N.W., in Washington, D.C. Photocopies may also be obtained by submitting a written request by mail to the FRA Docket Clerk at the Office of Chief Counsel, Federal Railroad Administration, 1120 Vermont Avenue, N.W., Mail Stop 10, Washington, D.C., 20590.

FRA prepared an analysis of this proposal which may be found, in its entirety in the docket for this rulemaking. Principally, for a Class I railroad, FRA estimates that a SIP will cost between \$300,000 to \$800,000 to prepare, but will prevent between \$1,500,000 to \$12,000,000 in accident costs. For a Class II railroad, FRA estimates that a plan will cost between \$50,000 to \$200,000 to prepare, but will prevent between \$60,000 to \$1,200,000 in accident costs. The rule will not apply to small entities, *i.e.*, Class III freight railroads. In addition, a railroad may avoid substantial service difficulties by carrying through the safety planning process. This could save the railroad

hundreds of millions or billions of dollars. In the first three quarters of 1998, UP reported losses of over \$900,000,000 due to service difficulties. The societal costs of these delays is probably much greater as the figures only quantify costs incurred by UP.

FRA derived its estimates of accident reduction benefits from UP's merger with SP, which created several unsafe conditions and encountered several serious accidents, at least one of which was likely due to inadequate safety planning. UP's service difficulties were reported in its 10-Q filed with the Securities and Exchange Commission for the third quarter of 1998. FRA's estimates of SIP costs are based on the reported costs of NS and CSXT, which prepared respective SIPs in their acquisition of Conrail.

#### Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., requires an assessment of the impact of proposed rules on "small entities." The proposed rule relates to mergers, consolidations, and acquisitions involving, in general, Class I or Class II railroads, and would not apply to Class III freight railroads as currently drafted. Given FRA's recently published interim policy establishing "small entities" as being railroads that meet the line haulage revenue requirements of a Class III railroad, FRA certifies that this proceeding will not have a significant economic impact on a substantial number of small businesses. See Interim Statement of Policy Concerning Small Entities Subject to the Railroad Safety Laws (Policy Statement), 62 Fed. Reg. 43024, Aug. 11, 1997.

FRA adds that in its Policy Statement, it interprets commuter railroads as "small governmental jurisdictions" as defined under the RFA. "Small governmental jurisdictions" apply to communities "with a population of less than 50,000" under RFA. 5 U.S.C. 601(5). FRA submits that to the extent the proposed rule affects Class III commuter railroads, they serve

communities exceeding 50,000 persons. Accordingly, FRA certifies that the proposal will not affect “small governmental jurisdictions,” obviating the need to prepare an RFA analysis.

Nevertheless, in light of the potential for a change in the definition when FRA issues its final Policy Statement or in transactions covered by this proposed rule, FRA invites comments in this proceeding from any interested party on FRA's definition of “small entity.”

#### Paperwork Reduction Act

FRA submits that the proposed rule does not contain information collection requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq., and its implementing regulations, 5 CFR part 1320, (collectively, PRA). Specifically, the agency has determined that the rule does not involve a “collection of information” as defined by the Office of Management and Budget under 49 CFR 1320.3(c) because the information collection requirements will not impact ten or more persons within any 12-month period. (For purposes of this rule, the definition of “person” under the PRA is consistent with the definition as enumerated in the regulatory text. See 49 CFR 1320.3(k).) Therefore, the rule does not require FRA to conduct or sponsor a collection of information within the meaning and application of the PRA, obviating the need to prepare a paperwork package in this instance. See 49 CFR 1320.5(a). FRA invites public comment on the agency’s estimate that the information collection requirement will impact ten or less persons within a 12-month period.

#### Environmental Impact

FRA has evaluated this proposed rule in accordance with its procedures for ensuring full consideration of the potential environmental impacts of FRA actions, as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive

Orders, and related directives. This regulation meets the criteria that establish this as a non-major action for environmental purposes.

#### Federalism Implications

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### **STB's Statement of Basis**

As pointed out in the joint FRA/STB introduction, the Board is responsible for promoting a safe rail transportation system. By advance notice of proposed rulemaking (ANPRM) published in the Federal Register on December 4, 1997, at 62 FR 64193, the Board requested comments on the extent to which railroads should be required to provide information pertaining to the manner in which they intend to provide for the safe implementation of authority granted by the Board. The Board explained that, over the years, it and its predecessor agency, the Interstate Commerce Commission (ICC), have considered the issue of safety along with other relevant issues in individual cases. As particularly pertinent here, in the Conrail Acquisition case,<sup>6</sup> the Board for the first time required applicants to provide detailed information on how they proposed to provide for the safe integration of their corporate cultures and operating systems, if the Board were to approve the proposed transaction. (The Board has required the same type of showing in the proposed merger between CN and IC, which is now pending before the Board.) The Board did so at the suggestion of FRA and rail labor interests, after FRA advised the Board, based on its experience following the STB's approval of the UP/SP merger in August 1996, that it believed that certain of

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<sup>6</sup> Conrail Acquisition, STB Finance Docket No. 33388 (STB Decision No. 52, served Nov. 3, 1997).

the safety problems that arose in the implementation of that merger might have been avoided with sufficient advance planning.

Specifically, the Board required applicants in Conrail Acquisition to file detailed Safety Implementation Plans (SIPs) developed within guidelines set by FRA. The railroads' submissions were made part of the environmental record in that proceeding and dealt with in the ongoing environmental review process in that case. The SIPs were included in the Draft Environmental Impact Statement (Draft EIS) to allow review and comment by FRA, other parties, and the public. The Board's environmental staff (SEA) also independently reviewed the plans.

FRA and SEA (in its Final Environmental Impact Statement (Final EIS)) concluded that applicants had satisfactorily addressed the safety implementation concerns presented by the transaction to date. Moreover, shortly before the Final EIS was issued, the Board entered into a MOU with FRA, with DOT's concurrence, to establish an ongoing monitoring process during implementation of the proposed Conrail Acquisition. The MOU clarified the actions that FRA and the Board would take to ensure the successful implementation of the SIPs. Under the terms of the MOU, FRA will monitor, evaluate, and review the applicants' progress. The MOU provides that FRA may request action by the Board, in the exercise of the STB's oversight authority over the applicants, to correct identified safety deficiencies resulting from the transaction. When requesting Board action, FRA will provide recommendations for correcting the deficiency. FRA will report periodically to the Board regarding safety integration of the Conrail Acquisition, but not less than biannually. FRA will also report significant integration issues to the Board if and when they are identified. FRA's reporting will continue until FRA advises the Board in writing that the proposed integration has been safely completed.

The Board's ANPRM in this proceeding explained that, having developed a vehicle by which to evaluate safety integration issues in Conrail Acquisition, it was appropriate to consider the advisability of promulgating rules to extend this process to other rail transactions subject to the Board's jurisdiction. Accordingly, the Board sought public comment from FRA and any other interested persons on how the Board should proceed to assure the safe implementation of rail transactions subject to its jurisdiction (i.e., whether the STB should proceed broadly by general rule or exclusively on a case-by-case basis, and whether procedures other than those adopted in Conrail Acquisition might be preferable in Board-approved transactions outside the merger area).<sup>7</sup>

As discussed in more detail in the Board's decision served July 27, 1998, announcing that the STB would institute a rulemaking, the commenters that responded to our ANPRM varied widely in their recommendations. DOT urged the Board to undertake a joint rulemaking proceeding and announced that FRA on its own is developing procedures that would be required for Board transactions. Other commenters including the National Industrial Transportation League (NITL) stressed the need for coordination with FRA. The railroad participants argued that special procedures were not necessary and that we should proceed only on a case-by-case basis. On the other hand, the labor participants argued that the STB should adopt special procedures and that we do so for all transactions, including ones involving small or start-up railroads.

The parties representing shipper interests took positions in between those of the railroad and labor participants. For example, NITL urged that there be formal rules for major control and construction transactions, but that for minor control transactions we require only that safety be considered, with less advance documentation required. The Chemical Manufacturers Association

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<sup>7</sup> The administrative process permits the Board to proceed either on a case-by-case basis or by rule, and to address some kinds of transactions by rule and some by reliance on the development of precedent.

would require advance documentation only for future rail mergers and acquisitions. The City of Reno proposed that preparation of a SIP as in Conrail Acquisition be required for all railroad mergers. Additionally, it suggested that the STB require a FRA certification process for certain transactions.<sup>8</sup>

Based on the comments in response to the ANPRM and the Board's experience with the SIP process in Conrail Acquisition, the Board issued its decision served July 27, 1998, finding sufficient merit to warrant further exploration of establishing regulations addressing the safe implementation of Board approved transactions. The Board directed STB staff to develop a joint notice of proposed rulemaking addressing the issues that have arisen in this proceeding and that are of concern to FRA, and to submit the proposed notice for its evaluation and approval prior to going forward with publication.<sup>9</sup>

Following the issuance of the Board's July 27, 1998 decision, Board staff has met informally with FRA staff regarding the development of an appropriate proposal that would accomplish the objectives of both agencies, avoid gaps and inconsistencies in the two agencies' regulatory requirements, and impose as little burden as possible on the participating parties.

#### **STB's Section-By-Section Analysis of Its Proposed Rule**

##### § 1106.1 Purpose.

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<sup>8</sup> The California Public Utilities Commission made a similar request.

<sup>9</sup> This joint approach was predicated upon assurances by the Department of Transportation that a joint process would not subject the exercise by the Board of its rulemaking authority in this proceeding to review by the Office of Management and Budget, in contravention of this agency's Congressionally mandated independence.

The rules are designed to assure adequate and coordinated consideration of safety integration issues by the Board and FRA in the implementation of certain transactions subject to the Board's jurisdiction.

§ 1106.2 Definitions.

This section sets forth definitions used in this part; these definitions are self explanatory.

§ 1106.3 Actions for which Safety Integration Plan is Required.

This section explains which transactions require a railroad to file a Safety Integration Plan with the Board. These transactions include a Class I railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area proposing to consolidate with, merge with, or acquire control of another Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area; a Class II railroad proposing to consolidate with, merge with, or acquire control of another Class II railroad, with which it connects so as to involve the integration of operations; or any railroad merging with, consolidating with, or acquiring control of another railroad or railroads, except a transaction involving a Class III freight only railroad, that would result in operations generating revenue in excess of the Class I railroad threshold. The regulation also requires a Class I or Class II railroad requesting authority to acquire railroad property under 49 U.S.C. 10901 or 10902 that involves intercity passenger or commuter operations to file a SIP. Generally, these regulated transactions coincide with the transactions covered by FRA, except for start up operations, which will promote consistency and efficiency in the interplay between FRA and STB. In cases where the filing of a SIP is required only by FRA's rules, the Board does not contemplate delaying the processing of the Board proceeding to require compliance with FRA's separate rules. Where the filing of a SIP is required by the Board's rules, the Board will enforce the

requirement with appropriate sanctions, including suspending the processing of the application, or in extreme cases, dismissal.

The proposed rule does not cover Class III freight railroads, i.e., those railroads that generate revenue, measured in 1991 dollars, of less than \$20 million per year. The Board had originally intended to cover transactions involving Class III carriers where a Class I or Class II carrier was involved, or the Class III carrier was acquiring a line on which commuter or intercity passenger service is being provided. However, based on FRA's representations that in its experience such transactions do not create sufficient safety problems to warrant imposing the burden of requiring preparation of a SIP, the Board has initially decided to limit the scope of its proposal to exclude those transactions as has FRA. The Board, like FRA, specifically solicits comments, however, from interested parties as to whether the final rule should cover these transactions. The comments should articulate a detailed rationale for regulating these transactions, the safety information that should be required, and evidence of any consequences in leaving these transactions unregulated.

#### § 1106.4 The Safety Integration Plan Process

Proposed § 1106.4 sets out the procedures for an applicant to file a SIP, and the procedures by which the Board will consider a SIP in connection with its approval or authorization of transactions for which the Board has concluded such consideration is required. A railroad seeking to carry out a covered transaction must file a SIP prepared in accordance with FRA's regulations with the STB's SEA and FRA no later than the date the application or exemption is filed with the Board. The SIP will become part of the environmental documentation in the Board proceeding and will be considered in the environmental review process consistent with the Board's environmental rules at 49 CFR part 1105. Generally, covered transactions will be subject to environmental

review because the nature of the transaction involves operational changes that exceed the regulatory thresholds established under 49 CFR 1105.7(e)(4) or (5). See 49 CFR 1105.6(b)(4)(i). In the event that a SIP should be required in a transaction that would not be subject to environmental review, the Board intends to develop appropriate case-specific SIP procedures. The Board specifically requests comments on whether such transactions should be covered by these rules, and if so, what procedures would be appropriate.

After FRA reviews the SIP, FRA will issue its findings and conclusions on the adequacy of the plan to SEA at a date that is sufficiently in advance of the Board's issuance of its Draft Environmental Assessment or Draft EIS. As discussed earlier, FRA will provide its analysis of the SIP within the time frame indicated, whenever possible. Nevertheless, recognizing that the SIP is an ongoing and fluid process, as in the Conrail Acquisition, FRA may comment on the plan, and an applicant's status of progress in completing a SIP, without endorsing the plan in full. The Board agrees with FRA that a flexible response is necessary to enable an applicant to complete a comprehensive plan.

Additionally, this approach will enable the Board to incorporate FRA's comments in its draft environmental documentation, which, in turn, will encourage the public to review and comment on the proposed transaction. SEA will then independently review the SIP and respond to comments received pursuant to the plan in its final environmental documentation. Finally, the Board will consider the entire environmental record, including information concerning the SIP, in deciding whether to approve or reject the proposed transaction. Should the Board approve the transaction, adopt the SIP, and require that the applicant comply with the same, the railroad must coordinate with FRA in carrying out the plan, including any amendments to the same, if necessary.

See FRA's section-by-section analysis discussing amendments at § 244.19 for a more complete discussion.

As explained in FRA's section-by-section analysis of § 244.17(f), FRA is proposing to advise the Board about FRA's findings on the ongoing implementation process during any oversight period established by the Board, in accordance with an agreement that FRA and the Board will enter into and execute. Should FRA identify shortcomings or deficiencies during integration, STB reserves jurisdiction to reopen the proceedings and impose terms and conditions on the transaction to ensure the transaction is safely implemented. FRA also has undertaken to advise the Board when, in its view, the proposed integration of applicants' operations has been safely completed.

#### § 1106.5 Waiver.

The Board can waive or modify the requirements of this part where a carrier shows that relief is warranted or appropriate.

#### § 1106.6 Reservation of Jurisdiction.

The Board reserves the right to require the filing of a SIP in transactions other than those provided in this part, or to adopt modified SIP requirements in individual cases, if it concludes doing so is necessary to properly consider an application or other request for authority.

#### Regulatory Flexibility Act

The Board preliminarily certifies that its proposal to require safety integration plans under certain circumstances, if adopted, would not have a significant effect on a substantial number of small entities. The Board, however, seeks comments on whether there would be effects on small entities that should be considered.

#### Environmental Impact

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

**FRA's Proposed Rule**

List of Subjects

**49 CFR Part 244**

Railroad Safety; Regulations on Safety Integration Plans Governing Railroad Consolidations, Mergers, Acquisitions of Control, and Start Up Operations.

In consideration of the foregoing, FRA proposed to amend chapter II of title 49, Code of Federal Regulations, to read as follows:

1. Part 244 is added to read as follows:

**PART 244—REGULATIONS ON SAFETY INTEGRATION PLANS GOVERNING RAILROAD CONSOLIDATIONS, MERGERS, ACQUISITIONS OF CONTROL, AND START UP OPERATIONS**

**Subpart A—General**

Sec.

- 244.1 Scope, application, and purpose.
- 244.3 Preemptive effect.
- 244.5 Penalties.
- 244.7 Waivers.
- 244.9 Definitions.

**Subpart B—Safety Integration Plans**

- 244.11 Contents of a Safety Integration Plan.
- 244.13 Subjects to be addressed in a Safety Integration Plan involving an amalgamation of operations or start up operations.
- 244.15 Subjects to be addressed in a Safety Integration Plan not involving an amalgamation of operations or start up operations.
- 244.17 Procedures.
- 244.19 Disposition.
- 244.21 Compliance and Enforcement.

**Appendix A to Part 244—Schedule of Civil Penalties (Reserved).**

**Authority:** 49 U.S.C. 20103, 20107, 21301; 5 U.S.C. 553 and 559; Sec. 31001(s)(1), Pub. L. No. 104-134, 110 Stat. 1321-373 (28 U.S.C. 2461 note); and 49 CFR 1.49.

**Subpart A—General**

**§ 244.1 Scope, application, and purpose.**

(a) This part prescribes requirements for filing a Safety Integration Plan with FRA whenever:

(1) A Class I railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area proposes to consolidate with, merge with, or acquire control of another Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area;

(2) A railroad proposes to start up operations as a railroad as defined under § 244.9 of this part;

(3) A Class II railroad proposes to consolidate with, merge with, or acquire control of another Class II railroad with which it would connect so as to involve the integration of operations; or

(4) Any railroad merger, consolidation, or acquisition of control would result in operations that generate revenue in excess of the Class I railroad threshold, except for a transaction involving a Class III freight only railroad.

(b) The purpose of this part is to achieve a reasonable level of railroad safety during the implementation of transactions described in subsection (a) of this section. This part does not preclude a railroad from filing more inclusive information not inconsistent with this part.

(c) The requirements prescribed under this part apply only to FRA's disposition of a regulated transaction filed by an applicant. Certain of the transactions covered by this part require separate filing with and approval by the Surface Transportation Board. See 49 CFR part 1106.

**§ 244.3 Preemptive effect.**

Under 49 U.S.C. 20106, issuance of these regulations preempts any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not unreasonably burden interstate commerce.

**§ 244.5 Penalties.**

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least \$500, but not more than \$11,000 per day, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed \$22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense. Appendix A to this part contains a schedule of civil penalty amounts used in connection with this part.

(b) As specified in section 244.21 of this part, FRA may also exercise any of its other enforcement remedies if a railroad fails to comply with section 244.21.

(c) Any person who knowingly and willfully makes a false entry in a record or report required by this part shall be subject to criminal penalties under 49 U.S.C. 21311.

**§ 244.7 Waivers.**

(a) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with any requirement of this part. The filing of such a petition does not affect that person's responsibility for compliance with that requirement pending action on such a petition.

(b) Each petition for a waiver under this section must be filed in the manner and contain the information required by part 211 of this chapter.

(c) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions the Administrator deems necessary.

#### **§ 244.9 Definitions.**

As used in this part—

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

Amalgamation of operations means the migration, combination, or unification of one set of railroad operations with that of another set of railroad operations, including, but not limited to, the allocation of resources affecting railroad operations (e.g., changes in personnel, track, bridges, or communication or signal systems; or use or deployment of maintenance-of-way equipment, locomotives, or freight or passenger cars).

Applicant means a Class I or Class II railroad, a railroad providing intercity passenger service or a railroad providing commuter service in a metropolitan or suburban area engaging in a transaction subject to this part.

Best practices means the safest and most efficient rules or instructions governing railroad operations that are reasonable and practicable in accordance with railroad industry standards.

Corporate culture means the attitudes, commitments, directives, and practices of railroad management with respect to safe railroad operations.

Class I or Class II railroad has the meaning assigned by regulations of the Surface Transportation Board (49 CFR Part 1201; General Instructions 1-1), as those regulations may be revised by the Board (including modifications in class thresholds based revenue deflator adjustments) from time to time.

Control means actual control, legal control, or the power to exercise control through (1) common directors, officers, stockholders, a voting trust, or a holding or investment company, or (2) any other means. See 49 U.S.C. 10102.

Consolidation means the creation of a new (1) Class I or Class II railroad by combining existing railroads, or (2) a railroad providing intercity passenger service or a railroad providing commuter service in a metropolitan or suburban area by taking over the assets or assuming the liabilities, or both, of another Class I or Class II railroad, a railroad providing intercity passenger service or a railroad providing commuter service in a metropolitan or suburban area, such that the resulting unified entity has the combined capital, powers, and subsidiaries and affiliates, if applicable, of all of its constituents.

Environmental documentation means either an Environmental Impact Statement or Environmental Assessment prepared in accordance with the Surface Transportation Board's environmental rules at 49 CFR part 1105.

Merger means the acquisition of one Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area by another Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area, such that the acquiring

railroad acquires the stock, assets, liabilities, powers, subsidiaries and affiliates of the railroad acquired.

Person means an entity of any type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any independent contractor providing goods or services to a railroad; and any employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means any form of non-highway ground transportation that runs on rails or electromagnetic guideways, including:

(1) Commuter or other short-haul rail passenger service in a metropolitan or suburban area; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads.

The term does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Safety Integration Plan means a comprehensive written plan submitted to and approved by FRA in compliance with this part that demonstrates in required detail how an applicant will provide for safe railroad operations during and after any proposed transaction covered by this part, and otherwise assure compliance with the Federal railroad safety laws.

Section of Environmental Analysis or “SEA” means the Section that prepares the Surface Transportation Board’s environmental documents and analyses.

Start up operation means to initiate railroad operations on a rail line or lines in which the commencement of operations would either involve intercity or commuter passenger service or produce revenue in excess of the Class II railroad threshold.

Transaction means a consolidation, merger, acquisition of control, or start up operation subject to the requirements of this part.

### **Subpart B—Safety Integration Plans**

#### **§ 244.11 Contents of a Safety Integration Plan.**

Each Safety Integration Plan shall contain the following information for each subject matter identified in § 244.13 or § 244.15 of this part:

(a) A detailed description of:

(1) For transactions involving a start up operation, the physical and operational characteristics of the start up operation and the best practices to be adopted; or

(2) For all other transactions, how the applicant differs from each railroad it proposes to acquire or with which the applicant proposes to consolidate or merge, and the best practices of these railroads.

(b) A detailed description of the proposed manner and method of operations of the resulting railroad or start up operation;

(c) The proposed specific measures, expressed step-by-step, for each relevant subject matter that the applicant believes will result in safe implementation of the proposed transaction consistent with the requirements of this part;

(d) The allocation of resources, expressed as human and capital resources within designated operating budgets, directed to complete operations subject to the transaction;

(e) The measures to be taken to comply with the Federal railroad safety laws, where applicable; and

(f) The timetable, stated in specific terms from commencement to completion, for implementing subsections (c), (d) and (e) of this section.

**§ 244.13 Subjects to be addressed in a Safety Integration Plan involving an amalgamation of operations or start up operations.**

Each Safety Integration Plan involving an amalgamation of operations or start up operations shall address the following subjects for railroad operations conducted on property subject to the transaction:

(a) Corporate culture. Each applicant shall:

- (1) Identify and describe differences in corporate cultures for each safety-related area;
- (2) Describe how these cultures lead to different practices governing rail operations; and
- (3) Explain how the proposed integration of corporate cultures will result in a system of “best practices” when the proposed transaction is implemented.

(b) Training. Each applicant shall identify classroom and field courses, lectures, tests, and other educational or instructional forums designed to ensure the proficiency and qualification of the following employees:

- (1) Employees who perform train and engine service;
- (2) Employees who inspect and maintain track and bridges;
- (3) Employees who inspect, maintain and repair any type of on-track equipment, including locomotives, passenger cars, and freight cars of all types;
- (4) Dispatchers or operators;
- (5) Employees who inspect and maintain signal and train control devices and systems;

(6) Hazardous materials personnel;

(7) Employees who maintain or upgrade communication systems affecting rail operations;

and

(8) Supervisors of employees enumerated in paragraphs (b)(1) through (7) of this section.

(c) Operating practices.

(1) Operating rules. Each applicant shall identify the operating rules, timetables, and timetable special instructions to govern railroad operations, including yard or terminal operations.

(2) Accidents/incidents. Each applicant shall identify the reporting procedures for any accident/incident subject to 49 CFR 225 and the policy on harassment and intimidation required by part 225, including a copy of the applicant's internal control plan under 49 CFR 225.33.

(3) Alcohol and drug. Each applicant shall identify the post-accident toxicological testing, reasonable cause testing, and random alcohol and drug testing programs as required under 49 CFR 219.

(4) Qualification and certification of locomotive engineers. Each applicant shall identify the program for qualifying and certifying locomotive engineers under 49 CFR 240.

(5) Hours of service laws. Each applicant shall identify the procedures for complying with the Federal hours of service laws and related measures to minimize fatigue of employees covered by 49 U.S.C. chapter 211.

(d) Motive power and equipment. Each applicant shall identify the qualification standards for employees who inspect, maintain, or repair railroad freight or passenger cars and locomotives, and designation of facilities that will repair such equipment.

(e) Signal and train control. Each applicant shall identify the signal and train control systems governing railroad operations and maintenance, capital improvement, and research and development projects for signal and train control operations.

(f) Track Safety Standards and bridge structures. Each applicant shall identify the maintenance and inspection programs for track and bridges.

(g) Hazardous Materials. Each applicant shall:

(1) Identify an inspection program covering the following areas:

- (i) Field inspection practices;
- (ii) Hazardous materials communication standards; and
- (iii) Emergency response procedures.

(2) Develop and deploy computer software operating systems at designated locations providing immediate retrieval of shipping papers accompanying shipments of hazardous materials for inspection and photocopying by representatives of FRA during normal business hours, if applicable.

(h) Dispatching operations. Each applicant shall identify:

- (1) The railroad dispatching system to be adopted;
- (2) The migration of the existing dispatching systems to the adopted system, if applicable;
- (3) The criteria used to determine duties performed by operators or dispatchers employed to execute operations; and
- (4) The work load imposed on dispatchers or operators to carry out duties assigned.

(i) Highway-rail grade crossing systems. Each applicant shall identify a program, including its development and implementation, covering the following:

- (1) Highway-rail grade crossing signal system safety, in general;

- (2) Emergency response actions;
- (3) Public education forums on highway-rail grade crossing safety; and
- (4) Proposals to improve highway-rail grade crossing safety and highway-rail grade crossing system warning devices.

(j) Personnel staffing. Each applicant shall identify the number of employees by job category, currently and proposed, to perform each of the following types of function:

- (1) Train and engine service;
- (2) Yard and terminal service;
- (3) Dispatching operations;
- (4) Roadway maintenance;
- (5) Freight car and locomotive maintenance;
- (6) Maintenance of signal and train control systems, devices, and appliances;
- (7) Hazardous materials operations; and
- (8) Managers responsible for oversight of safety programs.

(k) Capital investment. Each applicant shall identify the capital investment program, clearly displaying at least planned investments in track and structures, signals and train control, and locomotives and equipment. The program shall describe any differences from the program currently in place on each of the railroads involved in the transaction.

(l) Relationship between freight and passenger service. Each applicant shall identify measures addressing passenger and freight operations on lines subject to the transaction.

(m) Information systems compatibility. Each applicant shall identify measures providing for a seamless interchange of information relating to the following subject matters:

- (1) Train consists;

- (2) Movements and movement history of locomotives and railroad freight cars;
- (3) Dispatching operations;
- (4) Accident/incident reporting and recordkeeping requirements; and
- (5) Emergency termination of operations.

**§ 244.15 Subjects to be addressed in a Safety Integration Plan not involving an amalgamation of operations or start up operations.**

Each Safety Integration Plan required by this part that does not propose an amalgamation of operations or start up operations shall address subsections (b), (j), and (k) of § 244.13 of this part for railroad operations conducted on property subject to the transaction.

**§ 244.17 Procedures.**

(a) Each applicant shall file one original of a proposed Safety Integration Plan with the Associate Administrator for Safety, FRA, 1120 Vermont Avenue, N.W., Mailstop 5, Washington, D.C., 20590. If applicable, the applicant shall file the plan with FRA and the Surface Transportation Board for proposed transactions within its jurisdiction no later than the date it files its application or exemption with the Surface Transportation Board.

(b) The applicant shall submit such additional information necessary to support its proposed Safety Integration Plan as FRA may require.

(c) The applicant shall coordinate with FRA to resolve FRA's comments on the proposed Safety Integration Plan until such plan is approved.

(d) For a transaction requiring Surface Transportation Board approval, FRA will file its findings and conclusions on the proposed Safety Integration Plan with the Board's Section of Environmental Analysis at a date sufficiently in advance of the Board's issuance of its draft

environmental documentation in the case to permit incorporation in the draft environmental document.

(e) Assuming FRA approves the proposed Safety Integration Plan and, if applicable, the Surface Transportation Board approves the proposed transaction, each applicant involved in the transaction shall coordinate with FRA in implementing the approved Safety Integration Plan.

(f) During implementation of an approved Safety Integration Plan, FRA will inform the Surface Transportation Board about implementation of the plan at times and in a manner designed to aid the Board's exercise of its continuing jurisdiction over the approved transaction in accordance with an agreement that FRA and the Board will enter into and execute. Pursuant to such agreement, FRA will consult with the Board at all appropriate stages of implementation, and will advise the Board when the integration of operations subject to the transaction is complete.

**§ 244.19 Disposition.**

(a) Standard of review.

(1) Each applicant shall:

(i) Write a thorough, complete, and clear Safety Integration Plan; and

(ii) Describe in detail a logical and workable transition from conditions existing before the proposed transaction to conditions intended to exist after consummation of the transaction.

(2) FRA shall review an applicant's Safety Integration Plan to determine whether it provides a reasonable assurance of safety at every step of the proposed transaction.

(b) Approval of the Safety Integration Plan. A Safety Integration Plan that is satisfactory to the FRA Administrator shall receive a notice of approval. The approval shall be conditioned on an applicant's execution of all of the elements contained in the plan, including all later developments subject to FRA approval that could not be completed before approval of it.

(c) Amendment.

(1) By the applicant. The applicant may amend its Safety Integration Plan, as needed, from time to time. Any amendment is subject to the approval of the FRA Administrator.

(2) By FRA. The FRA Administrator may require an applicant to amend its approved Safety Integration Plan from time to time should circumstances warrant.

**§ 244.21 Compliance and Enforcement.**

(a) A railroad shall have an FRA approved Safety Integration Plan before changing its operations to implement a proposed transaction subject to this part.

(b) FRA may exercise any or all of its enforcement remedies authorized by the Federal railroad safety laws if a railroad fails to comply with subsection (a) of this section or to execute any measure contained in an FRA approved Safety Integration Plan.

(c) Where the Surface Transportation Board has authorized a transaction, FRA will consult with the Board at all appropriate stages of implementation of the Safety Integration Plan.

Issued in Washington, D.C. on \_\_\_\_\_.

\_\_\_\_\_  
Jolene M. Molitoris  
Federal Railroad Administrator

**STB's Proposed Rule**

List of Subjects

49 CFR Part 1106

Procedures for Surface Transportation Board Consideration of Safety Integration Plans in Cases Involving Railroad Consolidations, Mergers, and Acquisitions of Control.

For the reasons set forth in the preamble, a new title 49, subtitle IV, part 1106 of the Code of Federal Regulations is proposed to be added as follows:

**PART 1106 — SAFETY INTEGRATION PLAN PROCEDURES**

Sec.

1106.1 Purpose.

1106.2 Definitions.

1106.3 Actions for which Safety Integration Plan Is Required.

1106.4 The Safety Integration Plan Process.

1106.5 Waiver.

1106.6 Reservation of Jurisdiction.

**Authority:** 5 U.S.C. 553; 5 U.S.C. 559; 49 U.S.C. 721; 49 U.S.C. 10101; 49 U.S.C. 10901-10902; 49 U.S.C. 11323-11325; 42 U.S.C. 4332.

**§ 1106.1 Purpose.**

These rules are designed to assure adequate and coordinated consideration of safety integration issues, by both the Board and the Federal Railroad Administration, the agency within the Department of Transportation responsible for the enforcement of railroad safety, in the implementation of rail transactions subject to the Board's jurisdiction. They establish the procedure by which the Board will consider safety integration plans in connection with its approval or authorization of transactions for which the Board has concluded such consideration is required.

**§ 1106.2 Definitions.**

The following definitions apply to these regulations:

Act means the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995).

Applicant means any Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area engaging in a transaction subject to this part.

Board means the Surface Transportation Board.

Class I or Class II railroad has the meaning assigned by regulations of the Surface Transportation Board (49 CFR Part 1201; General Instructions 1-1), as those regulations may be revised by the Board (including modifications in class thresholds based revenue deflator adjustments) from time to time.

Environmental documentation means either an Environmental Impact Statement or an Environmental Assessment prepared in accordance with the Board's environmental rules at 49 CFR part 1105.

Federal Railroad Administration (or FRA) means the agency within the Department of Transportation responsible for railroad safety.

Safety Integration Plan or "SIP" means a comprehensive written plan, prepared in accordance with FRA guidelines or regulations, explaining the process by which Applicants intend to integrate the operation of the properties involved in a manner that would maintain safety at every step of the integration process, in the event the Board approves the transaction that requires a SIP.

Section of Environmental Analysis or "SEA" means the Section that prepares the Board's environmental documents and analyses.

Transaction means an application by a Class I railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area that proposes to consolidate with, merge with, or acquire control under 49 U.S.C. 11323(a)(1) of another Class I or Class II railroad, a railroad providing intercity passenger service, or a railroad providing commuter service in a metropolitan or suburban area; a Class II railroad proposing to consolidate with, merge with, or acquire control under 49 U.S.C. 11323(a)(1) of another Class II railroad with which it would connect so as to involve the integration of operations; or any consolidation, merger, or acquisition of control under 49 U.S.C. 11323(a)(1) that would result in

operations generating revenue in excess of the Class I railroad threshold, except for a transaction involving a Class III freight only railroad. "Transaction" also includes (1) a request for authority by a Class I or Class II railroad to acquire railroad property under 49 U.S.C. 10901 or 10902 that involves intercity passenger or commuter railroad operations, and (2) a proceeding other than those specified above if the Board concludes that a SIP requirement is necessary to its proper consideration of the application or other request for authority.

**§ 1106.3 Actions for which Safety Integration Plan Is Required.**

A Safety Integration Plan shall be filed by any applicant requesting authority to undertake a transaction as defined under § 1106.2 of this part.

**§ 1106.4 The Safety Integration Plan Process.**

(a) Each applicant in a transaction subject to this part shall file a SIP in accordance with the informational requirements prescribed at 49 CFR part 244, or other FRA guidelines or requirements regarding the contents of a SIP, with SEA and FRA no later than the date the application or exemption is filed with the Board.

(b) The SIP shall be made part of the environmental record in the Board proceeding and dealt with in the ongoing environmental review process under 49 CFR part 1105. The procedures governing the process shall be as follows:

(1) In accordance with 49 CFR 244.17, FRA will provide its findings and conclusions on the adequacy of the SIP (i.e., assess whether the SIP establishes a process that provides a reasonable assurance of safety in executing the proposed transaction) to SEA at a date sufficiently in advance of the Board's issuance of its draft environmental documentation in the case to permit incorporation in the draft environmental document.

(2) The draft environmental documentation shall incorporate the SIP, any revisions or modifications to it based on further consultations with FRA, and FRA's written comments regarding the SIP. The public may review and comment on the draft environmental documentation within the time limits prescribed by SEA.

(3) SEA will independently review each SIP. In its final environmental documentation, SEA will address written comments on the SIP received during the time established for submitting comments on the draft environmental documentation. The Board then will consider the full environmental record, including the information concerning the SIP, in arriving at its decision in the case.

(4) If the Board approves the transaction, adopts the SIP, and requires compliance with the SIP, each applicant involved in the transaction shall coordinate with FRA in implementing the approved Safety Integration Plan, including any amendments thereto. FRA has provided in its rules at 49 CFR part 244 for providing information to the Board during implementation of an approved transaction that will assist the Board in exercising its continuing jurisdiction over the transaction. FRA also has undertaken to advise the Board when, in its view, the integration of applicants' operations has been safely completed.

(c) If a SIP is required in transactions that would not be subject to environmental review under the Board's environmental rules at 49 CFR part 1105, the Board will develop appropriate case specific SIP procedures based on the facts and circumstances of the case.

#### **§ 1106.5 Waiver.**

The SIP requirements established by this part can be waived or modified by the Board where a rail carrier shows that relief is warranted or appropriate.

#### **§ 1106.6 Reservation of Jurisdiction.**

The Board reserves the right to require a SIP in cases other than those enumerated in this part, or to adopt modified SIP requirements in individual cases, if it concludes doing so is necessary in its proper consideration of the application or other request for authority.

Decided: December 18, 1998

By the Board, Chairman Morgan and Vice Chairman Owen.

Vernon A. Williams  
Secretary