

DEPARTMENT OF TRANSPORTATION**Federal Railroad Administration****49 CFR Part 246**

[Docket No. FRA–2022–0020, Notice No. 1]

RIN 2130–AC92

Certification of Signal Employees

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

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes regulations for the certification of signal employees, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008.

DATES: Comments on the proposed rule must be received by July 31, 2023. FRA will consider comments received after that date to the extent practicable.

ADDRESSES: *Comments:* Comments related to Docket No. FRA–2022–0020 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

Instructions: All submissions must include the agency name, docket number (FRA–2022–0020), and Regulatory Identification Number (RIN) for this rulemaking (2130–AC92). All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information. Please see the Privacy Act heading in the **SUPPLEMENTARY INFORMATION** section of this document for Privacy Act information related to any submitted comments or materials.

Docket: For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and follow the online instructions for accessing the docket.

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SUPPLEMENTARY INFORMATION:**Abbreviations and Terms Used in This Document**

AAR—Association of American Railroads

ASLRRRA—American Short Line and Regional Railroad Association
 CE—Categorical Exclusion
 CFR—Code of Federal Regulations
 DAC—Drug and alcohol counselor
 DOT—United States Department of Transportation
 EA—Environmental Assessment
 EIS—Environmental Impact Statement
 FRA—Federal Railroad Administration
 IRFA—Initial Regulatory Flexibility Analysis
 NEPA—National Environmental Policy Act
 NPRM—Notice of Proposed Rulemaking
 OMB—United States Office of Management and Budget
 PRA—The Paperwork Reduction Act
 PTC—Positive Train Control
 PV—Present Value
 RIN—Regulatory Identification Number
 RSAC—Railroad Safety Advisory Committee
 RSIA—Rail Safety Improvement Act of 2008
 SAP—Substance Abuse Professional
 STB—The Surface Transportation Board
 U.S.C.—United States Code

Table of Contents for Supplementary Information

- I. Executive Summary
- II. Legal Authority
- III. Background
- IV. Section-by-Section Analysis
- V. Regulatory Impact and Notices
 - A. Executive Order 12866
 - B. Regulatory Flexibility Act and Executive Order 13272
 - C. Paperwork Reduction Act
 - D. Federalism Implications
 - E. International Trade Impact Assessment
 - F. Environmental Impact
 - G. Executive Order 12898 (Environmental Justice)
 - H. Unfunded Mandates Reform Act of 1995
 - I. Energy Impact
 - J. Privacy Act Statement
 - K. Executive Order 13175 (Tribal Consultation)

I. Executive Summary*Purpose of the Regulatory Action*

FRA proposes to require railroads to develop programs for the certification of signal employees and to submit those written certification programs to FRA for approval prior to implementation. Signal employees are responsible for the installation, testing, troubleshooting, repair, and maintenance of railroad signal systems which, for purposes of this proposed rule, include highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, broken rail detection systems, power-assisted switches, and switch point indicators.

Under this proposed rule, railroads would be required to verify and document that each signal employee¹ has the requisite knowledge, skills, safety record, and abilities to safely perform all of the safety-related signal

employee duties mandated by Federal laws and regulations, prior to certification. In addition, railroads would be required to have formal processes for revoking certification (either temporarily or permanently) for signal employees who violate specified minimum requirements.

FRA is proposing this regulation in response to the Rail Safety Improvement Act of 2008 (RSIA), which required the Secretary of Transportation (Secretary) to submit a report to Congress addressing whether certification of “certain crafts or classes” of railroad employees or contractors, including signal employees, was necessary to “reduce the number and rate of accidents and incidents or to improve railroad safety.” If the Secretary determined it was necessary to require the certification of certain crafts or classes to improve railroad safety, section 402 of the RSIA authorized the Secretary to prescribe such regulations.

The Secretary submitted a report to Congress on November 4, 2015,² stating that, based on FRA’s preliminary research, signal employees were one of the most viable candidate railroad crafts for certification, particularly with the introduction of Positive Train Control (PTC) technology. Given the safety critical role of signal employees in facilitating safe railroad operations, FRA determined that railroad safety is expected to be improved if signal employees were required to satisfy certain standards and be certified by each railroad whose signal systems they install, troubleshoot, repair, test, or maintain.

Summary of Major Provisions

This proposed rule would require railroads to develop written programs for certifying individuals who work as signal employees on their territories and to submit those written certification programs to FRA for approval prior to implementation. FRA would issue a letter to the railroad when it approves a certification program that explains the basis for approval and a program would not be considered approved until the approval letter is issued.

FRA is proposing to require Class I railroads (including the National Railroad Passenger Corporation), and railroads providing commuter service, to submit their written certification programs to FRA no later than eight (8) months after the final rule effective date. Class II and Class III railroads would be

¹ Although “signal employees” are also referred to as “signalmen,” those terms are synonymous.

² A copy of this November 4, 2015 Report to Congress has been posted in the rulemaking docket at: <https://www.regulations.gov/document/FRA-2022-0020-0001>.

required to submit their written certification plans sixteen (16) months after the final rule effective date. New railroads that begin operation after the final rule effective date would be required to submit their written certification programs to FRA and obtain FRA approval before installing their signal systems and commencing operations. In addition, railroads seeking to materially modify their FRA-approved certification programs would be required to obtain FRA approval prior to modifying their programs.

Railroads would be required to evaluate certification candidates in multiple areas, including prior safety conduct as a motor vehicle operator, prior safety conduct with other railroads, substance abuse disorders and alcohol/drug rules compliance, and vision and hearing acuity.

The proposed rule also contains minimum requirements for the training provided to candidates for signal employee certification. These proposed requirements are intended to ensure signal employees receive sufficient training before they are certified to work on signal systems. These proposed requirements are also intended to ensure that certified signal employees periodically receive recurring training on railroad signal system standards, test procedures, operating rules and procedures, and orders governing the installation, operation, testing, troubleshooting, repair, and maintenance of railroad signal systems, as well as comprehensive training on new signal systems and technology before they are introduced on the railroads where they work.

With the exception of individuals designated as certified signal employees prior to FRA approval of the railroad's signal employee certification program, the proposed rule would prohibit railroads from certifying signal employees for intervals longer than three (3) years. This three-year limitation, which would be consistent with the 36-month maximum period for certifying locomotive engineers in 49 CFR 240.217(c) and the 36-month maximum period for certifying conductors in 49 CFR 240.201(c), would allow for periodic re-evaluation of

certified signal employees to verify their continued compliance with FRA's minimum safety requirements.

Subpart D of this proposed rule addresses the process and criteria for denying and revoking certification. Proposed § 246.301 describes the process a railroad would be required to undergo before it denies an individual certification or recertification. This process would include providing the certification candidate with the information that forms the basis for the denial decision and giving the candidate an opportunity to rebut such evidence. When a railroad denies an individual certification or recertification, it must issue its decision in writing and the decision must comply with certain requirements provided in the proposed rule.

A railroad could only revoke a signal employee's certification if one of eleven events occurs. Generally, for the first revocable event that is not related to a signal employee's use of drugs or alcohol, the individual's certification would be revoked for 30 days. If an individual accumulates more of these violations in a given time period, the revocation period (period of ineligibility) would become increasingly longer.

If a railroad acquires reliable information that a certified signal employee has violated an operating rule or practice requiring decertification under the proposed rule, it must suspend the signal employee's certification immediately while it determines whether certification revocation is warranted. In such circumstances, signal employees would be entitled to a hearing. Similar to a railroad's decision to deny an individual certification, a railroad's decision to revoke a signal employee's certification would be required to comply with certain requirements. Finally, if an intervening cause prevented or materially impaired a signal employee's ability to comply with a railroad operating rule or practice, the railroad would not revoke the signal employee's certification.

Subpart E of this proposed rule discusses the dispute resolution process for individuals who wish to challenge a

railroad's decision to deny certification, deny recertification, or revoke certification. This dispute resolution process mirrors the process used for locomotive engineers and conductors under 49 CFR parts 240 and 242, respectively.

Finally, the proposed rule contains two appendices. Appendix A discusses the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B provides guidance on the procedures railroads should employ in administering the vision and hearing requirements under §§ 246.117 and 246.118.

Costs and Benefits

FRA analyzed the economic impact of this proposed rule. FRA estimated the costs estimated to be incurred by railroads and the Government. FRA also estimated the benefits of fewer signal employee-caused accidents.

FRA is proposing regulations establishing a formal certification process for railroad signal employees. As part of that process, railroads would be required to develop a program meeting specific requirements for training current and prospective signal employees, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a comprehensive record, including of safety compliance infractions, that other railroads can review when considering individuals for certification.

This proposed regulation would ensure that signal employees are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

FRA estimates the 10-year costs of the proposed rule to be \$8.3 million, discounted at 7 percent. The estimated annualized costs would be \$1.2 million discounted at 7 percent. The following table shows the total costs of this proposed rule, over the 10-year analysis period.

TOTAL 10-YEAR DISCOUNTED COSTS
[2020 dollars]³

Category	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	1,140,385	1,168,920	162,365	137,033
Certification Eligibility Requirements	87,507	100,380	12,459	11,768
Recertification Eligibility Requirements	203,790	259,653	29,015	30,439

TOTAL 10-YEAR DISCOUNTED COSTS—Continued

[2020 dollars]³

Category	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Training	2,079,835	2,379,911	296,122	278,998
Knowledge Testing	746,865	898,884	106,337	105,377
Vision and Hearing	1,097,523	1,320,891	156,263	154,849
Monitoring Operational Performance	832,102	994,414	118,473	116,576
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	103,175	124,175	14,690	14,557
Petitions and Hearings	42,451	50,731	6,044	5,947
Government Administrative Cost	1,653,360	1,914,063	235,401	224,387
Total	8,277,337	9,566,001	1,178,507	1,121,427

This rule would reduce the likelihood of an accident occurring due to signal employee error. FRA has analyzed accidents over the past 10 years to categorize those where signal employee

training and certification would have impacted the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year quantifiable benefits

of the proposed rule. The total 10-year estimated benefits would be \$2.9 million (PV, 7%) and annualized benefits would be \$0.4 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS

[2020 dollars]

Category	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Grade Crossing Accidents	1,766,028	2,064,676	251,443	242,043
Train Accidents/Incidents	989,123	1,156,391	140,829	135,564
Business Benefits from Fewer Activation Failures	159,526	186,503	22,713	21,864
Total	2,914,678	3,407,570	414,985	399,471

This proposed rule would also provide unquantifiable benefits. FRA has quantified the monetary impact from accidents which is reported on FRA accident forms. However, some accident costs are not required to be reported on FRA accident forms (e.g., environmental impact). That impact may account for additional benefits not quantified in this analysis. If these costs were realized, accidents affected by this proposed rulemaking could have much greater economic impact than estimated quantitative benefit estimates.

There is also a chance of a high impact event due to signal employee error. This could involve fatalities, injuries, and environmental damage, as well as impact railroads, communities, and the public. FRA has not estimated the likelihood of such an accident, but this proposed rule is expected to reduce the risk of an accident of that magnitude.

II. Legal Authority

Pursuant to the Rail Safety Improvement Act of 2008, Public Law 110–432, sec. 402, 122 Stat. 4884 (Oct. 16, 2008) (hereinafter “RSIA”), the Secretary of Transportation (Secretary) was required to submit a report to Congress addressing whether certification of certain crafts or classes of employees, including signal repair and maintenance employees, was necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.⁴ If the Secretary determined it was necessary to require the certification of certain crafts or classes of employees to reduce the number and rate of accidents and incidents or to improve railroad safety, section 402 of the RSIA stated the Secretary may prescribe such regulations. The Secretary delegated this authority to the Federal Railroad Administrator. 49 CFR 1.89. In response to the RSIA, the Secretary submitted a report to Congress on November 4, 2015,

stating that, based on FRA’s preliminary research, dispatchers and signal employees were potentially the most viable candidate railroad crafts for certification. Based on the analysis in Section III below, the Federal Railroad Administrator has determined that it is necessary to require the certification of signal employees to improve railroad safety.

III. Background

1. Roles and Responsibilities of Signal Employees

Railroad signal employees play an integral role in ensuring the safety of railroad operations, as well as the safety of highway motorists. They are responsible for the installation, testing, troubleshooting, repair, and maintenance of signal systems, as defined in proposed 49 CFR 246.7, which railroads utilize to direct train movements. Signal employees must also use specialized test and maintenance equipment to complete safety critical

³Numbers in this table and subsequent tables may not sum due to rounding.

⁴ See also 49 U.S.C. 20103 (providing FRA’s general authority to “prescribe regulations and issue orders for every area of railroad safety”).

tasks on mechanical, electrical, and electronic signal equipment.

The work performed by signal employees can generally be divided into two categories: construction and maintenance. On larger railroads, some signal employees work in groups (often referred to as “gangs”) under the direct supervision and oversight of an experienced signal employee to construct, install, and upgrade signal systems and signal system subsystems and components. Some signal employees also work in “gangs” under the direct supervision and oversight of an experienced signal employee to make repairs to the signal system, while other signal employees (often referred to as “signal maintainers”) are tasked with inspecting and testing signal systems and performing minor and emergency repairs as needed.

The implementation of complex PTC system technology requires increasingly sophisticated work by signal employees. PTC systems provide another layer of safety to existing signal systems, many of which have been in place for many decades. In addition, PTC systems are interoperable with each other, as well as with existing signal systems. Therefore, signal employees need to understand the relationship between signal and PTC systems and the communication medium and how these systems operate, function, and react to a myriad of circumstances. Signal systems and PTC systems are also continually upgraded, so the development and implementation of these systems need to be properly understood and monitored by both FRA and railroad signal employees.

2. FRA History of Certification

On January 4, 1987, an Amtrak train collided with a Conrail train in Chase, Maryland, resulting in 16 deaths and 174 injuries. At the time, it was the deadliest train accident in Amtrak’s history. The subsequent investigation by the National Transportation Safety Board concluded that the probable cause of the accident was the impairment of the Conrail engineer who was under the influence of marijuana at the time of the collision.⁵

Following this accident, Congress passed the Rail Safety Improvement Act of 1988, Public Law 100–342, 4, 102 Stat. 624, 625 (1988), which instructed the Secretary of Transportation (Secretary) to “issue such rules, regulations, orders, and standards as may be necessary to establish a program

requiring the licensing or certification of any operator of a locomotive, including any locomotive engineer.” On June 19, 1991, FRA published a final rule establishing a certification system for locomotive engineers and requiring railroads to ensure that they only certify individuals who met minimum qualification standards.⁶ In order to minimize governmental intervention, FRA opted for a certification system where the railroads issue the certificates as opposed to a government-run licensing system. This final rule, published in 49 CFR part 240 (part 240), created certification requirements for engineers that addressed various areas including vision and hearing acuity; training, knowledge, and performance skills; and prior safety conduct.

Seventeen years later, Congress passed the RSIA, which mandated the creation of a certification system for conductors. On November 9, 2011, FRA published a final rule requiring railroads to have certification programs for conductors and to ensure that all certified conductors satisfy minimum Federal safety standards.⁷ The conductor certification rule, published in 49 CFR part 242 (part 242), was largely modeled after part 240 with some deviations based on the different job classifications. Part 242 also included some organizational improvements which made the regulation more streamlined than part 240.

3. Statutory Background for Signal Employee Certification

In addition to requiring certification for conductors, the RSIA required the Secretary to submit a report to Congress addressing whether certain other railroad crafts or classes of employees would benefit from certification. Specifically, section 402(b) of the RSIA requires that the Secretary issue a report to Congress “about whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.” As part of that report, section 402(c) specifically requires the Secretary to consider “signal repair and maintenance employees” as one of the railroad crafts for certification.

After identifying a railroad craft or class for which certification is necessary, pursuant to the report to Congress discussed above, section 402(d) authorizes the Secretary to “prescribe regulations requiring the

certification of certain crafts or classes of employees that the Secretary determines . . . are necessary to reduce the number and rate of accidents and incidents or to improve railroad safety.”

4. Report to Congress

On November 4, 2015, the Secretary submitted the report to Congress required under the RSIA. The report stated that, based on FRA’s preliminary research, dispatchers and signal repair employees were the most viable candidates for certification, particularly with the introduction of Positive Train Control (PTC) technology. In reaching this determination with respect to signal employees, the Secretary cited a variety of factors.

The report noted that signal employees perform safety-sensitive work as shown by signal employees being covered under the Hours of Service laws. Signal employees are also subject to regular and pre-employment random drug and alcohol testing. In 2012 and 2013, signal employees had a positive drug testing rate that was considerably higher than that of their train and engine service counterparts. Annual drug and alcohol testing data submitted to FRA in 2012 and 2013 showed a 0.75-percent random positive drug rate for signal employees, as compared to a 0.30-percent random positive drug rate for train and engine service employees.⁸

The report also noted that the greatest proportion of contractors covered under the Hours of Service laws are signal employees, who tend to switch employers more frequently than other crafts of employees. In addition, the report noted that frequent job-hopping by signal employees makes it even more important to track their violations and any disqualifications that may result. However, 49 CFR parts 240 and 242 require a five-year alcohol and drug background check, as well as disqualification of employees for specified alcohol and drug test violations and for refusing such testing. If such requirements are included in a signal employee certification program, they could help prevent signal employees with active substance abuse disorders from “job hopping” from one employer to another and reduce the safety risk of having individuals with

⁸ Testing results submitted to FRA in 2020 and 2021 showed a 0.81-percent random violation (drug and alcohol positives and refusals) rate and a 0.79-percent pre-employment violation rate for signal employees, as compared to a 0.49-percent random positive drug testing rate and a 0.55-percent pre-employment positive drug testing rate for train and engine service employees.

⁵ Railroad Accident Report: Rear-end Collision of Amtrak Passenger Train 94, the Colonial and Consolidated Rail Corporation Freight Train ENS-121, on the Northeast Corridor, Chase, Maryland, January 4, 1987 (144 Nat’l Transp. Safety Bd. 1988).

⁶ 56 FR. 28227 (June 19, 1991).

⁷ 76 FR 69801 (Nov. 9, 2011).

untreated substance abuse disorders working as signal employees.

Another important factor in the report was the nature of the work signal employees perform on wayside signal and train control systems, which are safety-critical for freight and passenger rail operations. The report noted that, in the coming decade, the rail industry will likely lose many experienced signal employees to retirement, while growth in freight, commuter, and intercity passenger rail will require that more signal employees are hired and trained.

The report also summarized the challenges posed by PTC system implementation, while noting the “increasingly sophisticated work” involved in the implementation of complex PTC system technology by signal employees.⁹ In particular, the report noted that “signal employees will be required to differentiate between a vital and non-vital PTC system¹⁰ and to address the technicalities of using standalone or overlay PTC systems.”¹¹ This combination of factors led to the report’s conclusion that signal employees are a potentially viable candidate craft for certification.

5. RSAC Working Group

In March 1996, FRA established the Railroad Safety Advisory Committee (RSAC), which provides a forum for collaborative rulemaking and program development. RSAC includes representatives from all of the agency’s major stakeholder groups, including railroads, labor organizations, suppliers and manufacturers, and other interested parties. When appropriate, FRA assigns a task to RSAC, and after consideration and debate, RSAC may accept or reject the task. If accepted, RSAC establishes a working group that possesses the appropriate expertise and representation of interests to develop recommendations to FRA for action on the task.

On April 21, 2017, a task statement regarding certification of signal employees was presented to the RSAC by email but no vote was taken. On

⁹ See 2015 DOT Report to Congress on Certification of Railroad Crafts at 3.

¹⁰ PTC systems vary widely in complexity and sophistication based on the level of automation and functionality they implement, the system architecture used, the wayside system upon which they are based (*i.e.*, non-signaled, block signal, cab signal, etc.), and the degree of train control they are capable of assuming. Vital systems are reliable and built upon failsafe principles, while non-vital systems are reliable but not guaranteed to provide failsafe operation.

¹¹ See 2015 DOT Report to Congress on Certification of Railroad Crafts at 3. An overlay system relies upon and supplements an existing wayside signal system or redundant method of operation. A standalone system replaces the existing method of operation.

April 24, 2019, the RSAC accepted a task (No. 19–03) entitled, “Certification of Railroad Signal Employees.”¹² The purpose of the task was “[t]o consider whether rail safety would be enhanced by developing guidance, voluntary standards, and/or draft regulatory language for the certification of railroad signal installation, repair, and maintenance workers.” The task called for the RSAC Signal Employee Working Group (Working Group) to perform the following actions:

- Review critical tasks performed by railroad signalmen for safe train operations, particularly with the introduction of Positive Train Control (PTC) technology;
- Review training duration, content, and methodology for new hires and continuing education.
- Review background checks designed to prevent railroad signalmen with active substance abuse disorders from “job-hopping” from one employer to another.

The revised task statement also asked the Working Group to address the following issues, if appropriate:

- What requirements for training and experience are appropriate?
- What classifications of signalmen should be recognized, if any?
- To what extent do existing requirements and procedures for the certification of locomotive engineers and conductors provide a model for signalmen certification?
- What types of unsafe conduct should affect railroad signalmen’s certification status?
- Do the existing locomotive engineer and conductor certifications provide an adequate model for handling appeals from decertification decisions of the railroads?

The Working Group, which included representatives from the Association of American Railroads (AAR), American Public Transportation Association (APTA), American Short Line and Regional Railroad Association (ASLRRA), Brotherhood of Railroad Signalmen (BRS), SMART Transportation, Commuter Rail Coalition, and National Railroad Construction & Maintenance Association, held its first and only meeting on September 5, 2019 in Washington, DC. At this meeting, the Working Group reviewed the task statement from the RSAC, discussed

¹² At the same meeting, the RSAC also accepted a task (No. 19–02) titled “Certification of Train Dispatchers.” A separate RSAC Working Group was formed to address this task and FRA plans to issue a related proposed rule that would establish certification requirements for dispatchers.

some of the safety-critical tasks performed by signal employees, and debated whether certification of signal employees would be beneficial to railroad safety. At the end of the meeting, action items were assigned and the next meeting was tentatively scheduled for January 2020.

However, on December 16, 2019, the presidents of the American Train Dispatchers Association, BRS, and the International Brotherhood of Electrical Workers (collectively the “Unions”) sent a letter to the FRA Administrator requesting that the RSAC task be withdrawn from consideration. The letter stated the Unions were involved in numerous activities and were not able to give the task proper attention. AAR and ASLRRA advised the unions that they were not opposed to this request. In response to this letter, FRA withdrew the task from the RSAC and the Working Group became inactive.

6. Public Outreach

In 2021, FRA revisited the issue of establishing certification requirements for signal employees. The agency assembled subject matter experts from FRA, the International Brotherhood of Electrical Workers (IBEW) and the Brotherhood of Railroad Signalmen to exchange facts or information regarding the tasks performed by signal employees. Those parties met virtually several times between May 5, 2021 and June 30, 2021.

As part of FRA’s outreach, a list of tasks performed by signal employees was developed. These tasks generally involved: vital equipment design validation, installation, calibration, testing, maintenance, and repair (interlockings, grade crossings, wayside signal systems, PTC, etc.). FRA reviewed each task to determine whether correctly performing the task was critical to railroad safety; what were the potential consequences if errors were made while performing the task; and whether there were any recent examples of issues or concerns with respect to the task. After performing this analysis, FRA concluded that the vast majority of tasks performed by signal employees (80–90% of the listed tasks) were critical to railroad safety with potentially catastrophic consequences, such as accidents, injuries, and/or deaths, if the tasks were not performed properly.

During FRA’s outreach, the benefits of certification based on the experience of stakeholders with engineer and conductor certification under 49 CFR parts 240 and 242 were also discussed. Some of the main benefits of

certification that were identified include:

- Creating a minimum standard for training to ensure that the training encompasses all skills and proficiencies necessary to properly perform all safety-related signal employee functions;
- Establishing a record of safety compliance that will follow a signal employee if they wish to become certified by another railroad and that can be used to review a signal employee's performance and potential training needs;
- Requiring certain safety checks, such as identifying active substance abuse disorders, that can minimize the risks posed by job hopping; and
- Establishing a system for individuals to dispute a railroad's decision to deny or revoke certification with the aim of creating a fair and consistent process for all parties.

Based on these meetings, FRA concluded that requiring certification for signal employees would be an important tool to ensure signal employees performing safety-sensitive tasks are adequately trained and qualified and have a documented record of performance that is accessible to prospective employers.

Following this initial outreach, FRA held a follow-up conversation with BRS and IBEW, on March 3, 2022, and individuals from the BRS and IBEW informed FRA of elements that they believe would be beneficial in a signal employee certification program. During this conversation, which was held in videoconference format, FRA asked the attendees to provide individualized feedback on how similar or different a signal employee certification rule should be to FRA's locomotive engineer and conductor certification rules found in 49 CFR parts 240 and 242.

FRA heard that the agency needs to ensure that comprehensive training is provided to signal employees as the current training is inadequate. FRA also heard that railroads are not providing enough training on new equipment and new technology for signal employees. It was also noted that, in some cases, signal employees are being required to use new equipment and new technology without having received any prior training on the equipment or technology.

On March 7, 2022, FRA had a conversation with the railroad industry, including Norfolk Southern Corporation (NS), ASLRRA, and AAR. During this conversation, which was conducted in a videoconference format, FRA also asked for individualized feedback on how

FRA's locomotive engineer and conductor certification regulations in 49 CFR parts 240 and 242 could be improved upon with respect to signal employee certification. Specifically, FRA asked for feedback on any regulatory provisions in 49 CFR parts 240 and 242 that, in their experience, may have been difficult to implement, as well as whether FRA should explore any changes to these regulatory provisions.

AAR expressed opposition to FRA's proposal to issue regulations requiring certification of signal employees arguing that there was not a safety benefit to certification. In addition, NS questioned the need for certification regulations in the absence of any identified gaps in coverage by existing railroad training programs.

ASLRRA expressed concern that FRA's proposal to issue regulations requiring certification of dispatchers and signal employees would result in a big paperwork burden with little benefit. In addition, ASLRRA asserted that most shortline railroads do not have signal systems. With respect to grade crossings, ASLRRA asserted that most shortline railroads rely on contractors to maintain their grade crossing warning systems.

After this conversation, FRA provided a short list of written questions to AAR and ASLRRA. While AAR did not provide additional feedback in response to FRA's list of questions, ASLRRA responded to FRA's list of written questions by email on April 13, 2022, a copy of which has been placed in the docket.¹³

On March 8, 2022, FRA staff had a follow-up conversation with BRS and IBEW to receive information on the types of errors and grade crossing and signal violations that should result in a railroad revoking a signal employee's certification. During this conversation, which was conducted in a videoconference format, FRA heard that it might be appropriate to revoke a signal employee's certification in response to willful violations.

7. Contractors

FRA considered whether railroad contractors (and subcontractors) should be authorized to certify their employees. FRA did not, however, include that option in this proposed rule. Instead, consistent with FRA's engineer and conductor certification regulations, this proposed rule requires railroads to

develop and submit certification programs to FRA for approval and then implement their FRA-approved certification programs. FRA is proposing to adopt this approach because railroads are ultimately held responsible for the actions (or failure to act) of their employees, contractors, and subcontractors when engaged in railroad operations.

FRA acknowledges that signal employee tasks are being subcontracted out by railroads to companies that specialize in this work. However, railroads are generally most knowledgeable about the signal systems that have been deployed on their territories. Therefore, railroads are best suited to develop certification programs that are needed to ensure all signal employees responsible for installing, troubleshooting, testing, repair, or maintenance of railroad signal systems, as defined in § 246.7, have been properly trained and certified on: (a) all applicable Federal rail safety laws, regulations, and orders governing the installation, testing, repair, and maintenance of these systems; and (b) all railroad rules and procedures promulgated to implement those Federal rail safety laws, regulations, and orders. In addition, by keeping certification programs in-house, railroads can implement quality control measures to ensure that their FRA-approved certification programs are being implemented properly.

Nonetheless, FRA is soliciting comment on the approach adopted in this proposed rule, which would require railroads to develop and implement FRA-approved signal employee certification programs. To ease any potential burden, especially on Class III railroads, the proposed rule would allow all railroads to choose between conducting the training or using a training program conducted by a third party, which would be adopted and ratified by the railroad. In addition, contractors that employ signal employees could help railroads comply with the requirements in this proposed rule by providing information about their signal employees' compliance with some of the proposed regulatory requirements. For example, contractors could provide information about their signal employees' compliance with the vision and hearing acuity requirements in the proposed rule. Under this proposed rule, however, railroads would ultimately be responsible for ensuring that certified signal employees are installing, testing, maintaining, and repairing their signal systems.

¹³ A record of public contact summarizing this meeting has been posted in the rulemaking docket at: <https://www.regulations.gov/document/FRA-2022-0020-0003>.

8. Interaction With Other FRA Regulations

While developing this proposed rule, FRA has been mindful of other regulations that may touch upon topics covered in this proposed rule, including FRA's training, qualification, and oversight regulations in 49 CFR part 243 (part 243); railroad safety risk reduction programs (SSP/RRP) in 49 CFR parts 270 and 271 (parts 270 and 271); and fatigue risk management programs (FRMP) in parts 270 and 271. However, FRA finds that this proposed rule would complement, rather than duplicate, those regulations.

Signal employees are currently included in part 243's requirements for training, qualification, and oversight for safety-related railroad employees. However, part 243 does not require railroads to have formal processes in place for promptly removing signal employees from service if they violate one or more basic regulatory standards that could have a significant negative impact on the safety of rail operations. FRA's proposed signal employee certification requirements have been drafted to help address this void, as well as prevent signal employees who have been fired for committing one or more of the revocable events discussed in the proposed rule from "job hopping" and quickly resuming safety-sensitive service at a different railroad that is unaware of the signal employee's prior violation(s) of FRA's rail safety regulations.

As codified in parts 270 and 271, FRA requires Class I railroads, railroads with inadequate safety performance, and passenger rail operations to implement railroad safety risk reduction programs. A railroad safety risk reduction program is a comprehensive, system-oriented approach to safety that determines an operation's level of risk by identifying and analyzing identified hazards and developing strategies to mitigate risks associated with those hazards. In this background, FRA is using the term "railroad safety risk reduction programs" to include both a "system safety program" (SSP) that is required for certain passenger rail operations¹⁴ and a "risk reduction program" (RRP) that is required for a limited number of other rail operations.¹⁵ Although a railroad safety risk reduction program might address a railroad's safety hazards and risks associated with its signal

employees, the framework established by these programs neither directly addresses the risks associated with signal systems nor establishes an industry-wide approach.

First, not every railroad is required to have a railroad safety risk reduction program. Indeed, FRA estimates that fewer than 100 railroads (out of approximately 750 railroads under FRA's jurisdiction) will be required to develop a railroad safety risk reduction program over the next 10 years.

Second, even if a railroad is required to have a railroad safety risk reduction program through which it identifies the risks associated with installing, testing, maintaining, and repairing signal systems, the railroad may decide not to implement mitigations to eliminate or reduce those specific risks. Parts 270 and 271 permit railroads to prioritize risks.¹⁶ Whether a railroad is required to have a program that mitigates risks associated with signal systems will depend on how the railroad prioritizes risks for mitigation and how effectively that mitigation would promote continuous safety improvement compared to mitigation of other identified hazards and risks. Thus, even if signal systems are identified as a risk, a railroad may not implement mitigations to eliminate or reduce that risk.

Accordingly, this proposed rule may complement the SSP/RRP requirements but does not duplicate those requirements. Without this proposed rule, railroads may not be required to implement mitigations to address identified safety risks associated with signal systems across the entire industry.

With respect to FRMPs,¹⁷ an FRMP is a comprehensive, system-oriented approach to safety in which a railroad determines its fatigue risk by identifying and analyzing applicable hazards and developing plans to mitigate, if not eliminate, those risks. Like the SSP/RRP rules, the FRMP rule is part of FRA's continual efforts to improve rail safety and satisfies the statutory mandate of Section 103 of the RSIA.¹⁸

Like the SSP/RRP requirements, there is no guarantee that any railroad covered by the regulation will use an FRMP to address signal issues. As with the SSP/RRP rules, a covered railroad must identify fatigue hazards, assess the risks associated with those fatigue

hazards, and prioritize those risks for mitigation purposes. It is possible that other fatigue risks, not associated with signal systems, might rank higher, in which case the risk associated with signal systems might not be promptly mitigated. Further, because the FRMP requirements would apply only to those railroads required to comply with the SSP/RRP requirements, an FRMP would not be required of every railroad. Thus, like the SSP/RRP rules, this proposed rule is complementary to the FRMP final rule and is not duplicative.

IV. Section-by-Section Analysis

Subpart A—General

Subpart A of the proposed rule contains general provisions, including a formal statement of the proposed rule's purpose and scope. The subpart also provides that this proposed rule does not constrain the ability of a railroad to prescribe additional or more stringent requirements for its signal employees that are not inconsistent with this proposed rule.

Section 246.1 Purpose and Scope

This proposed section, derived from 49 CFR 240.1 and 242.1, indicates that the purpose of the proposed rule is to ensure that only those persons who meet minimum Federal safety standards serve as certified signal employees, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

Even though a person may have a job title other than signal employee, the requirements of this proposed rule would apply to that person if they meet the definition of "signal employee" without regard to the class or craft of the employee or the manner in which the employee is compensated, if at all. The definition of "signal employee," and an explanation of who is covered by the definition, are discussed in more detail in the section-by-section analysis for § 246.7, below.

Section 246.3 Application and Responsibility for Compliance

The extent of FRA's jurisdiction, and the agency's exercise of that jurisdiction, is well-established. See 49 CFR part 209, app. A. This proposed application and responsibility for compliance section is consistent with FRA's *Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws* in appendix A to 49 CFR part 209 (Policy Statement).

This proposed section, derived from 49 CFR 240.3 and 242.3, provides that the proposed rule would apply to all railroads with four exceptions.

¹⁴ 49 CFR 270.3 (requiring the application of the system safety program rule to certain passenger rail operations).

¹⁵ 49 CFR 271.3 (requiring the application of the risk reduction program rule to certain rail operations).

¹⁶ See e.g., 49 CFR 270.5 (definition of "risk-based hazard management") and 271.103(b)(3).

¹⁷ On June 13, 2022, FRA published a final rule adding a FRMP to the railroad safety risk reduction program requirements in parts 270 and 271. 85 FR 83484.

¹⁸ Codified at 49 U.S.C. 20156.

Paragraph (a)(1) of this section notes that this proposed rule would not apply to railroads that do not have a signal system, as defined in § 246.7. In paragraph (a)(2), FRA proposes to exempt operations that occur within the confines of industrial installations commonly referred to as “plant railroads” and typified by operations such as those in steel mills that do not go beyond the plant’s boundaries and that do not involve the switching of rail cars for entities other than themselves. Further explanation of what is meant by the term “plant railroad” is provided in the section-by-section analysis for § 246.7.

In paragraph (a)(3), FRA is also proposing to exclude “tourist, scenic, historic, and excursion operations conducted only on track used exclusively for that purpose . . . and only on track inside an installation that is insular.” In other words, FRA is proposing to exclude tourist, scenic, historic, or excursion operations conducted only on track where there is no freight, intercity passenger, or commuter passenger railroad operations on the track. In addition, FRA is proposing to consider insularity when determining whether the requirements of this proposed rule apply to a tourist, scenic, historic, or excursion operation. As explained in the Policy Statement, FRA considers a railroad to be “insular” if its operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of any member of the public (except a business guest, a licensee of the tourist operation or an affiliated entity, or a trespasser) would be affected by the operation. A railroad is not considered insular if one or more of the following exists on its line: (a) A public highway-rail grade crossing that is in use; (b) an at-grade rail crossing that is in use; (c) a bridge over a public road or waters used for commercial navigation; or (d) a common corridor with a railroad (*i.e.*, its operations are within 30 feet of those of any railroad). In addition, when determining insularity for purposes of this proposed rule, FRA would consider whether a public pathway grade crossing is located on the railroad line. FRA is proposing to add this criterion to the determination of insularity for purposes of this proposed rule, in recognition of the potential safety risks associated with the use of public pathway grade crossings by members of the general public.

FRA believes that applying the proposed regulatory requirements in this part to signal employees who work on non-insular passenger rail operations off the general system is warranted by

the potential risk to passengers associated with accidents involving heavy motor vehicles. FRA acknowledges that a passenger railroad off the general system may be considered non-insular, yet have only private grade crossings on its line of railroad. Due to the non-insular status of the railroad, signal employees who install, maintain, test, or repair train-activated warning devices at those private grade crossings or who install, maintain, test, or repair signal systems on its line would be subject to this rule.

The final proposed exclusion in § 246.3(a)(4) covers rapid transit operations in an urban area that are not connected to the general railroad system of transportation. It should, however, be noted that FRA exercises jurisdiction over some rapid transit type operations, given their links to the general railroad system of transportation, such as rapid transit operations conducted on track used for freight, intercity passenger, or commuter passenger railroad operations, during a block of time during which a general system railroad is not operating (temporal separation). Thus, this proposed rule would apply to persons who perform work on signal systems for those rapid transit type operations.

Paragraph (b) is intended to clarify that any person, as defined in § 246.7 (including a railroad employee or employee of a railroad contractor) who performs a function required by this part will be held responsible for compliance.

Section 246.5 Effect and Construction

This proposed section is derived from 49 CFR 240.5 and 242.5. Paragraph (a) addresses the relationship of this proposed rule to preexisting legal relationships. Paragraph (b) states that FRA does not intend to alter the authority of a railroad to initiate disciplinary sanctions against its employees by issuance of this proposed rule.

Paragraph (c) of this section is intended to note that, as a general matter, FRA does not intend to create or prohibit the right to “flowback” or take a position on whether “flowback” is desirable. The term “flowback” has been used in the industry to describe a situation where an employee leaves their current position to return to a previously held position or craft. The reasons for reverting back to the previous craft may derive from personal choice or a less voluntary nature (such as downsizing). Many collective bargaining agreements address the issue of flowback. However, paragraph (c) must be read in conjunction with

§ 246.213, which would limit flowback in certain situations (*i.e.*, when a certificate is revoked due to an alcohol or drug violation).

Paragraph (d) of this proposed section addresses employee rights. The proposed rule would explicitly preserve any remedy already available to the person and would not create any new entitlements.

Section 246.7 Definitions

This section defines a number of terms that have specific meaning in this proposed part. Some of these terms have definitions that are similar to, but may not exactly mirror, definitions used elsewhere in this chapter.

Contractor, as defined in this proposed part, would include prime contractors, as well as subcontractors. This definition, which mirrors the definition of “contractor” in 49 CFR part 243, has been included in this section to help explain FRA’s intent that the requirements of this part which apply to railroad contractors are also intended to apply to railroad subcontractors as well.

Disable, as defined in this proposed part, would mean to render a device [or system] incapable of proper and effective action or to materially impair the functioning of that device. In the interest of consistency, this proposed definition is very similar to the definition of “disable” provided in § 218.53 of FRA’s railroad operating practices regulations. However, for purposes of this proposed part, the term “disable” would include situations in which a device or system is lawfully rendered incapable of proper and effective action.

Consistent with parts 240 and 242, FRA proposes to define “drug” as any substance (other than alcohol) that has known mind- or function-altering effects on an individual, specifically including any psychoactive substance and including, but not limited to, controlled substances. This term is intended to refer to substances that have a significant potential for abuse and/or dependence. Normal ingestion of caffeine in beverages and use of nicotine from tobacco products, even though involving some degree of habituation or dependence, are not intended to be included within the definition.

In this proposed part, the terms “ineligible” and “ineligibility” would be catch-all terms that not only encompass revocation and denial of certification, but also cover other situations in which a signal employee would be legally disqualified from serving as a signal employee. For example, a certified signal employee

may voluntarily refer him or herself for substance abuse counseling or treatment under 242.115(c). If the signal employee then refuses to complete a course of action recommended under the provisions of 49 CFR 219.1003, that would not be an operating rule or procedure, or type of alcohol or drug violation that would require revocation (nor would it require denial of certification). Rather the signal employee would simply remain “ineligible” until a railroad determined that the person no longer had a substance abuse disorder, or the person re-entered a substance abuse program and it had been determined under the provisions of 49 CFR 219.1003 that the person could safely return to duty under certain conditions.

In this proposed part, *mentor* would be defined as a certified signal employee who has at least one year of experience as a certified signal employee. FRA is proposing to define the term, “mentor,” to help clarify that a mentor provides direct supervision and oversight over the work of one or more signal employees.

In this proposed part, *person* would take on the same meaning as it does in FRA’s other safety rules. The proposed definition is intended to clarify that this term does not apply merely to individual persons. Instead, the term would mean “an entity of any type covered under 1 U.S.C. 1” and the proposed definition goes into detail regarding the types of people and entities that are covered.

FRA proposes a definition of *plant railroad* to aid in the understanding of the application of this part pursuant to section 246.3(a)(1). The definition coincides with FRA’s longstanding explanation of how the agency will not exercise jurisdiction over a plant railroad that does not operate on the general system of transportation and does not move cars for other entities. See 49 CFR part 209, app. A.

Although the RSIA required FRA to issue a report to Congress on whether the certification of certain crafts or classes of railroad carrier or railroad carrier contractor or subcontractor employees, including “signal repair and maintenance employees,” is necessary to reduce the number and rate of accidents and incidents or to improve railroad safety, the RSIA did not define the term, “signal repair and maintenance employees.” In the absence of such a definition in the RSIA, FRA proposes to use the streamlined term, “signal employee.” FRA also proposes to define this streamlined term, “signal employee,” as a person who is engaged in installing,

troubleshooting, testing, repair, or maintenance of railroad signal systems, highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, power-assisted switches, broken rail detection systems, and switch-point indicators, as well as other safety-related devices, appliances, and systems installed on the railroad in signaled or non-signaled territory. This proposed definition is generally consistent with the definition of “signal employee” in the hours of service law but includes the terms “troubleshooting” and “testing” which are not found in the statutory definition.¹⁹

Consistent with parts 240 and 242, the term “substance abuse disorder” is defined as a psychological or physical dependence on alcohol or a drug or another identifiable and treatable mental or physical disorder involving the abuse of alcohol or drugs as a primary manifestation.

This proposed definition would include drug and alcohol users who engage in abuse patterns which result in ongoing safety risks and violations. A substance abuse disorder is “active” within the meaning of this proposed rule if the person (1) is currently using alcohol or other drugs, except under medical supervision consistent with the restrictions described in § 219.103 of this chapter or (2) has failed to successfully complete primary treatment or successfully participate in aftercare as directed by a Substance Abuse Professional (SAP) or Drug and Alcohol Counselor (DAC).

Section 246.9 Waivers

This proposed section, derived from 49 CFR 240.9 and 242.9, provides the proposed requirements for a person seeking a waiver of any section of this proposed rule.

Section 246.11 Penalties and Consequences for Noncompliance

This proposed section, derived from 49 CFR 240.11 and 242.11, explains that FRA may impose civil penalties on any person, including a railroad or a contractor providing goods or services to a railroad, that violates any

¹⁹ 49 U.S.C. 21101(4). The hours of service law defines “signal employee” as “an individual who is engaged in installing, repairing, or maintaining signal systems.” 49 U.S.C. 21101(4). While FRA believes “troubleshooting” and “testing” would fall under the terms “installing, repairing, or maintaining” in the hours of service law definition, FRA wanted to make explicit in this rule that “troubleshooting” and “testing” are included in the definition of “signal employee.” The addition of “troubleshooting” and “testing” in the proposed definition in this rule is not intended to capture a broader group of employees than provided in the hours of service law.

requirement of this proposed rule. Any person who violates a requirement of this proposed rule may be subject to civil penalties between the minimum and maximum amounts authorized by statute and adjusted for inflation per violation. Individuals may be subject to penalties for willful violations only. Where a pattern of repeated violations, or a grossly negligent violation creates an imminent hazard of death or injury, or causes death or injury, an aggravated maximum penalty may be assessed.²⁰ Finally, a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying reports required by these proposed regulations.

Consistent with FRA’s final rule regarding the removal of civil penalty schedules from the CFR (84 FR 23730 (May 23, 2019)), FRA will not publish a civil penalty schedule for this rule in the CFR, but plans to publish a civil penalty schedule on its website. Penalty schedules are statements of agency policy, thus notice and comment are not required prior to their issuance, nor are they required to be published in the CFR. See 5 U.S.C. 553(b)(3)(A). Nevertheless, commenters are invited to suggest the types of actions or omissions under each regulatory section that would subject a person to the assessment of a civil penalty. Commenters are also invited to recommend what penalty amounts may be appropriate, based upon the relative seriousness of each type of violation.

Subpart B—Program and Eligibility Requirements

Section 246.101 Certification Program Required

This proposed section, derived from 49 CFR 240.101 and 242.101, would require railroads to have written certification programs comprised of multiple elements, each of which comports with specific regulatory provisions in the proposed rule related to that element. In addition to these required elements, paragraph (b)(1) would require railroads who elect to classify their certified signal employees into multiple occupational categories (and, in some cases, subcategories) to explain and discuss each category or subcategory of certified signal employees.

Paragraph (c) would require railroads to maintain version control for their certification programs. Therefore, railroads would be required to maintain an up-to-date, detailed list or index

²⁰ Please visit FRA’s website for the current aggravated maximum penalty amount at <https://railroads.dot.gov/>.

tracking every change made to their certification programs. FRA would encourage railroads to maintain a redlined version of their certification programs to reflect changes that have been made over the years in context.

Section 246.103 FRA Review of Certification Programs

This proposed section, derived from 49 CFR 240.103 and 242.103, describes the process for the submission and review of signal employee certification programs. Paragraph (a) of this section applies to railroads that have a signal system, as defined in § 246.7, in operation prior to the effective date of the final rule and provides the deadlines for when these railroads would be required to submit their certification programs to FRA. (Paragraph (a) would not, however, apply to railroads that are exempted by § 246.3(a)). The submission schedule in paragraph (a) would require Class I railroads and commuter service railroads to submit their programs earlier than Class II railroads, Class III railroads, and railroads not otherwise classified. The separate deadlines would help space out the initial influx of programs FRA will receive after the final rule goes into effect, to allow FRA to issue approval and disapproval decisions in a more timely manner. FRA also presumes that, in general, Class I railroads and commuter service railroads will have more resources to devote to creating these programs and will be better positioned to create and draft them more quickly.

Paragraph (b) of this section would only apply to railroads that commence operations after the effective date of the final rule. Prior to installing, implementing, or operating any signal system as defined in § 246.7, these railroads would be required to submit their signal employee certification program to FRA and obtain FRA approval.

Paragraph (c) of this section provides that railroads would submit their programs and their requests for approval (which are described in greater detail in § 246.106(a)) by uploading them to FRA's secure document submission site. This will allow for more efficient processing and will significantly reduce the risk of a program submission getting lost. FRA will need basic information from each railroad before setting up the user's account. In order to provide secure access, information regarding the points of contact will be required. It is anticipated that FRA will be able to approve or disapprove all or part of a program and generate automated

notifications by email to a railroad's points of contact.

FRA does not intend to develop a secure document submission site that would allow confidential materials to be identified and not shared with the general public. This is because FRA does not expect the information in a program to be confidential or proprietary, particularly since each railroad would be required to share the program submission, resubmission, or material modification with the president of each labor organization that represents the railroad's certified signal employees and the program will be available on FRA's website. See § 246.103(d) and (j). Accordingly, FRA does not at this time believe it is necessary to develop a document submission system to address confidential materials.

When a railroad submits its certification program to FRA, paragraph (d) of this section would require the railroad to also submit a copy of the program and the request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who would be subject to this part. The railroad's submission to FRA must include a statement affirming that it has provided a copy of the program and the request for approval to the president of each labor organization that represents its signal employees and to all of the railroad's signal employees who would be subject to this part. In addition, the railroad would be required to include a list of the names and email addresses of each labor organization president who received a copy of the program.

Paragraph (e) of this section explains who would be allowed to comment on these programs. For signal employees who are members of a labor union, any comments must be submitted by a designated representative. Signal employees who are not members of a labor union would, however, be permitted to personally submit comments on their railroad's certification program. FRA anticipates that comments submitted through this process will assist the agency in determining whether a program conforms to the requirements set forth in this rule, and thus, FRA will not make a decision on a program until after the 45-day comment period in paragraph (e)(1) has passed.

Paragraph (f) of this section states FRA's aspirational goal to decide on whether to approve a program within 90 days of the date that the program is submitted. However, this would only be a goal and not a deadline for the agency.

Paragraph (f)(3) explains that if FRA is unable to issue a decision on the program within 90 days, the program will not be considered approved on the 91st day. A certification program will not be approved until FRA issues a letter notifying the railroad that its program has been approved. While FRA will make every effort to issue approval and disapproval letters within 90 days, FRA recognizes that this will not always be possible. It may be especially difficult for FRA to meet this goal during the initial implementation of the final rule issued in this rulemaking when FRA expects to receive many certification programs within a relatively short period of time.

Paragraph (g) of this section addresses the process for railroads who wish to materially modify their previously approved programs. If a railroad wishes to materially modify its certification program, it must submit two documents to FRA: (1) a description of how it intends to modify its current program (this constitutes the request for approval required under § 246.106(a)); and (2) a copy of the modified program. Paragraph (g)(1) defines a "material modification" as a modification that "would affect the program's conformance with this part." This definition is taken from 49 CFR 240.103(h)(1) and 242.103(i)(1) and is intentionally broad to cover many different types of program modifications. FRA recognizes that there may be some desire among some interested parties to have a more specific definition of "material modification" in the regulation. Thus, FRA welcomes any comments on suggested changes to the proposed definition of "material modification."

Paragraph (g)(3) explains that the process for submission and review of material modifications mirrors the process for submission and review of initial certification programs. Railroads would be required to submit their material modifications to FRA in conformance with paragraph (c) of this section and would be required to send a copy of the material modification description and the modified program to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the modification in conformance with paragraph (e) of this section, and FRA would issue a letter either approving or disapproving the material modification in conformance with paragraph (f) of this section. If FRA approves the material modification, the railroad could begin implementing the modification and the modified program would replace the original program. If

FRA disapproves the material modification, the railroad would not be allowed to implement the modification and the original program must remain in effect. If a railroad's material modification submission contains multiple modifications, FRA reserves the right to approve some modifications while disapproving other modifications. In such an instance, the railroad could only begin implementing those modifications that FRA has approved.

Paragraph (h) of this section describes the process to resubmit a program or material modification that was previously disapproved by FRA. Paragraph (h)(2) notes that the process for submission and review of resubmitted programs and material modifications mirrors the process for submission and review of initial certification programs. Railroads would resubmit their initial programs or material modifications to FRA in conformance with paragraph (c) of this section and would send a copy of the resubmitted program or material modification to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the resubmitted program or material modification in conformance with paragraph (e) of this section and FRA would issue a letter either approving or disapproving the resubmitted program or material modification in conformance with paragraph (f) of this section.

Railroads would, however, remain responsible for maintaining their signal systems, as defined in § 246.7, in compliance with Federal regulations even if rail operations cease or have not yet been initiated.

Paragraph (h)(3) provides the deadlines, if any, for when a railroad must resubmit its certification program or material modification to FRA. For railroads that have installed or implemented a signal system, as defined in § 246.7, prior to the effective date of the final rule (legacy railroads), if their initial certification program is disapproved by FRA, the railroad would be required to resubmit its program within 30 days of the date FRA notified the railroad that its program was deficient. If a legacy railroad fails to resubmit its program within 30 days and continues operations, FRA may use its enforcement discretion to determine whether enforcement action against the railroad is warranted.

FRA believes a 30-day deadline is needed for legacy railroads because § 246.105(a) allows legacy railroads to continue operations while they await FRA approval of their programs. Thus, without a deadline, legacy railroads

could purposely delay coming into compliance with the final rule issued in this rulemaking by taking months or even years to resubmit their programs. In contrast, railroads that begin operations after the effective date of the final rule cannot begin operations until FRA approves their program. Likewise, no railroad (legacy or non-legacy) can implement a material modification to its program until FRA has approved the modification. In these scenarios, a deadline is unnecessary because the railroad has every incentive to resubmit its programs or material modifications in a timely manner. However, while there is no FRA-imposed deadline in these scenarios, FRA still recommends that railroads provide their resubmissions within 30 days of being notified of deficiencies.

Paragraph (i) of this section acknowledges that FRA reserves the right to revisit its prior approval of a certification program. In certain circumstances, including an audit of a certification program, FRA may discover that it made an error when it previously approved a program. This paragraph allows FRA to rescind a wrongful prior approval while also providing the railroads with certain rights. Paragraph (i)(3) notes that the process for submission and review of programs whose prior approval has been rescinded mirrors the process for submission and review of initial certification programs and resubmission of initially disapproved programs. Railroads would resubmit their programs to FRA in conformance with paragraph (c) of this section and they would send a copy of the resubmitted program to all required parties referenced in paragraph (d) of this section. Certain interested parties would be allowed to comment on the resubmitted program in conformance with paragraph (e) of this section, and FRA would issue a letter either approving or disapproving the resubmitted program in conformance with paragraph (f) of this section.

Paragraphs (i)(6) and (i)(7) allow for a grace period where a rescinded program may remain in effect for a certain period of time. However, once FRA approves a resubmitted program, the resubmitted program must replace the rescinded program. In addition, a rescinded program can no longer remain in effect if FRA has twice disapproved the railroad's resubmitted program. This latter scenario is best explained through an example: On February 10th, FRA notifies ABC Railroad (ABC) that FRA is rescinding its prior approval of the railroad's signal employee certification program. On March 10th, ABC

resubmits its program to FRA. On June 10th, FRA disapproves ABC's resubmitted program. On July 10th, ABC sends FRA its second resubmitted program. On October 10th, FRA issues a letter once again disapproving ABC's program. In this example, ABC's rescinded program could remain in effect between February 10th and October 10th. However, after October 10th, the rescinded program could no longer be in effect. If ABC continued to operate its signal system after October 10th, when it did not have an FRA-approved certification program, FRA could find that the railroad failed to implement a program. In such cases, FRA would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising its enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to address the deficiencies in its resubmissions.

Finally, paragraph (j) of this section notes that the following documents would be made available on FRA's website (*railroads.dot.gov*): (1) certification programs and material modifications submitted by the railroads; (2) any comments to the submissions from the railroads; and (3) the letters from FRA approving or disapproving a program or a material modification. While parts 240 and 242 do not currently require the posting of these documents on FRA's website, the current practice with respect to locomotive engineer and conductor certification programs has been for FRA to post comments on a railroad's submission, as well as FRA approval and disapproval letters, on its website. Paragraph (j) of this section in this proposed rule is intended to make the proposed review and approval process for railroad signal employee certification programs as transparent as possible.

Section 246.105 Implementation Schedule for Certification Programs

This section, derived from 49 CFR 240.201 and 242.105, contains the timetable for implementing this proposed rule. Paragraph (a) of this section acknowledges railroads that have installed or implemented a signal system, as defined in § 246.7, prior to the effective date of the final rule may continue their rail operations while they await FRA's approval of their certification programs. However, if FRA disapproves a legacy railroad's certification program twice (the initial

submission and the first resubmission), the railroad will no longer be in compliance with the rule if it continues to operate its signal system without an FRA-approved program. In such a scenario, FRA could find that the railroad has failed to implement a program and would determine the appropriate enforcement approach to achieve compliance, including civil penalties and/or an emergency order. In exercising this enforcement discretion, FRA may consider such factors as the number and extent of the remaining deficiencies in the program and whether the railroad made good faith efforts to comply with the requirements of the rule through its submitted program. Paragraph (b) provides that any non-legacy railroad (a railroad that did not have any signal system, as defined in § 246.7, installed or implemented prior to the effective date of the final rule) may not install or implement a signal system until FRA has approved its signal employee certification program.

Paragraph (c) of this section would require railroads to designate as certified signal employees, in writing, all persons authorized by the railroad to perform the duties of each category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 as of the effective date of the final rule. Similarly, paragraph (d) of this section would require railroads to designate as certified signal employees, in writing, all such persons authorized by the railroad to perform the duties of certified signal employees pursuant to § 246.107 between the effective date of the final rule and the date FRA approves the railroad's certification program. Railroads would also be required to issue a certificate to each person they designate. This designation system is modeled after the system used when parts 240 and 242 first went into effect. This system allows "legacy signal employees" to obtain certificates so that when their railroad's program is approved, they will be considered "previously certified signal employees" when the time comes for them to be recertified through the railroad's signal employee certification program. Therefore, the recertifying railroad will not have to provide legacy certified signal employees with the kind of basic training that would be given to individuals with little to no signal experience. In other words, a person with 20 years of experience as a signal employee most likely does not need to take a "Signal 101" course that provides a basic overview of signal systems and related technology. Instead, this person would be better served by undergoing

continuing education training as described in §§ 246.107(b)(2) and 246.119(j).

Paragraph (e) of this section states that after the final rule has been in effect for eight months, no person would be permitted to serve as a certified signal employee unless that person has been certified. Paragraph (f) of this section requires each railroad to make formal determinations concerning those individuals it has designated as certified signal employees within three years after FRA's approval of the railroad's certification program. Pursuant to this paragraph, a designated signal employee may serve as a certified signal employee for up to three years from the date of FRA's approval of the program. At the end of three years, however, the designated signal employee can no longer serve as a certified signal employee unless they successfully complete the tests and evaluations provided in subpart B of this rule (*i.e.*, the full certification process).

Thus, individuals who are designated as certified signal employees under paragraphs (c) and (d) of this section could be certified for more than three years before they have to complete the railroad's full certification process. For example, if a person is designated as a certified signal employee on September 1, 2024, and FRA approves the railroad's certification program on September 1, 2025, the signal employee would not have to go through the full certification process and get recertified until September 1, 2028 (four years from the date the individual was designated by the railroad as a certified signal employee). Railroads should note that they may not test and evaluate a designated signal employee or signal employee certification candidate under subpart B of this rule until they have a certification program approved by FRA pursuant to § 246.103.

In order to test and evaluate all of its designated signal employees by the end of the three-year period, a large railroad would likely have to begin that process well in advance of the end of the three-year period. For example, paragraph (f), which is derived from the designation provisions in parts 240 and 242, would permit a railroad to test and evaluate one-third of its designated signal employees within one year of the approval date of the railroad's certification program; another one-third within two years of the program's approval date; and the final one-third within three years of the program's approval date.

To address the issue of designated signal employees who would be eligible to retire within three years of the date

FRA approves their railroad's certification program, FRA is proposing paragraphs (f)(1) through (3) in this section since it would not be an efficient use of railroad resources to conduct the full certification process for a designated signal employee who is going to retire before the end of their designation period. Paragraph (f)(1) provides that a designated signal employee, who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date FRA approves the railroad's certification program, may request in writing that the railroad not perform the full certification process on that designated signal employee until three years from the date FRA approves the railroad's program.

Paragraph (f)(2) would allow the railroad to honor the designated signal employee's request. Thus, paragraphs (f)(1) and (2) allow designated signal employees to serve as signal employees for the full designation period and then retire before being subjected to the full certification process. While it is in the railroads' interest not to perform the full certification process for a person who is going to retire once the designation period expires, and thus, in their interest to grant as many requests as possible, it may not be feasible to accommodate every request that is made. If, for example, a significant number of designated signal employees properly request that the railroad wait to recertify them at the end of the designation period, but then do not retire by the end of the designation period, the railroad might not be able to recertify everyone in time and would risk violating this rule. In recognition of that risk and the need to give railroads some flexibility to comply with the rule, paragraph (f)(2) also provides that a railroad granting any request to delay performance of the full certification process must grant the request of all eligible persons "to every extent possible."

In addition, paragraph (f)(3) provides that a designated signal employee who is also subject to recertification under part 240 or 242 may not make a request under paragraph (f)(1) of this section. This provision recognizes that railroads would likely want to have concurrent certification processes for certifying a person who will be both a certified signal employee and a certified locomotive engineer or conductor. Thus, it would not be appropriate, in that instance, for a designated signal employee who is already subject to recertification under part 240 or 242 to

make a request to delay the full signal employee certification process.

Paragraph (g) of this section provides that after FRA approves a railroad's certification program, the railroad cannot certify or recertify a person as a signal employee unless that person has been tested and evaluated in accordance with the procedures provided in subpart B of this rule. In other words, after FRA approves a railroad's program, that railroad can no longer designate persons as certified signal employees under paragraph (c) or (d) of this section.

Section 246.106 Requirements for Certification Programs

This proposed section, derived from Appendix B to part 240 and Appendix B to part 242, provides both the proposed organizational requirements and a narrative description of the submission required under §§ 246.101 and 246.103. FRA is not proposing to require railroad submissions to be made on a specific form. Instead, FRA proposes to prescribe only minimal constraints on the organization and manner of presenting information.

Paragraph (a) of this section addresses what must be included in a railroad's submission to FRA. Specifically, the railroad must include two documents in its submission: (1) a request for approval; and (2) the certification program. If a railroad is submitting its initial certification program, the request for approval can be a brief document that simply states the railroad is submitting its initial signal employee certification program to FRA for approval. However, if a railroad is making a material modification or modifications to a signal employee certification program that has previously been approved by FRA, the request for approval must describe how the railroad intends to modify its program. In addition, the railroad must provide a copy of the modified certification program that identifies all of the proposed changes from the last FRA-approved version of the program, as required by section 246.103(g).

Paragraph (b) of this section would require that signal employee certification programs be divided into six sections, each dealing with a different subject matter, and that the railroad identify the appropriate person to be contacted in the event FRA needs to discuss some aspect of the railroad's program. Paragraph (b)(1) would require railroads to include basic contact information in Section One of their certification programs and to address whether the railroad elects to accept responsibility for training persons not previously certified as signal employees.

However, for railroads that elect to classify their certified signal employees into more than one occupational category or subcategory by class, task, location, or other suitable terminology, paragraph (b)(1) would require the railroad to provide detailed information about each occupational category (and subcategory, if applicable) of certified signal service in Section One of its certification program.

Paragraph (b)(2) would require railroads to address in Section Two of their certification programs how they will provide continuing education for certified signal employees. A matter of particular concern to FRA is how each railroad will ensure that certified signal employees receive sufficient training on new signal systems and related technology that are deployed on the railroad's territory. While a railroad would have the latitude to select the specific subject matters to be covered, the duration of continuing education sessions, the methods of presenting the information, and the frequency with which continuing education will be provided, the railroad must describe in this section how it will use that latitude to ensure that its certified signal employees receive up-to-date and comprehensive training on new signal systems and related technology so as to comply with the training standards set forth in § 246.119(j).

However, time and circumstances can diminish both abstract knowledge and the proper application of that knowledge to discrete events. Time and circumstances can also alter the value of previously obtained knowledge and the application of that knowledge. Therefore, certified signal employees also need to have their fundamental knowledge of applicable Federal laws and regulations, as well as railroad signal system safety rules and practices, refreshed periodically. Therefore, the railroad must also describe in Section Two how it will ensure that its certified signal employees remain knowledgeable concerning the safe discharge of their responsibilities, in accordance with the standard set forth in § 246.119(j).

Section Three of the certification program must address requirements for the testing and evaluation of previously certified signal employees. Paragraph (b)(3)(i) would require railroads to address how their certification programs will comply with the standards found in § 246.121. Section 246.121 would require railroads, when seeking a demonstration of the signal employee's knowledge, to employ a written or electronic test containing objective questions that address the following subject matters: (i) compliance with all

applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology; (ii) compliance with all applicable railroad safety and operating rules; and (iii) compliance with all applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems and related technology. In addition, the test must also include a practical demonstration component. Paragraph (b)(3)(ii) would also require railroads, in their certification programs, to explain their procedures for testing vision and hearing acuity and for ensuring that their medical examiners have sufficient knowledge to make determinations on whether candidates for signal employee certification or recertification can safely work as certified signal employees.

Section Four of the certification program would address the requirements for training, testing, and evaluating persons not previously certified as signal employees. Railroads that elect, in Section One of the certification programs, to not take responsibility for training persons not previously certified as signal employees can skip this section. Paragraph (b)(4) would require railroads that elect to provide training to persons who have not been previously certified as signal employees to provide details in Section Four for how they will train, test, and evaluate these individuals to ensure they acquire and demonstrate sufficient knowledge and skills to safely perform the job of a certified signal employee. Paragraph (b)(4)(i) would also require railroads to discuss in Section Four its procedures for mentoring candidates for signal employee certification, in accordance with § 246.124.

Paragraph (b)(4)(ii) would require railroads to include the same level of detail in Section Four of their certification programs as that provided in Sections Two and Three of their programs. Therefore, railroads would be required to address both the training requirements found in § 246.119 and the knowledge testing requirements in § 246.121.

If a railroad intends to rely on another entity to provide training to persons not previously certified as signal employees, paragraph (b)(4)(iii) would require the railroad to explain in Section Four how the railroad will ensure that the training provided by another entity adheres to the railroad's certification program. Specifically, the railroad would be required to explain how persons not previously certified as signal employees will be given the required training on

the railroad's signal systems and related technology.

Paragraph (b)(5) would require railroads to discuss in Section Five of their certification programs how the railroad will monitor the operational performance of its certified signal employees in accordance with § 246.123. In particular, the railroad must discuss the processes and procedures it will use for ensuring that such monitoring and testing is performed. This includes a description of the scoring system the railroad will employ during monitoring observations and unannounced tests.

Finally, paragraph (b)(6) would require railroads to address in Section Six of their certification programs how the railroad will perform routine administration of the program. This section must include summaries of how the program will comply with the various provisions listed in paragraph (b)(6) that contain procedural requirements for railroad certification programs.

Section 246.107 Signal Service Classifications

This proposed section would permit, but not require, railroads to issue certificates for one or more occupational categories or subcategories of certified signal employee service. While some railroads with only one type of signal employee service might not have any interest in certifying multiple types of signal employee service, larger railroads that have already established multiple categories of signal employee service (such as signal maintainers, signal inspectors, locomotive signal/electrical technicians, etc.) on their territories may find it beneficial to issue certificates for multiple types of signal employee service. Therefore, by allowing railroads to classify their certified signal employees into multiple occupational categories or subcategories, FRA would give railroads the flexibility to shape the structure of their certification programs to highlight the specific tasks and responsibilities for each category and subcategory of certified signal employee working on their territories.

A railroad that classifies its certified signal employees into separate categories, such as signal maintainers, signal inspectors, and locomotive signal/electrical technicians, would be permitted to issue specific certificates for each category of signal employee service. This proposed section would also allow railroads to certify signal employees for signal system work on specific railroad divisions or subdivisions, as opposed to issuing one universal signal employee certificate

that would certify the signal employee to perform signal system work anywhere on the certifying railroad's territory. As further explained in the Section-by-Section Analysis of § 246.106(b), railroads that choose to classify their certified signal employees into multiple occupational categories and subcategories would be required by § 246.106(b)(1)(iv) to provide detailed information about each occupational category (and subcategory, if applicable) of its certified signal employees.

Paragraph (b) of this section would require certified signal employees to immediately notify the railroad (or their employer, if they are not employed by a railroad) if they are called to work on a signal system or signal-related technology on which they have not been certified. When notified that a certified signal employee has been called to work on a signal system or signal-related technology on which the employee has not been certified, paragraph (c) would prohibit the railroad from requiring the certified signal employee to work on the signal system or signal-related technology unless the certified signal employee is allowed to work under the direct oversight and supervision of a mentor in accordance with § 246.124.

Section 246.109 Determinations Required for Certification and Recertification

This proposed section lists the determinations that would be required for evaluating a candidate's eligibility to be certified or recertified. The reference to § 246.303 in paragraph (a)(2) of this section is to ensure railroads determine whether a candidate is eligible to hold a certification by reviewing any prior revocations addressed in subpart D of this rule.

Despite the reference in paragraph (a)(1) of this section to provisions in §§ 246.111 and 246.113 requiring a review of safety conduct information from the preceding five years, § 246.113(g)(1) would not permit a railroad to consider information concerning safety conduct that occurred prior to the effective date of the final rule issued in this rulemaking. Even though this provision would result in a railroad's evaluation of less than five years' worth of information for some signal employees early on in the rule's effective period, it is included in part 246 for the same reason similar provisions were included in parts 240 and 242—namely, that all signal employees should be permitted to start with a “clean slate” for certification purposes as a matter of basic fairness. See 56 FR 28228, 28242 (June 19, 1991).

Paragraph (b) of this section would provide flexibility to railroads and signal employees or signal employee candidates in obtaining the information required by §§ 246.111 and 246.113. For example, in some states, railroads may be able to obtain motor vehicle operator data for signal employees and signal employee candidates through background checks.

Section 246.111 Prior Safety Conduct as Motor Vehicle Operator

This proposed section, derived from 49 CFR 240.111, 240.115, and 242.111, would provide the requirements and procedures that a railroad would be required to follow when evaluating a certified signal employee or certification candidate's prior safety conduct as a motor vehicle operator. FRA believes that the prior safety conduct of a motor vehicle operator is one indicator of that person's drug and/or alcohol use and therefore an important piece of information for a railroad to consider.

Pursuant to this section, each person seeking certification or recertification as a signal employee would be required to request in writing that the chief of each driver licensing agency that issued them a driver's license within the preceding five years provide a copy of the person's driving record to the railroad. Unlike part 240, this proposed rule would not require individuals to also request motor vehicle operator information from the National Driver Registry (NDR). Based on the NDR statute and regulation (*see* 49 U.S.C. chapter 303 and 23 CFR part 1327), railroads are prohibited from running NDR checks or requesting NDR information from individuals seeking employment as certified signal employees.

Paragraphs (b) and (c) of this section would require a railroad to certify or recertify a person for 60 days if the person: (1) requested the required information at least 60 days prior to the date of the decision to certify or recertify; and (2) otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5). If a railroad certifies or recertifies a person for 60 days pursuant to paragraphs (b) and (c) but is unable to obtain and evaluate the required information during those 60 days, the person would be ineligible to perform as a certified signal employee until the information can be evaluated. However, if a person is simply unable to obtain the required information, that person or the certifying or recertifying railroad could petition for a waiver from FRA (*see* 49 CFR part 211). During the pendency of the waiver request, a railroad would be required to certify or recertify a person if the person

otherwise meets the eligibility requirements of § 246.109(a)(1) through (5).

Paragraph (k) of this section would require certified signal employees or persons seeking certification as signal employees to notify their employer (if employed by a railroad or contractor to a railroad), all prospective certifying railroads (if applicable), and all railroads with whom the person holds a signal employee certificate of motor vehicle incidents described in paragraph (m) of this section within 48 hours of the conviction or completed State action to cancel, revoke, suspend, or deny their motor vehicle driver's license for such incidents. Paragraph (k) would also prohibit railroads from having a more restrictive company rule requiring certified signal employees or persons seeking signal employee certification to report a conviction or completed State action to cancel, revoke, or deny a motor vehicle driver's license in less than 48 hours.

The reasoning behind proposed paragraph (k) involves several intertwined objectives. As a matter of fairness, a railroad should not revoke, deny, or otherwise make a person ineligible for certification until that person has received due process from the State agency taking the action against the motor vehicle license. Further, by not requiring reporting until 48 hours after the completed State action, the proposed rule would have the practical effect of ensuring that a required referral to a drug and alcohol counselor (DAC) under paragraph (n) of this section would not occur prematurely. However, proposed paragraph (k) would not prevent an eligible person from choosing to voluntarily self-refer. Nor would it prevent the railroad from referring the person for an evaluation under an internal railroad policy if other information exists that identifies the person as possibly having a substance abuse disorder.

Paragraph (n) of this section would provide that if a motor vehicle incident described in paragraph (m) is identified, the railroad would be required to provide the data to its DAC along with "any information concerning the person's railroad service record." Furthermore, the person would have to be referred for evaluation to determine whether the person has an active substance abuse disorder. If the person has an active substance abuse disorder, the person would not be eligible for certification. However, even if it is determined that the person is not currently affected by an active substance abuse disorder, the railroad would be

required, if recommended by a DAC, to condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs or both. The intent of this proposed provision is to use motor vehicle records to identify signal employees or candidates for signal employee certification who may have active substance abuse disorders and make sure they are referred for evaluation and any necessary treatment before allowing them to perform safety sensitive service. Any testing performed as a result of a DAC's recommendation under paragraph (n) would be done under company authority, not Federal. However, the testing would be required to comply with the "technical standards" of part 219, subpart H, and part 40.

Paragraph (n)(5) is intended to clarify that failure to cooperate in the DAC evaluation discussed in paragraphs (n)(2) of this section would result in the person being ineligible to perform as a certified signal employee until such time as the person cooperates in the evaluation.

Section 246.113 Prior Safety Conduct With Other Railroads

This proposed section, which is derived from 49 CFR 240.113, 240.205, and 242.113, would establish a process for certification candidates to request information about their prior safety conduct when employed or certified by another railroad. Except as otherwise provided by the retroactive time limit contained in paragraph (g) of this section, this section would require railroads to review records provided by railroads that previously employed or certified the certification candidate regarding the candidate's prior compliance with §§ 246.115 and 246.303 within the previous five years, as well as the candidate's motor vehicle driving record within the previous three years.

Paragraph (b) of this section contains an exception that if a certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request pursuant to paragraph (c) of this section. Such candidates, however, must notify the railroad where they are seeking certification of this fact. This exception should help minimize any burden arising from these proposed requirements.

For certification candidates who do not qualify for the exception provided in paragraph (b), paragraph (c) would require the certification candidate to submit a written request to each railroad that employed or certified the candidate

within the previous five years. As indicated earlier, the written request would direct the previous railroad employer or certifying railroad to provide information about the certification candidate's prior compliance with §§ 246.115 and 246.303 within the previous five years, as well as the candidate's motor vehicle driving record within the previous three years from the date of the written request.

In addition, railroads would be required by paragraph (e) to comply with written requests for records of prior safety conduct submitted by former employees or certified signal employees pursuant to this section within 30 days after receipt of such requests. Railroads that are unable to provide information about prior safety conduct within 30 days would be required by paragraph (f) to either: (1) provide a written explanation of why the railroad cannot provide the information within the requested time frame, along with an estimate of how much time will be needed to supply the requested information; or (2) provide an adequate explanation for why the railroad cannot provide the information requested.

In the event a railroad seeking to certify or recertify a certification candidate receives a written statement from another railroad pursuant to paragraph (f) of this section, which explains that the railroad cannot provide the information requested, the railroad seeking to certify or recertify the certification candidate would be deemed to have complied with the eligibility determination required by paragraph (a) of this section, provided the railroad retains a copy of the other railroad's written statement in its records.

Similarly, in the event a railroad seeking to certify or recertify a certification candidate does not receive a written response from other railroads, the railroad would be deemed to have complied with the eligibility determination required by paragraph (a) of this section provided the railroad retains a copy of its written request for this information in its records.

Section 246.115 Substance Abuse Disorders and Alcohol Drug Rules Compliance

This proposed section, which is derived from 49 CFR 240.119, 240.205, and 242.115, addresses: (1) active substance abuse disorders; and (2) specific alcohol/drug regulatory violations. As noted earlier, annual drug and alcohol testing data submitted to FRA revealed that signal employees had

a random violation rate (drug and alcohol positives and refusals) and a pre-employment violation rate that was considerably higher than their train and engine service counterparts.

Therefore, this section and § 246.111 address certain situations in which inquiry must be made into the possibility that the individual has an active substance abuse disorder if the individual is to obtain or retain a certificate. The fact that specific instances are cited in this section would not preclude the general duty of the railroad to take reasonable and proportional action in other appropriate cases. Declining job performance, extreme mood swings, irregular attendance and other indicators may, to the extent not immediately explicable, indicate the need for an evaluation under internal policies of the railroad.

The purpose of identifying conditions is not to require (and does not require) a railroad to order an evaluation any time a listed condition is exhibited. Rather, FRA is simply providing guidance here as to conditions that may, given the context, call for an evaluation under internal policies of the railroad. Moreover, FRA remains vigilant of harassment and intimidation and will take appropriate action if such conduct is discovered.

Paragraph (a) of this section would require railroads to determine that a person initially certifying, or a signal employee recertifying, meets the eligibility requirements of this section. In addition, each railroad would be required by § 246.203 to retain the documents used to make that determination.

Paragraph (c) of this section would prohibit a person with an active substance abuse disorder from being certified as a signal employee. This means appropriate action must be taken with respect to a certificate (whether denial or suspension) whenever the existence of an active substance abuse disorder comes to the official attention of the railroad, with the exception discussed below. Paragraph (c) would also provide a mechanism for an employee to voluntarily self-refer for substance abuse counseling or treatment.

Paragraph (d) would address conduct constituting a violation of § 219.101 or § 219.102 of the alcohol/drug regulations. Section 219.101(a)(1) prohibits regulated employees from using or possessing alcohol or any controlled substance when the employee is on duty and subject to performing regulated service for a railroad. Section 219.101(a)(2) prohibits regulated employees from reporting for

regulated service, or going on or remaining on duty in regulated service, while under the influence of (or impaired by) alcohol or while having a breath or blood alcohol concentration of 0.04 or more. A regulated employee is also prohibited from using alcohol either within four hours of reporting for regulated service or after receiving notice to report for regulated service, whichever is less. This is conduct that specifically and directly threatens safety in a way that is wholly unacceptable, regardless of its genesis and regardless of whether it has occurred previously. In its more extreme forms, such conduct is punishable as a felony under the criminal laws of the United States (18 U.S.C. 341 *et seq.*) and a number of states.

Section 219.102 prohibits use of a controlled substance by a regulated employee, at any time, whether on or off duty, except for approved medical use. Abuse of marijuana, cocaine, amphetamines, and other controlled substances poses unacceptable risks to safety.

Under the alcohol/drug regulations, whenever a violation of § 219.101 or § 219.102 is established, based on authorized or mandated chemical testing, the employee must be removed from service and may not return until after an SAP evaluation, any needed treatment and/or education, and a negative return-to-duty test, and is subject to follow-up testing (as required by § 219.104). These requirements constitute an absolute minimum standard for action when a signal employee is determined to have violated one of these prohibitions. Considering the need both for general and specific deterrence with respect to future unsafe conduct, additional action should be premised on the severity of the violation and whether the same individual has had prior violations.

This proposed rule would require railroads to consider conduct that occurred within the period of five consecutive years prior to the review. This is the same period provided in this proposed rule as the maximum period of ineligibility for certification following repeated alcohol/drug violations and is the same period used in parts 240 and 242. Use of a 5-year cycle reflects railroad industry experience indicating that conduct committed as much as 5 years before may tend to predict future alcohol or drug abuse behavior. For example, in analyzing data submitted to FRA between 2017 and 2021, FRA found that railroad employees returning to duty from previous drug or alcohol violations were approximately five times more likely to test positive than

other railroad employees. Of course, railroads would retain the flexibility to consider prior conduct (including conduct more than 5 years prior) in determining whom they will hire as signal employees.

Conduct violative of the FRA proscriptions against alcohol and drugs need not occur while the person is serving in the capacity of a signal employee in order to be considered. For instance, an employee who violated § 219.101 while working as a conductor and then sought signal employee certification six months later (under the provision described below) would not be eligible for certification. The same is true under part 240—an employee who violates § 219.101 while working as a brakeman and then seeks locomotive engineer certification six months later would not be eligible for certification at that time. The responsibility of the railroad would therefore not be limited to periodic recertification. This proposed rule would require a review of certification status for any conduct in violation of § 219.101 or § 219.102.

The proposed rule would require a determination of ineligibility for a period of 9 months for an initial violation of § 219.101. This would parallel the 9-month ineligibility period in §§ 240.119(c)(4)(iii) and 242.115(e)(4)(iii).

Specifying a period of ineligibility serves the interest of deterrence while giving further encouragement to deal with the problem before it is detected by management. In order to preserve and encourage referrals, the nine-month period could only be waived in the case of a qualifying referral (*see* § 219.1001). FRA believes that this distinction in treatment, which is also found in part 242, is warranted as a strong inducement to participation because referral programs help identify troubled employees before those employees get into accidents and incidents.

In the case of a second violation of § 219.101, the signal employee would be ineligible for a period of five years. Given railroad employment practices and commitment to alcohol/drug compliance, it is likely that any individual so situated may also be permanently dismissed from employment. However, it would be important that the employing railroad follow through and revoke the certificate under this proposed rule, so the signal employee could not go to work for another railroad (or railroad contractor) within the five-year period using the unexpired certificate issued by the first railroad as the basis for certification. These proposed sanctions

mirror the sanctions in §§ 240.119 and 242.115.

Under this proposed rule, one violation of § 219.102 within the 5-year window would require only temporary suspension and the minimum response described in § 246.115(e) (referral for evaluation, treatment as necessary, negative return-to-duty test, and appropriate follow-up). This parallels the approach taken in parts 240 and 242 and reflects FRA's intent to not undercut the therapeutic approach to drug abuse employed by many railroads. This approach permits first-time positive drug tests to be handled in a non-punitive manner that concentrates on remediation of any underlying substance abuse problem and avoids the adversarial process associated with investigations, grievances, and arbitrations under the Railway Labor Act and collective bargaining agreements. A second violation of § 219.102 would subject the employee to a mandatory two-year period of ineligibility. A third violation within five years would lead to a five-year period of ineligibility.

This proposed rule also addresses violations of §§ 219.101 and 219.102 in combination. A person violating § 219.101 after a prior § 219.102 violation would be ineligible for three years; and the same would be true for the reverse sequence. This mirrors the ineligibility period for locomotive engineers and conductors who have one § 219.101 violation and one § 219.102 violation. *See* 49 CFR 240.119(e)(4)(ii) and 242.115(e)(4)(ii).

Refusals to participate in chemical tests would be treated as if the test were positive. A refusal to provide a breath or body fluid sample for testing under the requirements of 49 CFR part 219 when instructed to do so by a railroad representative would be treated, for purposes of ineligibility under this section, in the same manner as a violation of: (1) § 219.101, in the case of a refusal to provide a breath sample for alcohol testing, or a blood specimen for mandatory post-accident toxicological testing; or (2) § 219.102, in the case of a refusal to provide a body fluid specimen for drug testing.

Interested parties should, however, note that 49 CFR part 40, subpart I, discusses medical conditions under which an individual's failure to provide a sufficient sample would not be deemed a refusal. In addition, subpart G of FRA's alcohol and drug regulations excuses employees from compliance with the requirement to participate in random drug and alcohol testing if the employee can substantiate a medical emergency involving the employee or an

immediate family member. *See* 49 CFR 219.617.

If an employee covered by 49 CFR part 219 refuses to provide a breath or body fluid specimen or specimens when required to by a railroad pursuant to a mandatory provision of 49 CFR part 219, then the railroad (apart from any action it takes under part 246) would be required to remove that employee from regulated service and disqualify the employee from working in regulated service for nine months. *See* 49 CFR 219.104 and 219.107; *see also*, 49 CFR part 219, subpart H, and 49 CFR 40.191 and 40.261. The employee would also be prohibited by § 246.213(c) from working as a certified signal employee for any other railroad during this 9-month period.

Paragraph (e) prescribes the conditions under which employees may be certified or recertified after a determination that the certification should be denied, suspended, or revoked, due to a violation of § 219.101 or § 219.102 of FRA's alcohol/drug regulations. These conditions are derived from the conditions in §§ 240.119(d) and 242.115(f) and closely parallel the return-to-duty provisions of the alcohol/drug rule. The proposed regulation would not require compensation of the employee for the time spent in this testing, which is a condition precedent to retention of the certificate; but the issue of compensation would ultimately be resolved by reference to the collective bargaining agreement or other terms and conditions of employment under the Railway Labor Act. Moreover, the railroad that intends to withdraw its conditional certification would be required to afford the signal employee the hearing procedures provided by § 246.307 if the signal employee does not waive their right to the hearing.

Paragraph (f) would ensure that a signal employee, like any other covered employee, can self-refer for treatment under the alcohol/drug rule (49 CFR 219.1003) before being detected in violation of alcohol/drug prohibitions and would be entitled to confidential handling of that referral and subsequent treatment. This means that a railroad would not normally receive notice from the DAC of any substance abuse disorder identified as a result of a voluntary self-referral under 49 CFR 219.1003. However, paragraph (f) would also require that the railroad policy provide that confidentiality is waived if the signal employee at any time refuses to cooperate in a recommended course of counseling or treatment, to the extent that the railroad must receive notice that the employee has an active substance

abuse disorder so that appropriate certificate action can be taken. The effect of this proposed provision is that the certification status of a signal employee who seeks help and cooperates in treatment would not be affected, unless the signal employee fails to follow through.

Section 246.117 Vision Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for vision acuity testing that a railroad would have to incorporate in its signal employee certification program. This section differs from its analogous sections in 49 CFR parts 240 and 242 in that 40 CFR parts 240 and 242 address the requirements of vision and hearing acuity in the same section. However, FRA determined that for this proposed rule, it could more clearly present these requirements if they are in two separate sections: one section for vision acuity (§ 246.117) and one section for hearing acuity (§ 246.118).

Paragraph (c) of this section contains the general vision standards that a person would be required to satisfy in order to be certified as a signal employee unless they are determined to have sufficient vision acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the vision acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA is proposing that certified signal employees should have to satisfy certain vision standards, with the ability to distinguish between colors being particularly important. However, FRA requests comments on whether vision acuity standards for certified signal employees are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section permits a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a certified signal employee, the railroad could certify that person under this proposed regulation if the railroad obtains the medical examiner's professional medical opinion to that

effect. If necessary, medical examiners could condition their opinion on certain circumstances or restrictions, such as the use of corrective lens.

Paragraph (e) of this section describes what documents the railroad would be required to keep on file with respect to vision acuity testing. Railroads would be required to retain these records for individuals who the railroad certifies as signal employees, as well as those individuals for whom the railroad denies certification. Paragraph (g) of this section addresses the issue of vision deterioration. Once certified signal employees become aware that their vision has deteriorated, they must notify the railroad before performing any subsequent service as a certified signal employee. FRA presumes that certified signal employees would most likely become aware of deterioration in their vision either through their own personal observation or through examination by a medical professional. Should this occur, before a certified signal employee can return to service, they must be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified signal employee still satisfies the vision acuity standards in this part, the certified signal employee would be allowed to return to service. However, if the medical examiner concludes that the certified signal employee no longer satisfies these requirements, the railroad must deny the person's certification in accordance with § 246.301, regardless of how much time remains before the signal employee's current certificate expires. Certified signal employees should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 246.118 Hearing Acuity

This proposed section, derived from 49 CFR 240.121, 240.207, and 242.117, contains the requirements for hearing acuity testing that a railroad would be required to incorporate in its signal employee program.

Paragraph (c) of this section contains the general hearing standards that a person must satisfy in order to be certified as a signal employee unless they are determined to have sufficient hearing acuity under paragraph (d) of this section. The standards in paragraph (c) mirror the hearing acuity standards for locomotive engineers and conductors in 49 CFR parts 240 and 242. FRA is considering whether hearing acuity standards are necessary for certified signal employees and if so, whether they need to be as stringent as the standards for engineers and

conductors. FRA proposes that certified signal employees should have to satisfy certain hearing standards and it seems logical for these standards to be consistent with the hearing standards for engineers and conductors. However, FRA requests comments on whether hearing acuity standards for certified signal employees are necessary, and if so, whether they should be as strict as the standards for locomotive engineers and conductors.

Although some individuals may not be able to meet the threshold acuity levels in paragraph (c) of this section, they may be able to compensate in other ways that will permit them to function at an appropriately safe level despite their physical limitations. Paragraph (d) of this section would permit a railroad to have procedures whereby doctors can evaluate such individuals and make discrete determinations about each person's ability to compensate for their physical limitations. If the railroad's medical examiner concludes that an individual has compensated for their limitations and could safely serve as a certified signal employee, the railroad could certify that person under this regulation once the railroad possesses the medical examiner's professional medical opinion to that effect. If necessary, medical examiners could condition their opinion on certain circumstances or restrictions, such as the use of a hearing aid.

Paragraph (e) of this section describes what documents the railroad would be required to keep on file with respect to hearing acuity testing. Railroads would be required to retain these records for both individuals who the railroad certifies as signal employees and those individuals for whom the railroad denies certification. Paragraph (g) of this section addresses the issue of hearing deterioration. Once certified signal employees become aware that their hearing has deteriorated, they would be required to notify the railroad before performing any subsequent service as a certified signal employee. FRA presumes certified signal employees would most likely become aware of deterioration in their hearing either through their own personal observation or through examination by a medical professional. Before a certified signal employee could return to service, they would have to be reexamined. If upon reexamination, the railroad's medical examiner concludes that the certified signal employee still satisfies the hearing acuity standards in this part, the certified signal employee could return to service. However, if the medical examiner concludes that the certified signal employee no longer satisfies these

requirements, the railroad would be required to deny the person's certification in accordance with § 246.301, regardless of how much time remains before the signal employee's current certificate expires. Certified signal employees should note that willful noncompliance with the notification requirement in this paragraph could result in enforcement action.

Section 246.119 Training Requirements

This proposed section, derived from 49 CFR 240.123, 240.213, and 242.119, would require railroads to provide initial and periodic training to signal employees. Such training is necessary to ensure certified signal employees have the knowledge, skills, and abilities necessary to safely perform all of the safety-related duties mandated by Federal law, regulations, and orders.

Paragraph (b) of this section would require railroads to address in their certification programs whether the railroad will accept responsibility for training persons who have not been previously certified as signal employees and thus obtain authority to provide initial signal employee certification or whether the railroad will only recertify signal employees who were previously certified by other railroads. If a railroad accepts responsibility for training persons who have not been previously certified as signal employees, paragraph (c) of this section would require the railroad to state in its certification program whether it will conduct the training or whether the railroad will employ a training program that has been adopted and ratified by the railroad, but will be conducted by another entity on its behalf.

Under this section, railroads would have latitude to design and develop the training and delivery methods they will employ; but paragraphs (d), (e), and (f) of this section contain proposed requirements for railroads that elect to train persons who have not been previously certified as signal employees. Pursuant to paragraph (d), a railroad that makes this election would be required to determine how training will be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, practical demonstration, on-the-job training, or other formal training. Paragraph (d)(3) would also require railroads to review and modify their training programs whenever new safety-related railroad laws, regulations, orders, and procedures are issued, as well as whenever new signal systems,

technologies, software, or equipment are introduced into the workplace.

Paragraph (f) of this section provides the requirements a person not previously certified as a signal employee would have to satisfy in order to become a certified signal employee. Paragraph (f)(2) states the person must demonstrate on-the-job proficiency by successfully completing the tasks, and using the signal systems and technology necessary, to be a certified signal employee on the railroad. A certification candidate may perform these tasks under the direct onsite supervision of a certified signal employee who has at least one year of experience as a signal employee. FRA requests comments, including any supporting data, on whether this “one year of experience” requirement for certified signal employees supervising certification candidates is sufficient. The final proposed requirement, found in paragraph (f)(3), is that the previously uncertified person must demonstrate their knowledge of the railroad’s signal systems, technologies, software, and equipment deployed on the railroad’s territory. If the railroad uses a written test to fulfill this requirement, paragraph (f)(3) would require the railroad to provide the person(s) being tested with an opportunity to consult with a qualified instructor to explain a test question. This requirement is equivalent to 49 CFR 242.119(f) and is included so that certification candidates being tested can obtain clarification of test questions from someone who possesses knowledge of the signal systems, technologies, software and equipment deployed in the relevant territory.

Paragraph (g) of this section would require railroads to retain written documentation of the listed determinations. Paragraph (g)(1) would only apply to people who have not been previously certified as signal employees, whereas paragraph (g)(2) would apply to all persons seeking signal employee certification.

Paragraph (h) would require all railroads, regardless of their election in paragraph (b) of this section, to provide comprehensive training on the installation, operation, testing, maintenance, and repair of the signal systems and related technology deployed on their territory. (This training must include training on both signal software and signal equipment.) In order to implement this requirement, paragraph (h) requires railroads to address in their certification program how such training will be provided and how the railroad will ensure that each certified signal employee receives this

comprehensive training before the employee is required to install, operate, test, maintain, or repair any signal system or related technology deployed on the railroad’s territory.

Paragraph (h)(3) would also require railroads to discuss in their programs the maximum amount of time that a certified signal employee can be absent from performing various types of safety-sensitive work on signal systems before refresher training will be required. This provision is intended to require railroads to address situations in which a certified signal employee may have been working on signal system installations for an extended period and was not involved in the intricacies of maintenance and repair of those systems during that time. This time period cannot exceed twelve months. However, railroads would be allowed to choose a shorter time period if they desire.

Paragraph (j) of this section would require each railroad to provide for the continuing education of their certified signal employees to ensure each certified signal employee maintains the necessary knowledge and skills concerning compliance with all applicable Federal laws, regulations, and orders; compliance with all applicable railroad signal system safety and operating rules; and compliance with all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of new and existing signal systems and new and existing signal-related technology deployed on its territory. Given the formal annual review and analysis of railroad certification programs that each Class I railroad, commuter railroad, and Class II railroad would be required by § 246.215 to conduct, FRA anticipates that these railroads will address issues identified during the annual review and analysis of their certification programs in their continuing education programs. Thus, FRA expects the annual review and analysis required by § 246.215 will help improve the overall quality of the railroads’ training programs.

Paragraph (k) is intended to ensure that each certified signal employee receives comprehensive training on the installation, operation, testing, maintenance, and repair of new signal systems (including software and equipment) and new signal-related technology deployed on the railroad’s territory before the employee is required to install, operate, test, maintain, or repair any such system or signal-related technology.

Section 246.121 Knowledge Testing

This proposed section, derived from 49 CFR 240.125, 240.209, and 242.121, would require railroads to provide for the initial and periodic testing of certified signal employees. Paragraph (b) of this section outlines the general requirements for such testing. This testing will have to effectively examine and measure a signal employee’s knowledge of: (a) all applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology, (b) all applicable railroad safety and operating rules, and (c) all applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad’s signal systems and related technology.

Under this section, railroads would have discretion to design the tests that will be employed; for most railroads that would entail some modification of their existing “book of rules” examination to include new subject areas. This section does not specify the minimum number of questions to be asked or the passing score to be obtained. However, it would require that the test be conducted without open reference books unless use of such materials is part of a test objective. Also, this section would require that knowledge testing include a practical demonstration component, with other test components in written or electronic form. Since the testing procedures and requirements selected by the railroad would be submitted to FRA for approval, FRA expects the railroad would describe how it will exercise its discretion to ensure certified signal employees on its territory demonstrate their knowledge concerning the safe discharge of their responsibilities. FRA would also monitor the exercise of discretion being afforded to railroads by this section.

Paragraph (c) of this section mirrors 49 CFR 242.121(e) and would require the railroad to provide the person(s) being tested with an opportunity to consult with a qualified instructor to explain one or more test questions.

Paragraph (d) of this section states that if a person fails a test, the railroad cannot allow that person to serve as a certified signal employee until they achieve a passing score on reexamination. The railroad would decide how much time, if any, must pass after a test failure before a certification candidate can be reexamined. Furthermore, the railroad would decide what additional training, if any, a candidate would receive after a test

failure. The railroad would also decide whether there should be a limit on the number of times a candidate could retake a test, and if so, the number of test retakes the railroad will allow.

Section 246.123 Monitoring Operational Performance

This proposed section, derived from 49 CFR 240.129 and 242.123, contains proposed requirements for conducting unannounced compliance tests. Paragraph (a) of this section would require each railroad to describe in its certification program how it will monitor the conduct of its certified signal employees by performing unannounced compliance tests on the railroad's signal standards, test procedures, and Federal regulations concerning signal systems, as well as monitoring the performance of signal-related tasks. Paragraph (a)(3) would require railroads to indicate the types of actions they will take if they identify deficiencies in a certified signal employee's performance during an unannounced compliance test. FRA believes it is up to each railroad to decide the appropriate action to take in light of various factors, including collective bargaining agreements. Further, FRA believes that the vast majority of railroads have adequate policies to deal with deficiencies in a signal employee's performance and have handled them appropriately for many years.

To avoid restricting the options available to the railroads and employee representatives to develop processes for handling test failures, FRA designed this regulation to be as flexible as possible. There are a variety of actions and approaches that a railroad could take, such as developing and providing formal remedial training for certified signal employees who fail tests or have deficiencies in their performance. Railroads could also implement formal procedures whereby certified signal employees are given the opportunity to explain, in writing, the factors that they believe caused their test failure or performance deficiency. These explanations could help railroads identify areas of training on which to focus or perhaps discover that the reason for the failure/deficiency was due to something other than a lack of skills. FRA believes there are numerous other approaches that could be considered and evaluated by railroads and their certified signal employees. FRA does not want to stifle a railroad's ability to adopt an approach that is best for its organization.

Paragraph (a)(4) would require railroads to describe how they will

monitor the performance of signal-related tasks by their certified signal employees. For example, railroad monitoring could include unaccompanied, post-installation inspections of signal cut-overs (conducted within three days of the installation) to verify that the certified signal employee properly installed and tested the signal system in accordance with the railroad's signal standards. Paragraph (b) of this section provides proposed requirements for these unannounced compliance tests, including signal system tests that must be performed and who would be allowed to conduct the tests. Paragraph (b)(3) specifies that each railroad would be required to give each of its certified signal employees at least one unannounced compliance test each calendar year, except as provided in paragraph (d) of this section. FRA recognizes that before these unannounced compliance tests can be performed in conformance with this section, a railroad's certification program must first be approved by FRA. Thus, at the latest, FRA expects railroads to perform these unannounced compliance tests on all of their certified signal employees during the calendar year immediately following the year their certification program is first approved by FRA. For example, if FRA approves one railroad's program in January 2025 and another railroad's program in December 2025, both of these railroads would be required to perform unannounced compliance tests on all of their certified signal employees starting in 2026. While FRA would encourage these railroads to commence the unannounced tests after their programs are approved in 2025, FRA recognizes it may not be practical to perform unannounced tests on all of their certified signal employees by the end of 2025, especially for the railroad whose program was not approved until December 2025.

Paragraph (c) of this section reflects FRA's recognition that some certified signal employees may not be performing tasks that require certification. Therefore, a railroad would not be required to provide those certified signal employees with an annual, unannounced compliance test. For example, a certified signal employee may be on furlough, in military service, off with an extended illness, or working in another craft. In situations like these where a certified signal employee is not performing tasks that require certification, the railroad would not have to give an unannounced compliance test. However, when the

certified signal employee resumes work on signal systems that requires certification, they would have to be given an unannounced compliance test within 30 days. Moreover, the railroad would be required to retain a written record documenting the dates on which the certified signal employee stopped performing tasks requiring certification, the date the certified signal employee resumed performing signal system work requiring certification, and the date the certified signal employee received their unannounced compliance test following their resumption of signal system work requiring certification.

Section 246.124 Mentoring

This proposed section would require railroads to include, in their certification programs, procedures for mentoring signal employees who have not been certified by the railroad (such as newly-hired signal employees who were certified by their previous employers). By allowing for the mentoring of these signal employees, railroads can allow uncertified signal employees to perform signal work under the direct oversight and supervision of a mentor until these signal employees are certified by the railroad.

After a railroad's certification program has been approved by FRA, paragraph (b) of this section would require that the railroad assign either a signal employee that it has certified pursuant to this part or a signal employee who is working under the direct observation and supervision of a mentor to perform work on a signal system or signal-related technology that requires certification. Therefore, if the railroad assigns a signal employee that it has not certified to perform work on a signal system or signal-related technology that requires certification, paragraph (b) would require the railroad to assign a mentor who can directly oversee and supervise the work performed by the signal employee.

Paragraph (c) of this section would only apply to railroads who elect to classify their certified signal employees into more than one occupational category or subcategory, in accordance with § 246.107. These railroads would be required by paragraph (c) to address in their certification programs how mentoring will be provided for certified signal employees who move into a different occupational category or subcategory of certified signal service.

Paragraph (e) of this section reflects FRA's intent that mentors must be held accountable for the work performed by the signal employees who are working under their direct oversight and supervision. Therefore, paragraph (e)

would require railroads to address in their certification programs how they will hold mentors accountable for the work performed by signal employees who are working under their direct oversight and supervision.

Section 246.125 Certification Determinations Made by Other Railroads

This section of the proposed rule, derived from 49 CFR 240.225 and 242.125, contains requirements that would apply when a certified or previously certified signal employee is about to begin work for a different railroad. This section would allow a railroad to rely on determinations made by another railroad concerning a person's certification.

As noted previously in the discussion above related to § 246.124, railroads would be required to provide mentoring for signal employees with some signal system work experience who have not been certified by the railroad. However, this section would also require railroads to address in their certification programs how they will administer training for previously uncertified signal employees with extensive signal experience or previously certified signal employees who have had their certification expire. In both scenarios, FRA would allow the railroad to reduce the on-the-job training that might otherwise be required if these signal employees were treated as having no signal system work experience. However, if a railroad's certification program fails to specify how the railroad will train a previously certified signal employee hired from another railroad, all signal employees hired by that railroad would be required to take the hiring railroad's entire training program (regardless of the signal employee's prior certification status).

Subpart C—Administration of the Certification Program

Section 246.201 Time Limitations for Certification

This proposed section, derived from 49 CFR 240.217 and 242.201, contains various time constraints that preclude railroads from relying on stale information when evaluating a candidate for certification or recertification. For example, when making a determination of eligibility based on prior safety conduct on a different railroad pursuant to § 246.113, paragraph (a)(1) would prohibit a railroad from relying on information provided more than one year before the railroad's certification decision. However, paragraph (b) goes on to

explain that the time constraints listed in paragraph (a) would not apply to railroads who are making certification or recertification decisions based on the eligibility determination that have already been made by another railroad in accordance with § 246.125.

Paragraph (c) would prohibit a railroad from certifying a person as a signal employee for more than three years except for those individuals who are designated as certified signal employees under § 246.105(c) or (d). When a railroad designates a person as a certified signal employee under § 246.105(c) or (d), that certification can last for three years after the date that FRA initially approves the railroad's certification program. This could, however, lead to situations where a certificate could be valid for more than three years. For example, if a railroad designates a person as a certified signal employee in January 2025, but FRA does not approve the railroad's certification program until January 2026, the signal employee's certification could last until January 2029 (four years in total). However, any subsequent recertifications for that signal employee could only last for three years. In other words, if the signal employee in the previous example got recertified in January 2029, that certificate would expire no later than January 2032.

Paragraph (d) would require railroads to issue certificates that comply with § 246.207 to their certified signal employees within 30 days from the date of the railroad's decision to certify or recertify that person.

Section 246.203 Retaining Information Supporting Determinations

This proposed section, derived from 49 CFR 240.215 and 242.203, contains recordkeeping requirements for railroads that employ certified signal employees. Paragraph (b) lists the documents that railroads would be required to retain for each of their certified signal employees and certification candidates, while paragraph (e) would require railroads to retain these records for six (6) years from the date of the certification, recertification, denial, or revocation decision. Paragraph (e) would also require railroads to make these records available to FRA representatives, upon request, in a timely manner.

Paragraph (f) would prohibit railroads and individuals from falsifying records that railroads are required to retain pursuant to this section. Paragraph (g) contains minimum standards for electronic recordkeeping with which railroads would be required to comply to maintain electronic versions of the

required records. These minimum standards for electronic recordkeeping are virtually identical to the electronic recordkeeping standards contained in 49 CFR 242.203.

Section 246.205 List of Certified Signal Employees and Recordkeeping

This proposed section, derived from 49 CFR 240.221 and 242.205, would require a railroad to maintain a list of its certified signal employees. Paragraph (b) of this section would also require railroads to update their lists of certified signal employees at least annually and to make its list of certified signal employees available, upon request, to FRA representatives in a timely manner.

Paragraph (c) contains minimum standards for electronic recordkeeping with which railroads would be required to comply, in order to maintain an electronic version of the list of certified signal employees required by this section. These minimum standards are similar to the electronic recordkeeping standards contained in 49 CFR 242.205.

Paragraph (d) would prohibit railroads and individuals from falsifying the list of certified signal employees that railroads are required to maintain pursuant to this section.

Section 246.207 Certificate Requirements

This proposed section contains proposed requirements for the certificate that each certified signal employee would be required to carry. The requirements in paragraphs (a)–(e) of this section, which pertain to the proposed minimum content for certificates and authorization of the person who would be designated to sign the certificates, are derived from 49 CFR 240.223 and 242.207.

Paragraph (a) of this section specifies that railroads have the option of issuing certificates electronically or in paper form. Paragraph (a)(1) would require that the signal employee certificate identify the railroad issuing the certificate. Therefore, a certified signal employee who works for more than one railroad would be required to have a separate certificate for each railroad with whom the signal employee is certified. For railroads who choose to classify their certified signal employees into occupational categories or subcategories, pursuant to § 246.107, paragraph (a)(2) would require the railroad to indicate the specific signal employee category(ies) or subcategory(ies) for which the person has been certified.

Paragraph (a)(7) would require the certificate to be signed by an individual who has been designated by the railroad

as an authorized signatory of signal employee certificates, as described in paragraph (c) of this section. Electronic signatures are permitted under this proposed rule. In addition, paragraph (e) of this section would prohibit railroads and individuals from falsifying certificates.

Paragraphs (f) and (i) are derived from 49 CFR 240.305 and 242.209. These paragraphs would require signal employees to have their certificates in their possession while on duty, display their certificates when requested by an FRA representative, State inspectors²¹ authorized under 49 CFR part 212, or certain railroad officers, and to notify a railroad if they are called to serve as a signal employee in a service that would cause the employee to exceed their certificate limits.

Paragraph (g), derived from 49 CFR 240.301 and 242.211(a), would require a railroad to promptly replace a certified signal employee's certificate at no cost to the employee, if the certificate is lost, stolen, mutilated, or becomes unreadable. However, unlike § 242.211(b), this section does not contain detailed requirements for temporary replacement certificates. Temporary replacement certificates generally contain most of the information provided on official certificates. Therefore, it does not appear to be especially burdensome for railroads to issue temporary certificates to replace certificates that have been lost, stolen, mutilated, or become unreadable. Nonetheless, by refraining from proposing a formal process for the issuance of temporary replacement certificates, FRA would allow railroads to decide how and when to issue temporary replacement certificates to signal employees. FRA is soliciting comment on this proposed approach.

Section 246.213 Multiple Certifications²²

This proposed section, derived from 49 CFR 240.308 and 242.213, establishes how railroads would handle certified signal employees who are also certified in another railroad craft. FRA recognizes that while it is fairly common for an

individual to work as both an engineer and a conductor, it is less common for a signal employee to also work in another craft that requires certification. However, because situations may arise where a certified signal employee is also certified to work in another craft, such as a locomotive engineer or conductor, FRA would like to address how railroads would be required to handle such situations.

Paragraph (a) of this section would allow a certified signal employee to become certified in one or more of the other railroad crafts that require certification such as locomotive engineer or conductor. If a person is certified in multiple crafts by the same railroad, paragraph (b) would require the railroad to coordinate the expiration dates of those certificates, to the extent possible. While railroads are not required to have all of a person's certificates expire at the same time, it would be beneficial from the standpoint of administrating the certification programs if railroads followed this practice. Thus, FRA encourages railroads to coordinate these expiration dates when possible.

Paragraph (c) of this section would pertain to signal employees who hold signal employee certificates issued by multiple railroads or who are seeking to become certified signal employees for multiple railroads. Paragraph (c)(1) would require the signal employee to immediately notify their employer(s) and all railroads with whom the signal employee holds a signal employee certificate, if a railroad denies, suspends, or revokes the signal employee's certification or recertification. Certified signal employees should note that willful noncompliance with the notification requirements in this paragraph will likely result in enforcement action including, but not limited to, disqualification from safety-sensitive service.

Paragraph (c)(2) would prohibit an individual from working as a certified signal employee for any railroad while their signal employee certification is suspended or revoked by a railroad, except as provided for in § 246.124(d). For example, if an individual is a certified signal employee with Railroad ABC and Railroad DEF, and ABC suspends and/or revokes the individual's certificate, that individual would not be able to work as a certified signal employee for DEF, or any other railroad, during the period of suspension and/or revocation. (Section 246.124(d) would, however, allow the individual to perform work on signal systems, if allowed by a railroad's

certification program, under the direct oversight and supervision of a mentor.)

Paragraph (c)(3) states that if a person has their signal employee certification suspended or revoked by one railroad and that person attempts to become a certified signal employee with another railroad during the certificate suspension or revocation period, they must notify the railroad from whom they are seeking certification that their signal employee certificate has been suspended or revoked. Therefore, if a person is seeking signal employee certification with Railroad XYX when their signal employee certificate is suspended or revoked by Railroad ABC, they must notify XYZ of their current suspended or revoked certification status.

Paragraphs (d), (e), and (f) of this section address how the revocation of a person's signal employee certification would affect that person's ability to work in another railroad craft requiring certification and vice versa. If a person's signal employee certification is revoked because of a drug or alcohol violation, as described in § 246.303(e)(11), then that person would be ineligible to work in any craft requiring certification, such as a locomotive engineer or conductor, for any railroad during the period of revocation. Such person would also be prohibited from obtaining certification in any of those crafts from any railroad while their signal employee certification is revoked. Likewise, if a person's non-signal employee certification, such as locomotive engineer or conductor, is revoked because of an alcohol or drug violation, as described in § 219.101 of this chapter, that person will be ineligible to work as a certified signal employee or obtain a signal employee certificate from any railroad during the revocation period. In contrast, if a signal employee's certification is revoked for a violation that does not involve alcohol or drugs, as described in §§ 246.303(e)(1) through (10), that person would still be able to work in any other railroad craft requiring certification, such as a locomotive engineer or conductor, during the period of revocation, as long as the person is certified in that craft. Likewise, a person could still work as a certified signal employee if their certificate for another railroad craft, such as locomotive engineer or conductor, was revoked due to a violation that did not involve drugs or alcohol.

FRA's reasoning for this line of delineation between revocable events that involve alcohol and drugs and those that do not is rooted in railroad safety. If someone shows up to work as

²¹ Although State inspectors authorized under 49 CFR part 212 could be considered FRA representatives, they are mentioned separately in this section to ensure there is no dispute regarding their authority.

²² To the extent possible, FRA has attempted to match the section numbers in this proposed rule to analogous sections in the conductor certification rule (49 CFR part 242). Since 49 CFR 242.213 addresses multiple certification issues, FRA is proposing to use section number 246.213 for the multiple certification section in this proposed rule instead of the next sequential section number, which would be 246.209.

a certified signal employee under the influence of alcohol or drugs, it stands to reason that they could likely show up to work for another craft, such as a locomotive engineer or conductor, under the influence as well. Thus, it makes sense for an individual's alcohol or drug violations as a certified signal employee to impact their eligibility to work in another craft that requires certification and vice versa. With respect to revocable events that do not involve alcohol or drugs, FRA finds that the tasks performed by a certified signal employee are so inherently different from the tasks performed in another certified craft, such as an operating crew member, that it does not automatically follow that a person's revocable event as a certified signal employee indicates they are more likely to also have a revocable event while performing in another craft. Thus, FRA is taking the position that the revocation of a signal employee certificate which does not involve alcohol or drugs should not affect that person's eligibility to work in another railroad craft requiring certification, and vice versa. However, FRA solicits comments on this issue.

Paragraphs (f) and (g) would prohibit a railroad from denying or revoking a signal employee's certification just because their attempt at certification or recertification in another railroad craft, such as locomotive engineer or conductor, was denied and vice versa. Paragraph (h) would allow a railroad to issue a single certificate to an individual who is certified in multiple railroad crafts that require certification. If a railroad exercises this option, it must ensure that the single certificate contains all of the components required for that craft. Alternatively, railroads are also welcome to issue multiple certificates to an individual who is certified in multiple crafts (one certificate for each craft). Thus, if a person is certified as both a signal employee and conductor, the railroad could issue the person a single certificate for both crafts or it could issue one signal employee certificate and one conductor certificate.

Finally, paragraph (i) of this section denotes that if a person is certified in multiple crafts and they are involved in a revocable event, that event can only lead to the revocation of a certificate for a single railroad craft. The railroad would be required to determine which certificate should be revoked based on the work the individual was performing at the time of the event. In such instances, while the railroad may only revoke a certificate for a single craft, that revocation could affect a person's eligibility to perform other crafts. For

example, if a person who is certified as a signal employee and a conductor violates § 246.303(e)(11) while on duty as a signal employee, the railroad should only revoke the person's signal employee certification. The person's conductor certification could not be revoked for the incident that occurred while the individual was on duty as a signal employee. However, as discussed in paragraph (d)(1) of this section, this person would not be able to work as a conductor while their signal employee certificate was revoked for this offense.

Section 246.215 Railroad Oversight Responsibilities

This proposed section, derived from 49 CFR 240.309 and 242.215, would require each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service, and each Class II railroad to conduct an annual review and analysis of its program for responding to detected instances of poor safety conduct by certified signal employees. FRA has formulated the information collection requirements of this proposed section to ensure that railroads collect data on signal employee safety behavior and feed that information into their operational monitoring efforts, thereby enhancing safety.

This section would require each Class I railroad (including the National Railroad Passenger Corporation), railroad providing commuter service, and Class II railroad to have an internal auditing plan to keep track of events involving poor safety conduct by certified signal employees. For each such event, the railroad would be required to indicate how it responded to that event. The railroad would then be required to evaluate this information, together with data showing the results of annual testing and causation of FRA reportable train accident/incidents, to determine whether additional or different actions, if any, are needed to improve the safety performance of its certified signal employees. FRA would not, however, require railroads to furnish this data or their analysis of the data to FRA. Instead, FRA would require that railroads be prepared to submit such information when requested.

As set forth in paragraph (i), an instance of poor safety conduct involving a person who is a certified signal employee and is certified in another railroad craft (such as a locomotive engineer or conductor) need only be reported once under the appropriate section of this chapter (e.g., under § 240.309, § 242.215, or under

this section). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred. This determination is similar to the determination made under part 225, in which railroads determine whether an accident was caused by poor performance of what is traditionally considered a conductor's job function (e.g., switch handling, derail handling, etc.) or whether it was caused by poor performance of what is traditionally considered a locomotive engineer's job function (e.g., operation of the locomotive, braking, etc.)

Subpart D—Denial and Revocation of Certification

This subpart parallels part 240 and part 242's approach to adverse decisions concerning certification (i.e., decisions to deny certification or recertification and revoke certification). With respect to denials, the approach of this proposed rule is predicated principally on the theory that decisions to deny certification or recertification will come at the conclusion of a prescribed evaluation process which would be conducted in accordance with the provisions set forth in this subpart. Thus, this proposed rule contains specific procedures designed to ensure that a person in jeopardy of being denied certification or recertification would be given a reasonable opportunity to examine and respond to negative information that may serve as the basis for being denied certification or recertification.

When considering revocation, this proposed rule contemplates that decisions to revoke certification would only occur for the reasons specified in this subpart. Since revocation decisions by their very nature involve a clear potential for factual disagreement, this subpart is structured to ensure that such decisions would only be made after a certified signal employee has been afforded an opportunity for an investigatory hearing at which the presiding officer would determine whether there is sufficient evidence to establish that the signal employee's conduct warranted revocation of their certification.

This subpart also provides for certificate suspension in certain circumstances. Certificate suspension would be employed in instances where there is reason to think the certificate should be revoked or made conditional but time is needed to resolve the situation. Certificate suspension would be applicable in instances where a person is awaiting an investigatory

hearing to determine whether that person violated certain provisions of FRA's alcohol and drug control rules, or committed a violation of certain signal standards, procedures, or practices, and situations in which the person is being evaluated or treated for an active substance abuse disorder.

Section 246.301 Process for Denying Certification

This proposed section, derived from 49 CFR 240.219 and 242.401, establishes minimum procedures that must be offered to a certification candidate before a railroad denies the candidate certification or recertification. Paragraph (a) of this section gives a certification candidate a reasonable opportunity to explain or rebut adverse information, including written documents or records, that the railroad intends to use as the basis for its decision to deny certification or recertification.

Paragraph (b) of this section requires that a written explanation of an adverse decision be 'served' on a certification candidate within 10 days of the railroad's decision. Paragraph (b) also requires that the basis for a railroad's denial decision address any explanation or rebuttal information that the certification candidate may have provided pursuant to paragraph (a) of this section.

Paragraph (c) of this section prohibits a railroad from denying certification based on a failure to comply with a railroad test procedure, signal standard, or practice which constitutes a violation under § 246.303(e)(1) through (10) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with that railroad test procedure, signal standard, or practice. This paragraph is derived from the intervening cause exception for revocation in § 246.307(h).

Section 246.303 Criteria for Revoking Certification

This proposed section, derived from 49 CFR 240.117, 240.305, and 242.403, provides the circumstances under which a signal employee may have their certification revoked. In addition, paragraph (a) of this section makes it unlawful to fail to comply with any of the railroad test procedures, signal standards and practices described in paragraph (e) of this section. Paragraph (a) is needed so that FRA can initiate enforcement action. For example, FRA might want to initiate enforcement action in the event that a railroad fails to initiate revocation action or a person who is not a certified signal employee violates a railroad test procedure, signal

standard or practice described in paragraph (e) of this section. (Railroads should, however, note that they may not revoke a signal employee's certificate, including a designated signal employee's certificate, until they have obtained FRA approval of their certification programs pursuant to § 246.103.)

Paragraph (b) of this section provides that a certified signal employee who fails to comply with a railroad test procedure, signal standard or practice described in paragraph (e) will have their signal employee certification revoked. Paragraph (c) provides that a certified signal employee who is monitoring, mentoring, or instructing another signal employee could have their certification revoked if the certified signal employee fails to take appropriate action to prevent a violation of a railroad test procedure, signal standard or practice described in paragraph (e) of this section. As explained in paragraph (c), "appropriate action" does not mean that a supervisor, certified signal employee, mentor, or instructor must prevent a violation from occurring at all costs, but rather the duty may be met by warning the signal employee, as appropriate, of a potential or foreseeable violation.

Paragraph (d) provides that a certified signal employee who is called by a railroad to perform a duty other than that of a signal employee would not have their signal employee certification revoked based on actions taken or not taken while performing that duty. In general, this paragraph would apply regardless of whether the individual was called to perform a certified craft, such as locomotive engineer or conductor, or a non-certified craft. However, this exemption would not, however, apply to violations described in paragraph (e)(11) of this section. Therefore, certified signal employees working in other capacities that do not require certification, who violate certain alcohol and drug rules would have their signal employee certification revoked for the appropriate period of time pursuant to § 246.115. However, if the certified signal employee was working in another certified craft, such as a locomotive engineer or conductor, at the time of the alcohol or drug violation, their certificate for the craft that they were performing at the time of the violation would be revoked as opposed to their signal employee certificate.

If a certified signal employee who is also certified in another craft, such as locomotive engineer or conductor, violates § 219.101 while performing a craft that does not require certification, the railroad must select one, and only

one, certificate to revoke. For example, if a person who is a certified signal employee and conductor violates § 219.101 while working as a brakeman, the railroad must decide to revoke either their signal employee or conductor certificate, but it cannot revoke both certificates. Regardless of which certificate the railroad chooses to revoke, however, the person will be unable to work as a signal employee or conductor during the period of revocation. *See* § 246.213(d).

Paragraph (e) provides the eleven types of rule infractions that could result in certification revocation. The infractions listed in paragraphs (e)(1) through (11) are derived in part from the revocable events provided in 49 CFR 242.117(e) but have been modified to account for the duties and responsibilities of a certified signal employee.

Paragraph (e)(1) refers to action(s) taken by a certified signal employee that interfere with the normal functioning of a highway-rail grade crossing warning system or signal system, if alternative means of protecting motorists and other crossing users have not already been provided. (For this purpose, railroads shall only consider violations of paragraph (e)(1) that result in an activation failure or false proceed signal.)

Paragraph (e)(2) refers to action(s) taken by a certified signal employee that fail to comply with a railroad rule or procedure when removing one or more of the following devices and systems from service: (a) highway-rail or pathway grade crossing warning devices and systems; (b) wayside signal devices and systems; or (c) other devices or systems subject to this part. Similarly, paragraph (e)(3) refers to action(s) taken by a certified signal employee that fail to comply with a railroad rule or procedure when placing these devices and systems in service or restoring them back to service.

Paragraph (e)(4) refers to violations involving a certified signal employee's failure to conduct certain inspections and tests on highway-rail and pathway grade crossing warning devices and systems that are required by railroad rule, signal standard, or railroad procedures. These required inspections and tests would include post-installation and post-repair testing and inspections that are required by FRA's grade crossing and signal regulations in parts 234 and 236, as well as inspections and tests that are required after modification or disarrangement of grade crossing warning devices and other types of signal systems.

Paragraph (e)(5) refers to a certified signal employee's failure to restore power to a train detection or highway-rail or pathway grade crossing warning device or system after manual interruption of the power source. (For violations of this nature, railroads would, however, be directed to consider only those violations that result in activation failure.)

Paragraph (e)(6) refers to a certified signal employee's failure to comply with railroad validation or cutover procedures.

Paragraph (e)(7) refers to a certified signal employee's failure to comply with FRA's Roadway Worker Protection regulations in 49 CFR part 214. However, for purposes of this part, paragraph (e)(7) would require railroads to consider only those violations that directly involve a certified signal employee who failed to ascertain whether on-track safety was being provided before fouling the railroad track.

Paragraphs (e)(8) through (e)(10) refer to a certified signal employee's failure to comply with FRA's Railroad Operating Practices regulations related to work performed on, under, or between rolling equipment. Paragraph (e)(11) refers to a certified signal employee's failure to comply with the alcohol and drug use prohibitions in § 219.101 of FRA's alcohol and drug regulations.

Paragraph (f) proposes a three-year period for considering certified signal employee conduct that failed to comply with a Federal regulation or railroad test procedure, signal standard or practice described in paragraphs (e)(1) through (10) of this section. However, when alcohol and drug violations are at issue, the time period for evaluating prior operating rule misconduct would be dictated by § 246.115, which would establish a period of 60 consecutive months prior to the date of review for such evaluations.

Paragraph (g) provides that if a single incident contravenes more than one Federal regulatory provision or railroad test procedure, signal standard, or practice listed in paragraph (e) of this section, the incident would be treated as a single violation. FRA considers a single incident to be a unique identifiable occurrence caused by a certified signal employee's violation of one or more railroad operating rules or practices listed in paragraph (e). However, a certified signal employee could be involved in more than one incident during a single tour of duty, if the incidents are separated by time, distance, or circumstance.

Paragraph (h) provides that a certified signal employee may have their

certification revoked for violation of a railroad test procedure, signal standard, or practice listed in paragraph (e) that occurs during a properly conducted monitoring test. However, as reflected in paragraph (i), violations of railroad test procedures, signal standards, or practices that occur during monitoring tests that are not conducted in compliance with this part, the railroad's testing procedures, or the railroad's program under § 217.9 will not be considered for revocation purposes.

Section 246.305 Periods of Ineligibility

This section of the proposed rule, derived from 49 CFR 240.117 and 242.405, describes how a railroad would determine the period of ineligibility (e.g., for revocation or denial of certification) for a certified signal employee or candidate for signal employee certification. Paragraph (a) of this section provides the starting date for a period of ineligibility. For persons who are not certified as signal employees, a period of ineligibility would begin on the date of the railroad's written determination that an incident involving a potential violation of one or more regulatory requirements in § 246.303(e)(1) through (10) has occurred. For example, if the railroad made a written determination on March 10th that an incident involving a potential violation of one or more regulatory requirements in § 246.303(e)(1) through (10) occurred on March 1st, the period of ineligibility would begin on March 10th for persons who are not certified signal employees. However, for certified signal employees and candidates for signal employee recertification, a period of ineligibility would begin on the date the railroad notifies the candidate for signal employee recertification that recertification has been denied or the date the railroad notifies the certified signal employee that their certification has been suspended.

Even though some certified signal employees will be subsequently notified that their certification will be revoked as a result of the incident, the period of ineligibility will begin on the date the railroad notifies the certified signal employee that their certification has been suspended. This is because once a person's certificate is suspended, they are ineligible to work as a certified signal employee pending a determination as to whether their certification should be revoked.

With respect to revocation, paragraph (b) of this section provides that once a railroad determines that a certified signal employee has failed to comply with its test procedures, signal

standards, or practices listed in § 246.303(e), two consequences would occur. First, the railroad would be required to revoke the signal employee's certification for a period of time provided in this section. Second, that revocation would initiate a period during which the signal employee would be subject to an increasingly more severe period of revocation if additional revocable events occur within the next 24 to 36 months.

The standard periods of revocation proposed in this section track the revocation periods provided in parts 240 and 242. One revocable event would result in revocation for 30 days. Two revocable events within 24 months of each other would result in revocation for six (6) months. Three revocable events within 36 months of each other would result in revocation of one (1) year. Four revocable events within 36 months of each other would result in revocation for three (3) years.

While paragraph (c) of this section contains a provision that parallels § 242.405(b) and provides that all periods of revocation may consist of training, paragraph (d) contains a provision that parallels §§ 240.117(h) and 242.405(c). Paragraph (d) provides that a person whose signal employee certification is denied or revoked would be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of revocation if they can satisfy all of the criteria listed in the paragraph.

Section 246.307 Process for Revoking Certification

This proposed section, derived from 49 CFR 240.307 and 242.407, provides the procedures a railroad would be required to follow if it acquires reliable information regarding a certified signal employee's violation of a railroad test procedure, signal standard, or practice described in § 246.303(e) or 246.115(d). Paragraph (b)(1) of this section would require a railroad to suspend a signal employee's certification immediately, upon receipt of reliable information regarding a violation of a railroad test procedure, signal standard, or practice described in § 246.303(e). Prior to, or upon suspending, the signal employee's certificate, paragraph (b)(3) would require the railroad to provide either verbal or written notice of the reason for the suspension, the pending revocation, and an opportunity for a hearing. If the initial notice was verbal, then the notice would have to be promptly confirmed in writing. The amount of time the railroad would have to confirm the verbal notice in writing would depend on whether or not a collective bargaining agreement is

in effect and applicable. In the absence of such an agreement, a railroad would have four days to provide written notice. If a notice of suspension is amended after a hearing is convened or does not contain citations to all railroad test procedure, signal standards, and practices that may apply to the potentially revocable event, the Certification Review Board (CRB or Board), if asked to review the revocation decision, might subsequently find that this constitutes procedural error pursuant to § 246.405.

Paragraph (b)(5) of this section would require the railroad, no later than the start of the hearing, to provide the signal employee with a copy of the written information and a list of witnesses that the railroad will present at the hearing. If requested, a recess to the start of the hearing would be granted if the written information and list of witnesses is not provided until just prior to the start of the hearing. If the information that led to the suspension of the signal employee's certificate pursuant to paragraph (b)(1) of this section is provided through statements of an employee of the convening railroad, the railroad would be required to make that employee available for examination during the hearing. Examination may be telephonic or virtual when it is impractical to provide the witness at the hearing. These provisions in paragraph (b)(5) of this section are intended to ensure that signal employees are provided with information and/or witnesses necessary to defend themselves at their hearings. Even if a railroad conducts a hearing pursuant to the procedures in an applicable collective bargaining agreement, the railroad would still have to comply with the provisions of paragraph (b)(5). It is not, however, FRA's intent to require railroads to call every witness included on the railroad's list of witnesses to testify at the hearing. If, for example, a railroad believes that it has provided sufficient evidence during a hearing to prove its case and that calling a witness on its list to testify would be unduly repetitive, the railroad would not be obligated to call that witness to testify. Of course, the opposing party could request that the witness be produced to testify, but the hearing officer would have the authority pursuant to paragraph (d)(4) of this section to determine whether the witness's testimony would be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

Paragraph (d)(2) of this section provides the presiding officer with the

powers necessary to regulate the conduct of the hearing. Thus, a presiding officer would be permitted to deny excessive hearing request delays by the signal employee. Moreover, a presiding officer could find implied consent to postpone a hearing when a signal employee's witnesses are not available within 10 days of the date the certificate is suspended. However, the CRB may grant a petition on review if the CRB finds that the hearing schedule caused the petitioner substantial harm.

Paragraph (e) of this section contains requirements regarding the written decision in a railroad hearing. FRA believes these requirements would ensure that railroads issue clear and detailed decisions. In turn, clear and detailed decisions would allow a signal employee to understand exactly why their certification was revoked and would allow the CRB to have a more detailed understanding of the case if asked to review the revocation decision pursuant to subpart E of this proposed rule.

Paragraph (f) credits the period of certificate suspension prior to the commencement of a hearing required under this section towards satisfying any applicable revocation period imposed in accordance with the provisions of § 246.305. For example, if a signal employee's certificate is suspended on July 1st and on July 11th, the railroad issues a decision to revoke the signal employee's certificate for 30 days, the time between July 1st and July 11th would count towards the 30-day revocation period. Thus, the signal employee's certificate would only be revoked for an additional 20 days after the railroad issued its revocation decision.

Paragraph (g) would require a railroad to revoke a signal employee's certification if it discovers that another railroad has revoked that individual's signal employee certification. The revocation period would coincide with the period of revocation imposed by the railroad that initially revoked the signal employee's certification. For example, if a signal employee is certified by Railroad ABC and Railroad XYZ, and ABC revokes the signal employee's certification from November 1st through November 30th, XYZ must revoke the signal employee's certification through November 30th once it learns of ABC's revocation. The revocation hearing requirement in this rule would be satisfied if any railroad holds a revocation hearing for the signal employee that arises from the same set of facts.

Paragraphs (h) and (i) provide two specific defenses for railroad

supervisors and hearing officers to consider when deciding whether to suspend or revoke a person's certificate due to an alleged revocable event. Pursuant to these provisions, either defense would have to be proven by sufficient evidence. Paragraph (h) would prohibit railroads from revoking a signal employee's certificate when there is sufficient evidence of an intervening cause that prevented or materially impaired the signal employee's ability to comply. For example, a railroad should consider assertions that a qualified instructor failed to take appropriate action to prevent an uncertified signal employee or signal employee trainee from using defective equipment. However, FRA does not intend to imply that all equipment failures and errors caused by others will serve to absolve signal employees from certification revocation under this proposed rule. The factual issues presented by each incident would need to be analyzed on a case-by-case basis.

Paragraph (i) would allow railroads to exercise discretion when determining whether to revoke a signal employee's certification "if sufficient evidence exists to establish that the violation of the railroad test procedure, signal standard, or practice described in § 246.303(e) was of a minimal nature and had no direct or potential effect on rail safety." However, FRA acknowledges that the determination as to whether an incident meets this criterion could be subject to different interpretations. For this reason, paragraph (j) would require railroads to retain information about the evidence relied upon when exercising this discretion. Unless a railroad fails to retain information as required in paragraph (j) or acts in bad faith, FRA does not anticipate taking enforcement action against the railroad even if FRA believes the railroad could have revoked the signal employee's certification.

Paragraph (j) of this section would require railroads to keep records of those violations in which they must not or elect not to revoke a signal employee's certificate pursuant to paragraph (h) or (i) of this section. Paragraph (k) addresses concerns that problems could arise if FRA disagrees with a railroad's decision not to suspend a signal employee's certificate for an alleged violation of a railroad test procedure, signal standard, or practice pursuant to § 246.303(e). As long as a railroad makes a good faith determination after a reasonable inquiry, the railroad will have immunity from civil enforcement for making what the agency believes to be an incorrect determination. However, if railroads do

not conduct a reasonable inquiry or act in good faith, they could be subject to civil penalty assessment under this rule. In addition, even if a railroad does not take what FRA considers appropriate revocation action, FRA could still take enforcement action against an individual responsible for the noncompliance by assessing a civil penalty against the individual or issuing an order prohibiting the individual from performing safety-sensitive functions in the rail industry for a specified period of time pursuant to part 209, subpart D.

Subpart E—Dispute Resolution Procedures

This subpart details the opportunities and procedures for a person to challenge a railroad's decision to deny certification or recertification or to revoke a signal employee's certification. While the proposed dispute resolution process for signal employees largely mirrors the processes for engineers under part 240 and conductors under part 242, FRA proposes some modifications in this proposed rule that will be discussed below. In addition, FRA has undertaken efforts to simplify these regulations to make them clear and comprehensible to all interested parties.

Section 246.401 Review Board Established

This proposed section, derived from 49 CFR 240.401 and 242.501, provides that a person who is denied certification or recertification or has had their signal employee certification revoked may petition FRA to review the railroad's decision. Pursuant to this section, FRA delegates initial responsibility for adjudicating such disputes to the CRB. Although creation of the CRB will require issuance of an internal FRA order, FRA anticipates that the CRB will mirror the Operating Crew Review Board (OCRB) which currently adjudicates disputes under parts 240 and 242.²³ Under this proposed rule, this newly created Board would adjudicate certification disputes for all certified crafts, including locomotive engineers, conductors, and signal employees. FRA is fully aware that these different job disciplines require different knowledge bases and skill sets. While the specific process for selecting CRB members would be delineated in an FRA order or other internal document, FRA would ensure that the CRB is composed of employees with sufficient backgrounds in these various

disciplines. Only those CRB members with sufficient knowledge of signaling would be able to participate as a voting member on a petition filed under this part.

Section 246.403 Petition Requirements

This proposed section, derived from 49 CFR 240.403 and 242.503, contains proposed requirements for obtaining FRA review of a railroad's decision to deny or revoke certification, or deny recertification. Paragraph (b) of this section would require petitioners to seek review in a timely fashion once the adverse decision is served on them. In the interest of consistency and uniformity with parts 240 and 242, petitioners would have 120 days from the date the adverse decision was served upon them to file a petition for review by the CRB.

Paragraph (b)(3) would require petitioners to file their petitions through <https://www.regulations.gov>. Petitioners and their representatives would, however, be well-advised to save some form of proof of filing, in case an error occurs in the *regulations.gov* system and they have to submit proof that their petition was timely filed. All documents associated with a CRB petition would be posted to the docket on *Regulations.gov* and all DOT dockets on *Regulations.gov* are available to the public. You may review DOT's complete Privacy Act Statement published in the **Federal Register** on April 11, 2000 (Volume 65, Number 70, Pages 19477–78).

Paragraph (b)(4) would require that a petition contain contact information, including an email address, for the petitioner and their representative, if any. The OCRB only communicates with parties via email. Therefore, FRA anticipates the CRB will operate in a similar manner and will only send communications to the parties via email. If a petition only contains an email address for the petitioner's representative, but not the petitioner, the CRB will only send any necessary communications to the representative. Accordingly, a petition filed in accordance with this part need not include a mailing address for petitioner or their representative, unlike petitions for review filed pursuant to parts 240 and 242. Lastly, if any required contact information for petitioner or their representative, such as a phone number or email address, changes during the pendency of a petition before the CRB, it would be the responsibility of the petitioner or their representative to provide the CRB and the railroad with the new contact information.

Paragraph (b)(6) would require petitioners or their representatives to

state the facts and arguments in support of their petition. In other words, they would need to explain to the CRB why they think the railroad was incorrect in denying or revoking the petitioner's certification. Paragraph (b)(7) would require petitioners to submit all documents related to the railroad's decision that are in their possession or reasonably available to them. This may include the transcript and exhibits from the petitioner's denial or revocation hearing. In most cases, these documents will be essential to the Board's ability to make an informed decision on the petition. If neither the petitioner nor the railroad provides these documents, the Board may have to specifically request these documents which would likely to delay the Board's adjudication of the petition. Therefore, it is in the petitioner's interest to include these documents as part of their petition.

Paragraph (c) of this section is intended to clarify a petitioner's responsibilities with respect to a petition seeking review of a railroad decision based on petitioner's alleged failure to comply with a drug or alcohol-related rule or a return-to-service agreement. If requested by the CRB, paragraph (c) would require a petitioner to supplement the petition with "a copy of the information under 49 CFR 40.329 that laboratories, medical review officers, and other service agents are required to release to employees." This paragraph would also require a petitioner to provide a written explanation in response to a CRB request if the petitioner does not supply the Board with written documents that should be reasonably available under 49 CFR 40.329.

Paragraph (d) of this section would give the CRB discretion to grant a request for additional time to file a petition if certain circumstances are met. As an initial matter, the petitioner would be required to show good cause for granting the extension. Thus, a petitioner would have to demonstrate a reasonable justification for granting the extension of time. This justification should be as detailed as possible to assist the Board in its determination. In addition to showing good cause for an extension, a petitioner would be required to submit their extension request before the deadline for filing their petition or, if the deadline has already passed, they must allege facts constituting "excusable neglect" for failing to meet the deadline. The mere assertion of excusable neglect, unsupported by facts, would be insufficient. Excusable neglect would require a demonstration of good faith on the part of the party seeking an

²³ In a future rulemaking, FRA expects to revise parts 240 and 242 to refer to the CRB instead of the OCRB.

extension of time, and some reasonable basis for the party's failure to comply with the time frame specified in this proposed rule. Absent a showing along these lines, relief would be denied. The Board would make determinations on whether "good cause" and/or "excusable neglect" has been shown on a case-by-case basis.

Paragraph (e) explains that a decision by the CRB to deny a petition for untimeliness or lack of compliance with the requirements of § 246.303 may be appealed directly to the FRA Administrator. Normally an appeal to the Administrator can only occur after a case has been heard by FRA's hearing officer. However, petitions that the Board finds to be untimely or incomplete are the two exceptions where a party can skip petitioning the hearing officer and go directly to filing an appeal with the Administrator.

Section 246.405 Processing Certification Review Petitions

This section of the proposed rule, derived from 49 CFR 240.405 and 242.505, details how petitions for review by the CRB would be handled. Paragraph (a) of this section notes that when FRA receives a CRB petition, FRA would send a written notification to the parties involved in the petition. FRA proposes to send these acknowledgments via email. If a representative files a petition on behalf of a petitioner, the petition must include the petitioner's email address, if the petitioner also wants to receive the acknowledgment email and any other correspondence (including the Board's decision) from FRA. The acknowledgment email would include the docket number for the petition so that both parties can access the documents in the case on <https://www.regulations.gov>. FRA would not send a copy of the petition to the railroad.

Paragraph (b) of this section would provide railroads with the opportunity to respond to a petition. While it is always optional for a railroad to respond to a petitioner's arguments, if the petitioner did not include relevant documents in their petition, such as hearing transcripts or exhibits, the railroad is required to provide FRA with those documents, even if it does not respond to the arguments in the petition. Railroads would have 60 days, from the date FRA sends the acknowledgment email, to file a response to the petition in the docket on <https://www.regulations.gov>. Railroads would be permitted to submit responses after the 60-day deadline, but the Board would only review such late filings if

practicable. In other words, there is no guarantee that the Board would review a late response prior to issuing a decision; thus, if a railroad wishes to respond to a petition, it should meet the 60-day filing deadline. The railroad could fulfill its requirement to serve a copy of its response on the other parties by sending its response via email to petitioner, petitioner's representative, and petitioner's employer (if different from the railroad that revoked petitioner's certification).

Paragraph (c) of this section explains when a case would be referred to the Board, and what authority the Board would have. If a railroad files a response before the 60-day deadline in paragraph (b) of this section, the petition would be referred to the Board upon receipt of the response. Otherwise, the petition would be referred to the Board 60 days after the date the acknowledgment email was sent. The Board would have the authority to grant a petition (rule in favor of the petitioner), deny a petition (rule in favor of the railroad), or dismiss a petition. An example of when the Board would dismiss a petition would be if the respondent railroad did not deny or revoke the petitioner's certification, and thus, there was no case or controversy before the Board. If there is insufficient evidence in the record for the Board to make a decision on the merits of a petition, the Board may choose to remand a petition or issue an interim order, so that additional fact-finding can occur.

Paragraphs (d), (e), and (f) of this section provide the standards of review that the Board would employ for procedural issues, factual issues, and legal issues, respectively. These standards mirror the standards of review used by the OCRB to review locomotive engineer and conductor petitions. The Board would not correct all procedural errors committed by a railroad. Instead, the Board would only grant a petition if the respondent railroad's procedural error caused substantial harm to the petitioner. For factual issues, the petitioner would be required to show that the respondent railroad did not have substantial evidence to support its decision to deny or revoke the petitioner's certification. If the Board must decide a legal issue, it would conduct *de novo* review, meaning that it would not give deference to any decision or interpretation made by the railroad.

Paragraph (g) of this section acknowledges that the Board's decision-making power would be limited to granting or denying a petition. In other words, the Board would only be empowered to make determinations

concerning qualifications under this proposed regulation. The Board would not be empowered to mitigate the consequences of a railroad decision if the decision is valid under this proposed regulation. The contractual consequences, if any, of these determinations would have to be resolved under dispute resolution mechanisms that do not directly involve FRA. For example, FRA cannot order a railroad to alter its seniority rosters or make an award of back pay, in the event of a finding that a railroad wrongfully denied certification.

Paragraph (h) of this section would require the Board to issue a written decision that would be served on all affected parties. FRA would send the decision to the parties by email and it will also be posted in the case's docket on <https://www.regulations.gov>.

Section 246.407 Request for a Hearing

This proposed section, derived from 49 CFR 240.407 and 49 CFR 242.507, provides that a party who has been adversely affected by a CRB decision would have the opportunity to request an administrative proceeding as prescribed in § 246.409. Paragraph (b) of this section contains the instructions and the deadline for submitting a hearing request. Just like CRB petitions, parties would be required to file hearing requests electronically. To file a hearing request, the adversely affected party would upload the request to the docket on <https://www.regulations.gov> that was used while the case was before the Board. This docket would also be used to file documents while the case is before the hearing officer. After the 20-day deadline to file a hearing request has passed, FRA would check the docket on <https://www.regulations.gov> to see if a hearing request was filed. Paragraph (c) of this section contains a list of elements that would be required for a hearing request, including the docket number assigned to the case when it was before the Board. With respect to the signature requirement in paragraph (c), FRA would accept electronic signatures.

Paragraph (d) of this section states that FRA would arrange for the appointment of a presiding officer. The presiding officer would then schedule a hearing for the earliest practicable date.

Paragraph (e) of this section provides that a party who fails to request an administrative hearing in a timely fashion would lose the right to further administrative review and the CRB's decision would constitute final agency action.

Section 246.409 Hearings

This section of the proposed rule, derived from 49 CFR 240.409 and 49 CFR 242.509, describes the authority of the presiding officer to conduct an administrative hearing and the procedures by which the administrative hearing would be governed. Paragraph (b) of this section provides that the proceeding would afford an aggrieved party a *de novo* hearing at which the relevant facts would be adduced and the correct application of this part would be determined. When the issues presented are purely legal, or when only limited factual findings are necessary to determine issues, the presiding officer may determine the issues following an evidentiary hearing only on the disputed factual issues, if any. The presiding officer could then grant full or partial summary judgment.

Paragraph (d) of this section provides that the presiding officer may authorize discovery. It would also authorize the presiding officer to sanction willful noncompliance with permissible discovery requests. Paragraph (e) of this section would require that documents in the nature of pleadings be signed. This signature could be electronic and would constitute a certification of factual and legal good faith. Paragraph (f) of this section contains a proposed requirement for service and for certificates of service. Paragraph (g) of this section would give the presiding officer authority to address noncompliance with a law or directive. This provision is intended to ensure that the presiding officer will have the authority to control the proceeding so that an efficient and fair hearing can be conducted.

Paragraph (h) of this section states the right of each party to appear and be represented. Paragraph (i) of this section is intended to protect witnesses by ensuring their right of representation and their right to have their representative question them. Paragraph (j) of this section would allow any party to request consolidation or separation of hearings of two or more petitions when appropriate under established jurisprudential standards. This option is intended to allow for more efficient determination of petitions in cases where a joint hearing would be advantageous.

Under paragraph (k) of this section, the presiding officer could, with certain exceptions, extend deadlines for action required in the proceedings, provided substantial prejudice would not result to a party. The authority to deny an extension request submitted after a deadline has already passed shows the preference for use of this authority to

provide extensions of time as a tool to alleviate unforeseen or unnecessary burdens, and not as a remedy for inexcusable neglect.

Paragraph (l) of this section would establish motions as the appropriate method for requesting action by the presiding officer. This paragraph also provides the proposed form of motions and the proposed response period for written motions. Paragraph (m) of this section contains proposed rules for the mode of hearing and record maintenance, including proposed requirements for sworn testimony, verbatim record (including oral testimony and argument), and inclusion of evidence or substitutes therefor in the record. Paragraph (n) of this section would direct the presiding officer to employ specific rules of evidence as guidelines for the introduction of evidence, and would permit the presiding officer to determine what evidence may be received. Further, paragraph (o) of this section provides additional powers the presiding officer may exercise during the proceedings.

Paragraph (p) of this section would require that the petitioner before the CRB, the railroad that took the certification action at issue, and FRA serve as mandatory parties to the administrative proceeding. Paragraph (q) of this section explains which party would be the hearing petitioner and which parties would be the respondents. If the Board granted the petition, the railroad would be the hearing petitioner and the signal employee or signal employee candidate would be a respondent. If the Board denied the petition, the signal employee or signal employee candidate would be the hearing petitioner and the railroad would be a respondent. The actions of the signal employee (or certification candidate) and the railroad would be at issue in the hearing—not the actions of the CRB. Thus, it is appropriate that the signal employee and the railroad fill the roles of petitioner and respondent for the hearing.

Paragraph (q) also provides that FRA would be a mandatory party in the proceeding. In all proceedings, FRA would initially be considered a co-respondent. If, based on evidence acquired after the filing of a hearing petition, FRA concludes that the public interest in safety is more closely aligned with the position of the petitioner than the respondent, FRA could request that the hearing officer exercise their inherent authority to realign parties for good cause shown. However, FRA anticipates that such a situation would rarely occur. FRA would represent the interests of the government; hence,

parties and their representatives would have to be careful to avoid ethical dilemmas that might arise due to FRA's ability to realign itself. Paragraph (q) also notes that the party requesting the hearing would have the burden of proving its case by the preponderance of evidence.

Paragraph (r) of this section would give the presiding officer authority to close the record in a case. Paragraph (s) of this section would also give the presiding officer authority to issue a decision and includes proposed requirements for that decision.

Section 246.411 Appeals

This proposed section, derived from 49 CFR 240.411 and 49 CFR 242.511, would permit any party aggrieved by the presiding officer's decision to file an appeal with the FRA Administrator. Paragraph (a) of this section provides that if no appeal is timely filed, the presiding officer's decision would constitute final agency action. The appeal must be filed in the same docket on <https://www.regulations.gov> used when the case was before the Board and the presiding officer.

Paragraph (b) of this section allows for a party to reply to the appeal. Paragraphs (c) and (d) of this section describe the Administrator's authority to conduct the proceedings of an appeal. Paragraph (e) of this section addresses the Administrator's options for ruling on an appeal. The phrase "except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted" is included in this proposed rule because a remand, or other intermediate decision, would not constitute final agency action. The inclusion of this phrase is intended to clarify this potential outcome to those parties who are not represented by an attorney or who might otherwise be confused as to whether any action taken by the Administrator should be considered final agency action.

Paragraph (f) of this section provides instructions for handling appeals to the Administrator that come directly from the CRB. The only cases that would be allowed to proceed directly from the Board to the Administrator would be cases in which the Board denied a petition for being untimely or incomplete. If the Administrator vacates and remands the Board's decision, the case would return to the Board. If the Administrator affirms the Board's decision, that would constitute final agency action.

Appendices

FRA has included two appendices with this proposed rule. Appendix A, derived from appendix C to part 240 and appendix C to part 242, provides a narrative discussion of the procedures that a person seeking certification or recertification should follow to furnish a railroad with information concerning their motor vehicle driving record. Appendix B, derived from appendix D to part 240 and appendix D to part 242, provides a narrative discussion of the procedures that a railroad would be required to employ when administering the vision and hearing requirements of §§ 246.117 and 246.118. This appendix discusses test methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry.

V. Regulatory Impact and Notices

A. Executive Order 12866 as Amended by Executive Order 14094

This proposed rule is not a significant regulatory action within the meaning of Executive Order 12866 as amended by Executive Order 14094, Modernizing Regulatory Review. Details on the estimated costs of this NPRM can be found in the Regulatory Impact Analysis (RIA), which FRA has prepared and placed in the docket (FRA–2021–0020).

FRA is proposing regulations establishing a formal certification process for railroad signal employees. As part of that process, railroads would be required to develop a program for training current and prospective signal employees, documenting and verifying that the holder of the certificate has achieved certain training and proficiency, and creating a record of safety compliance infractions that other railroads can review when considering individuals for certification. This

proposed regulation would ensure that signal employees are properly trained, are qualified to perform their duties, and meet Federal safety standards. Additionally, this proposed regulation is expected to improve railroad safety by reducing the rate of accidents/incidents.

The RIA presents estimates of the costs likely to occur over the first 10 years of the proposed rule. The analysis includes estimates of costs associated with development of training programs, initial and periodic training, knowledge testing, and monitoring of operational performance. Additionally, costs are estimated for vision and hearing tests, certification determinations made by other railroads, and Government administrative costs.

FRA estimated 10-year costs of \$8.3 million discounted at 7 percent. The annualized cost would be \$1.2 million discounted at 7 percent. The following table shows the estimated 10-year costs of the proposed rule.

TOTAL 10-YEAR DISCOUNTED COSTS
[2020 Dollars]

Category	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Development of Certification Program	1,140,385	1,168,920	162,365	137,033
Certification Eligibility Requirements	87,507	100,380	12,459	11,768
Recertification Eligibility Requirements	203,790	259,653	29,015	30,439
Training	2,079,835	2,379,911	296,122	278,998
Knowledge Testing	746,865	898,884	106,337	105,377
Vision and Hearing	1,097,523	1,320,891	156,263	154,849
Monitoring Operational Performance	832,102	994,414	118,473	116,576
Railroad Oversight Responsibilities	267,530	326,714	38,090	38,301
Certification Card	103,175	124,175	14,690	14,557
Petitions and Hearings	42,451	50,731	6,044	5,947
Government Administrative Cost	1,653,360	1,914,063	235,401	224,387
Total	8,277,337	9,566,001	1,178,507	1,121,427

This rule is expected to reduce the likelihood of an accident occurring due to signal employee error. FRA has analyzed accidents over the past 10 years to categorize those where signal

employee may have caused the accident. FRA then estimated benefits based on that analysis.

The following table shows the estimated 10-year benefits of the

proposed rule. The total 10-year estimated benefits would be \$2.9 million (PV, 7%) and annualized benefits would be \$0.4 million (PV, 7%).

TOTAL 10-YEAR DISCOUNTED BENEFITS
[2020 Dollars]

Category	Present value 7% (\$)	Present value 3% (\$)	Annualized 7% (\$)	Annualized 3% (\$)
Grade Crossing Accidents	1,766,028	2,064,676	251,443	242,043
Train Accidents/Incidents	989,123	1,156,391	140,829	135,564
Business Benefits from Fewer Activation Failures	159,526	186,503	22,713	21,864
Total	2,914,678	3,407,570	414,985	399,471

Additional benefits are discussed, but not quantified, in this analysis. This

proposed rule would require railroads to check with prior employers when hiring

a new signal employee. This would include a check of their prior safety

record and whether the prospective signal employee had their certification revoked in the past.

B. Regulatory Flexibility Act and Executive Order 13272

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) and E.O. 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA prepared this IRFA to facilitate public comment on the potential small business impacts of the requirements in this NPRM.

FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from adoption of the proposals in this NPRM. FRA particularly encourages small entities that could potentially be impacted by the proposed rule to participate in the public comment process. FRA will consider all information and comments received in the public comment process when making a determination of the economic impact on small entities.

1. Reasons for Considering Agency Action

FRA is concerned with accidents caused by signal employee error. Railroads' signal employee training programs may not be covering all aspects of a signal employee's job responsibility. Additionally, railroads may not be testing signal employees and ensuring that their knowledge is maintained continuously.

This NPRM would require railroads to develop a signal employee certification program. This proposed rule would ensure that railroads examine railroad safety with respect to signal employees. If FRA did not issue the rule as proposed, railroads would be free to hire and train signal employees as they see fit.

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

This proposed rule may reduce the rate of signal employee-caused accidents. The annual operational performance monitoring would ensure that signal employees maintain their

knowledge after the initial certification process.

FRA is proposing regulations for the certification of signal employees, pursuant to the authority granted in section 402 of the Rail Safety Improvement Act of 2008 (RSIA). Also, the general authority of the Secretary states, in relevant part, that the Secretary "as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970."²⁴ The Secretary delegated this authority to the Federal Railroad Administrator.²⁵

3. A Description of, and Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply

The Regulatory Flexibility Act of 1980 requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies that the rule would not have a significant economic impact on a substantial number of small entities. "Small entity" is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a "small entity" in the railroad industry is a for profit "line-haul railroad" that has fewer than 1,500 employees, a "short line railroad" with fewer than 1,500 employees, a "commuter rail system" with annual receipts of less than \$16.5 million dollars, or a contractor that performs support activities for railroads with annual receipts of less than \$16.5 million.²⁶

Federal agencies may adopt their own size standards for small entities in consultation with SBA and in conjunction with public comment. Under that authority, FRA has published a proposed statement of agency policy that formally establishes "small entities" or "small businesses" as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad as set forth in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted

annual revenues,²⁷ and commuter railroads or small Governmental jurisdictions that serve populations of 50,000 or less. *See* 68 FR 24891 (May 9, 2003) (codified at Appendix C to 49 CFR part 209). FRA is using this definition for the proposed rule.

When shaping the proposed rule, FRA considered the impact that the proposed rule would have on small entities.

The proposed rule would be applicable to all railroads with signal systems. However, some small railroads do not have a signal system as part of their operations. FRA estimates there are 744 Class III railroads, of which 704 operate on the general system. These railroads are of varying size, with some belonging to larger holding companies. Approximately 490 Class III railroads would be impacted by this rulemaking because they have a signal system. The remaining Class III railroads do not have a signal system, thus would have no need for signal employee certification program.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities That Would be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record

Railroads would be required to submit information to FRA for approval of signal employee certification programs. For small railroads that choose to develop their own certification programs, they would likely be less complex than larger railroads' operations. This would ease some of the burden on small railroads.

The training program, and annual railroad responsibilities would be prepared by a professional or administrative employee. The type of professional skills needed by an employee responsible for submitting a special approval request includes the ability to plan and organize work. Such an employee would also need good verbal and written communication skills and attention to detail.

Summary of Class III Railroad Costs

Class III Railroads would have all the same cost components as larger railroads except they would not be required to perform annual railroad oversight responsibilities in accordance with the proposed rule. Therefore, that

²⁴ 49 U.S.C. 20103.

²⁵ 49 CFR 1.89(a).

²⁶ U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes, August 19, 2019. https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%202019.%202019.pdf.

²⁷ The Class III railroad revenue threshold is \$40.4 million or less, for 2021. (The Class II railroad threshold is between \$40.4 million and \$900 million.) *See* Surface Transportation Board (STB), available at <https://www.stb.gov/news-communications/latest-news/pr-21-16/>.

cost has been excluded for Class III railroads.

The following table shows the annualized cost for Class III railroads

over the 10-year analysis period. The total estimated 10-year costs for Class III railroads would be \$2.4 million and the

annualized cost for all Class III railroads would be \$346,052 (PV, 7 percent).

TOTAL 10-YEAR AND ANNUALIZED COSTS, CLASS III RAILROADS

Category	Present value 7% (\$)	Annualized 7% (\$)
Development of Certification Program	309,067	44,004
Certification Eligibility Requirements	21,877	3,115
Recertification Eligibility Requirements	50,947	7,254
Training	519,959	74,030
Knowledge Testing	186,716	26,584
Vision and Hearing	1,097,523	156,263
Monitoring Operational Performance	208,026	29,618
Certification Card	25,794	3,672
Petitions and Hearings	10,613	1,511
Total	2,430,522	346,052

The industry trade organization representing small railroads, ASLRRRA, reports the average freight revenue per

Class III railroad is \$4.75 million.²⁸ The following table summarizes the average

annual costs and revenue for Class III railroads.

AVERAGE CLASS III RAILROADS' COSTS AND REVENUE

Total cost for Class III railroads, annualized 7%	Number of Class III railroads with signal systems	Average annual cost per Class III railroad (\$)	Average Class III annual revenue (\$)	Average annual cost as a percent of revenue
a	b	c = a ÷ b	d	e = c ÷ d
346,052	535	647	4,750,000	0.01%

The average annual cost for a Class III railroad impacted by this rule would be \$647. This represents a small percentage (0.01%) of the average annual revenue for a Class III railroad.

The estimates above show that the burden on Class III railroads would not be a significant economic burden. FRA requests comments on this estimate and will consider all comments when making a determination for the final rule.

5. Identification, to the Extent Practicable, of All Relevant Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rule

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with this NPRM. This proposed rule is complementary to, rather than duplicative of, other recent regulatory initiatives FRA has issued or

is in the process of developing. These initiatives include: the implementation of positive train control (PTC) systems by required railroads;²⁹ training, qualification, and oversight;³⁰ railroad safety risk reduction programs;³¹ and the development of fatigue risk management programs.³²

6. A Description of Significant Alternatives to the Rule

This analysis considered two alternatives to the rule: the baseline approach, and an approach that would certify just the training program. The baseline alternative (no action) would not ensure that signal employees are being properly trained. Without this rule, railroad operations may be less safe if railroads are not providing adequate training to their signal employees.

The alternative of certifying only the training program would require a railroad to enhance their training of signal employees. Training, however, is only a part of the certification process. The additional requirements of this proposed rule would ensure that signal employees' hearing, vision, prior safety conduct at other railroads, and other aspects have been reviewed and are consistent with railroad safety.

C. Paperwork Reduction Act

FRA is submitting the information collection requirements in this proposed rule to the Office of Management and Budget (OMB) for approval under the Paperwork Reduction Act of 1995.³³ The entire table contains the new information collection requirements and the estimated time to fulfill each requirement are as follows:

²⁸ American Short Line and Regional Railroad Association, *Short Line and Regional Railroad Facts and Figures*, p. 10 (2017 pamphlet).

²⁹ See generally 49 CFR part 236, subpart I; and press release in which FRA announces full implementation of positive train control (Dec. 29,

2020), available at <https://railroads.dot.gov/sites/fra.dot.gov/files/2020-12/fra1920.pdf>.

³⁰ 49 CFR part 243.

³¹ 49 CFR parts 270 and 271.

³² 85 FR 83484 (Dec. 22, 2020) (proposing to amend 49 CFR parts 270 and 271 to require certain

railroads to develop and implement a Fatigue Risk Management Program as one component of the railroads' larger railroad safety risk reduction programs).

³³ 44 U.S.C. 3501 *et seq.*

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³⁴	Total cost equivalent (E) = C * D
246.9—Waivers—Petitions	553 railroads	10.00 petition	3 hours	30.00	\$77.44	\$2,323.20
246.101/.103—Certification program required and FRA review of certification program—Development of signal employee certification program in accordance with this part and procedures contained under § 246.106 (Note: Each certification program includes procedure requirements under § 246.111 through § 246.121.).	553 railroads + ASLRRRA and holding companies.	187.66 plans (14.33 Class I and commuter railroads plans + 3.33 generic program developed by ASLRRRA and holding companies plans + 170 Class II and III railroads plans).	120 hours + 120 hours + 6 hours.	3,139.20	115.24	361,761.41
—(d)(1) Signal employees certification submission—Copies of the program provided to the president of each rail labor organization (RLO) that represents the railroad’s employees that are subject to this part.	553 railroads	2 copies	15 minutes .....	.50	77.44	38.72
—(d)(2) Affirmative statements that the railroad has provided a copy of the program to RLOs.	553 railroads	2 affirmative statements.	15 minutes .....	.50	77.44	38.72
—(e) Comment Period—Affirmed comments on a railroad’s program by any designated representative of employees subject to this part or any directly affected employee who does not have a designated representative.	553 railroads	31 comments	4 hours	124.00	77.44	9,602.56
—(g) Material Modifications of FRA-approved program—Railroad to submit a description of how it intends to modify the program and a copy of the modified program to FRA.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(h) Resubmission—Railroad can resubmit its program or material modification as described in paragraph (f)(2) of this section after addressing all of the deficiencies noted by FRA and the resubmission must conform with the procedures and requirements contained in § 246.106.	553 railroads + ASLRRRA and holding companies.	4.67 revised plans (3.67 revised plans Class I and commuter railroads + 1 revised plan ASLRRRA and holding companies).	21 hours + 20 hours	94.40	77.44	7,310.34
—(i) Rescinding Prior Approval of Program—Railroad to resubmit its certification program and the program must conform with the procedures and requirements contained in § 246.106.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
246.105(c)(1)—(d)(1)—Implementation schedule for certification programs—Designation of certified signal employee.	553 railroads	3,781 designated lists	5 minutes	315.08	77.44	24,399.80
—(c)(2)—(d)(2) Issue a certificate that complies with § 246.207 to each person that it designates.	553 railroads	3,781 issued certificates.	3 minutes	189.05	77.44	14,640.03
—(f) Written requests for delayed certification—Railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad’s certification program.	FRA anticipates zero submissions.					
—(g) Testing and evaluation—Railroad shall only certify or recertify a person as a signal employee if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.	The paperwork burden for testing and evaluation is included in the economic burden and the burden for certificates is included under § 246.105.					
246.106—Requirements for Certification Programs—Procedures for Submission and Approval of Dispatcher Certification Programs.	The paperwork requirements described in this section are accounted for throughout this table.					
246.109(a)—Determinations required for certification and recertification—Eligibility requirements.	The paperwork burden for this requirement is covered under § 246.111 through § 246.121 and § 246.303.					

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³⁴	Total cost equivalent (E) = C * D
246.111(a)–(c)—Prior safety conduct as motor vehicle operator—Eligibility requirements of this section involving prior conduct as a motor vehicle operator.	553 railroads	1,706 motor vehicle records.	5 minutes	142.17	77.44	11,009.64
—(e) If driver information is not obtained as required pursuant to paragraph (g) of this section, that person or the railroad certifying or recertifying that person may petition for a waiver in accordance with the provisions of part 211 of this chapter.	553 railroads	2 waivers	2 hours	4.00	77.44	309.76
—(f) Individual's duty—Consent to make information concerning driving record available to that railroad.	This is usual and customary procedure. The consent form is signed at the time of hiring to make driving information available to the railroad.					
—(g)–(h) Request to obtain driver's license information from licensing agency.	553 railroads	1,706 written requests.	5 minutes	142.17	59.00	8,388.03
—(i) Requests for additional information from licensing agency.	The paperwork burden for this requirement is included under § 246.111(g)–(h).					
—(j) Notification to railroad by persons of never having a license.	553 railroads	2 notices	10 minutes .....	.33	77.44	25.56
—(k) Report of motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to the employing railroad within 48 hours.	553 railroads	40 self-reports	10 minutes	6.67	77.44	516.52
—(l)–(m) Evaluation of person's driving record by railroad.	553 railroads	1,706 motor vehicle record evaluations.	5 minutes	142.17	71.89	10,220.60
—(n)(1) DAC referral by railroad after report of driving drug/alcohol incident.	553 railroads	36 DAC referrals	5 minutes	3.00	115.24	345.72
—(n)(2) DAC request and supply by persons of prior counseling or treatment.	553 railroads	1 request and supplied record.	30 minutes .....	.50	115.24	57.62
—(n)(3) Conditional certifications recommended by DAC.	553 railroads	3 conditional certification recommendations.	4 hours	12.00	115.24	1,382.88
246.113(b)—Prior safety conduct as an employee of a different railroad—Certification candidate has not been employed by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (d) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.	This is usual and customary procedure and therefore there is no paperwork burden.					
—(c) Person seeking certification or recertification under this part shall submit a written request to each railroad that employed the person within the previous five years.	553 railroads	43.00 requests	15 minutes	10.75	77.44	832.48
—(e) and (g) Railroad shall provide the information requested to the railroad designated in the written request.	553 railroads	43.00 records	15 minutes	10.75	77.44	832.48
—(f) An explanation shall state why the railroad cannot provide the information within the requested time frame or cannot provide the requested information.	FRA anticipates zero submissions.					
246.115(a)—Substance abuse disorders and alcohol drug rules compliance—Determination that person meets eligibility requirements.	553 railroads	1,535 determinations	2 minutes	51.17	77.40	3,960.56
—(b) Written documents from DAC that person is not affected by a disorder.	553 railroads	79 filed documents ...	30 minutes	39.50	115.24	4,551.98
—(c)(3) Fitness requirement—Voluntarily self-referral by signal employee for substance abuse counseling or treatment under the policy required by § 219.1003 of this chapter.	553 railroads	2 self-referrals	10 minutes .....	.33	115.24	38.03
—(d)(1)–(d)(2) Prior alcohol/drug conduct; Federal rule compliance.	553 railroads	1,535 certification reviews.	10 minutes	255.83	115.24	29,481.85
—(d)(3)(i) Written determination that most recent incident has occurred.	553 railroads	30 written determinations.	1 hour	30.00	115.24	3,457.20
—(d)(3)(ii) Notification to person that recertification has been denied.	553 railroads	30 notifications	30 minutes	15.00	77.44	1,161.60

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³⁴	Total cost equivalent (E) = C * D
—(d)(4) Persons/conductors waiving investigation/de-certifications.	553 railroads	20 waived investigations.	10 minutes	3.33	77.44	257.88
246.117(a)–(c)—Vision acuity—Determination vision standards met—Medical examiner certificate/record.	553 railroads	400 records	2 minutes	13.33	71.89	958.29
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	553 railroads	10 records	2 minutes .....	.33	71.89	23.72
—(d)(2) Railroad to provide a copy of this part to medical examiner.	553 railroads	400 copies	5 minutes	33.33	71.89	2,396.09
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	553 railroads	5 consultations + 5 conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified signal employee of deterioration of vision.	553 railroads	1 notification	10 minutes .....	.17	71.89	12.22
246.118—Hearing acuity—Determination hearing standards met—Medical records.	553 railroads	400 medical records	2 minutes	13.33	71.89	958.29
—(d)(1) Request for retest and another medical evaluation—Medical examiner certificate/record.	553 railroads	10 records	2 minutes .....	.33	71.89	23.72
—(d)(2) Railroad to provide a copy of this part to medical examiner.	553 railroads	400 copies	5 minutes	33.33	71.89	2,396.09
—(d)(3) Consultations by medical examiners with railroad officer and issue of conditional certification.	553 railroads	5 consultations + 5 conditional certifications.	30 minutes + 10 minutes.	3.33	71.89	239.39
—(g) Notification by certified signal employee of deterioration of hearing.	553 railroads	25 notifications	10 minutes	4.17	71.89	299.78
246.119(b)–(c)—Training requirements—A railroad’s election for the training of signal employees shall be stated in its certification program.	The paperwork burden for this requirement is covered under § 246.101/103.					
—(d) Initial training program for previously untrained person to be a signal employee.	553 railroads	184 training programs.	3 hours	553.00	115.24	63,727.72
—(d)(3) Modification to training program when new safety-related railroad laws, regulations and etc. are introduced into the workplace.	The paperwork burden for this requirement is outside the scope of the 3-year PRA review period.					
—(e) Relevant information or materials on safety or other rules made available to certification candidates.	The paperwork burden for this requirement is covered under § 246.101/103.					
—(f) and (g) Completion of initial training program by a person being certified as a signal employee—Written documentation showing completed training program that complies with paragraph (d) of this section.	553 railroads	3,781 written documents or records.	10 minutes	630.17	77.44	48,800.36
—(f)(3) Employee consultation with qualified supervisory employee if given written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a qualified instructor to explain a question.	The paperwork burden for this requirement is covered under § 246.119.					
—(h) Certification program is submitted in accordance with the procedures and requirements described in § 246.106.	The paperwork burden for this requirement is covered under § 246.101/103.					
—(i) Familiarization training for signal employee of acquiring railroad from selling company/railroad prior to commencement of new operation.	FRA anticipates zero submissions.					
—(j) Continuing education of certified signal employees.	553 railroads	2,000 training records	15 minutes	500.00	71.89	35,945.00
246.120—Requirements for qualification—Determining eligibility and.	The paperwork burden for this requirement is covered under § 246.119.					
—(b) Notification by persons not qualified on the signal system.	The paperwork burden for this requirement is covered under § 246.119.					
246.121(a)–(c)—Knowledge testing—Determining eligibility.	553 railroads	2,000 test records	5 minutes	166.67	77.44	12,906.92
—(d) Reexamination of the failed test	553 railroads	20 examination records.	5 minutes	1.67	77.44	129.32

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³⁴	Total cost equivalent (E) = C * D
246.123(c)—Monitoring operational performance—Unannounced compliance tests—Retention of a written record.	553 railroads	7,348 records	2 minutes	244.93	77.44	18,967.38
246.125—Certification determinations made by other railroads.	553 railroads	11.00 determinations	30 minutes	5.50	77.44	425.92
246.203(b)—Retaining information supporting determination—Records.	553 railroads	2,000 record retentions.	15 minutes	500.00	77.44	38,720.00
—(g) Amended electronic records	553 railroads	2 amended record	15 minutes .....	.50	77.44	38.72
246.205—List of certified signal employees and recordkeeping..	The paperwork requirement for this burden is covered under § 246.105(c)(1)–(d)(1).					
246.207(a)–(f)—Certificate requirements	The paperwork requirement for this burden is covered under § 246.105(c)(2)–(d)(2).					
—(b) Notification by signal employees that railroad request to serve exceeds certification.	553 railroads	110 notifications	30 seconds .....	.92	71.89	66.14
—(g)–(h) Replacement of certificates	553 railroads	45 replacement certificates.	5 minutes	3.75	77.44	290.40
246.213(a)–(h)—Multiple Certificates—Notification of denial of certification by individuals holding multiple certifications.	553 railroads	3 notifications	10 minutes .....	.50	77.44	38.72
—(i) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts.	The paperwork requirement for this burden is covered under § 246.105.					
246.215—Railroad oversight responsibility—Review and analysis of administration of certification program.	553 railroads	17.33 annual reviews and analyses.	8 hours	138.64	115.24	15,976.87
—(d) Report of findings and conclusions reached during annual review by railroad to FRA (if requested in writing by FRA) review and analysis effort..	553 railroads	2 reports	4 hours	8.00	115.24	921.92
246.301(a)—Denial of certification—Notification to candidate of information that and candidate response forms basis for denying certification.	553 railroads	6 notices + 3 responses.	1 hour	9.00	77.44	696.96
—(b) Denial Decision Requirements—Written notification of denial of certification by railroad to candidate.	553 railroads	6 notifications	1 hour	6.00	77.44	464.64
246.307(b)(1)–(b)(4)—Process for revoking certification—Immediate suspension of signal employee’s certification.	553 railroads	15 suspended certification letters and documentations.	30 minutes	7.50	77.44	580.80
—(b)(5)–(b)(6) Determinations based on the record of the hearing, whether revocation of the certification is warranted.	The paperwork requirement for this burden is covered under § 246.307(e).					
—(b)(7) Retention of record of the hearing for three years after the date the decision is rendered.	553 railroads	15 records	15 minutes	3.75	77.44	290.40
—(d)(9) Hearing Procedures—Written waiver of right to hearing.	553 railroads	3 written waivers	10 minutes .....	.50	59.00	29.50
—(e) Revocation Decision Requirements—Written decisions by railroad official.	553 railroads	15 written decisions and service of decisions.	2 hours	30.00	115.24	3,457.20
—(g) Revocation of certification based on information that another railroad has done so.	553 railroads	3 revoked certifications.	10 minutes .....	.50	115.24	57.62
—(j) Placing relevant information in record if sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available.	The paperwork requirement for this burden is covered under § 246.307(b)(7).					
—(k) Good faith determination	553 railroads	3 good faith determinations.	1 hour	3.00	77.44	232.32
Subpart E—Dispute Resolution Procedures—§ 246.401 through § 246.411.	The requirements under these provisions are exempted from the PRA under 5 CFR 1320.4(a)(2). Since these provisions pertain to an administrative action or investigation, there is no PRA burden associated with these requirements.					
Appendix A to Part 246—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data.	The paperwork requirements described in this appendix are accounted for throughout this table.					
Appendix B to Part 246—Medical Standards Guidelines.	The paperwork requirements described in this appendix are accounted for throughout this table.					

CFR section	Respondent universe	Total annual responses (A)	Average time per responses (B)	Total annual burden hours (C) = A * B	Wage rate (D) ³⁴	Total cost equivalent (E) = C * D
Totals ³⁵	553 railroads + ASLRRRA and holding companies.	35,577 responses	N/A	7,682	N/A	747,257

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information. Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: Whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA’s estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Arlette Mussington, Information Collection Clearance Officer, at email: arlette.mussington@dot.gov or telephone: (571) 609–1285 or Ms. Joanne Swafford, Information Collection Clearance Officer, at email: joanne.swafford@dot.gov or telephone: (757) 897–9908. Organizations and individuals desiring to submit comments on the collection of information requirements should direct them via email to Ms. Mussington at arlette.mussington@dot.gov or Ms. Swafford at joanne.swafford@dot.gov.

OMB is required to decide concerning the collection of information requirements contained in this rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication. FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements

³⁴ Throughout the tables in this document, the dollar equivalent cost is derived from the 2020 Surface Transportation Board’s Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes 75-percent overhead charges.

³⁵ Totals may not add due to rounding.

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

D. Federalism Implications

Executive Order 13132, Federalism,³⁶ requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, the agency consults with State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this proposed rule in accordance with the principles and criteria contained in Executive Order 13132. FRA has determined that this proposed rule has no federalism implications, other than the possible preemption of State laws under 49 U.S.C. 20106. Therefore, the consultation and funding requirements of Executive Order 13132 do not apply, and preparation of a federalism summary impact statement for the proposed rule is not required.

³⁶ 64 FR 43255 (Aug. 10, 1999).

E. International Trade Impact Assessment

The Trade Agreements Act of 1979³⁷ prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

F. Environmental Impact

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act³⁸ (NEPA), the Council on Environmental Quality’s NEPA implementing regulations,³⁹ and FRA’s NEPA implementing regulations⁴⁰ and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency’s NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.⁴¹ Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review.⁴²

The main purpose of this rulemaking is to establish certification requirements for signal employees. This rule would not directly or indirectly impact any environmental resources and would not

³⁷ 19 U.S.C. Ch. 13.

³⁸ 42 U.S.C. 4321 *et seq.*

³⁹ 40 CFR parts 1500–1508.

⁴⁰ 23 CFR part 771.

⁴¹ 40 CFR 1508.4.

⁴² See 23 CFR 771.116(c)(15) (categorically excluding “[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise”).

result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would warrant a more detailed environmental review.⁴³ FRA has concluded that no such unusual circumstances exist with respect to this proposed rule and it meets the requirements for categorical exclusion.⁴⁴

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.⁴⁵ FRA has also determined that this rulemaking does not approve a project resulting in a use of a resource protected by Section 4(f).⁴⁶ Further, FRA reviewed this proposed rulemaking and found it consistent with Executive Order 14008, “Tackling the Climate Crisis at Home and Abroad.”

G. Executive Order 12898 (Environmental Justice)

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and DOT Order 5610.2C⁴⁷ require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse

human health and environmental effects on minority populations or low-income populations.

H. Unfunded Mandates Reform Act of 1995

Under section 201 of the Unfunded Mandates Reform Act of 1995,⁴⁸ each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and Tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the Act⁴⁹ further requires that “before promulgating any general notice of proposed rulemaking that is likely to result in promulgation of any rule that includes any Federal mandate that may result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement” detailing the effect on State, local, and Tribal governments and the private sector. This proposed rule would not result in the expenditure, in the aggregate, of \$100,000,000 or more (as adjusted annually for inflation) in any one year, and thus preparation of such a statement is not required.

I. Energy Impact

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”⁵⁰ FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

J. Privacy Act Statement

In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to www.regulations.gov, as described in the system of records notice, DOT/ALL-14 FDMS, accessible through www.dot.gov/privacy. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of

names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

K. Executive Order 13175 (Tribal Consultation)

FRA has evaluated this proposed rule in accordance with the principles and criteria contained in Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, dated November 6, 2000. The proposed rule would not have a substantial direct effect on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Therefore, the funding and consultation requirements of Executive Order 13175 do not apply, and a Tribal summary impact statement is not required.

List of Subjects in 49 CFR Part 246

Administrative practice and procedure, Signal Employee, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

The Proposed Rule

■ For the reasons discussed in the preamble, FRA proposes to amend chapter II, subtitle B, of title 49 of the Code of Federal Regulations, by adding part 246 to read as follows:

PART 246—CERTIFICATION OF SIGNAL EMPLOYEES

Sec.

Subpart A—General

- 246.1 Purpose and scope.
- 246.3 Application and responsibility for compliance.
- 246.5 Effect and construction.
- 246.7 Definitions.
- 246.9 Waivers.
- 246.11 Penalties and consequences for noncompliance.

Subpart B—Program and Eligibility Requirements

- 246.101 Certification program required.
- 246.103 FRA review of certification programs.
- 246.105 Implementation schedule for certification programs.
- 246.106 Requirements for certification programs.
- 246.107 Signal service classifications.
- 246.109 Determinations required for certification and recertification.
- 246.111 Prior safety conduct as motor vehicle operator.

⁴³ 23 CFR 771.116(b).

⁴⁴ 23 CFR 771.116(c)(15).

⁴⁵ See 16 U.S.C. 470.

⁴⁶ See Department of Transportation Act of 1966, as amended (Public Law 89-670, 80 Stat. 931); 49 U.S.C. 303.

⁴⁷ Available at <https://www.transportation.gov/sites/dot.gov/files/Final-for-OST-C-210312-003-signed.pdf>.

⁴⁸ Public Law 104-4, 2 U.S.C. 1531.

⁴⁹ 2 U.S.C. 1532.

⁵⁰ 66 FR 28355 (May 22, 2001).

- 246.113 Prior safety conduct with other railroads.
- 246.115 Substance abuse disorders and alcohol drug rules compliance.
- 246.117 Vision acuity.
- 246.118 Hearing acuity.
- 246.119 Training requirements.
- 246.121 Knowledge testing.
- 246.123 Monitoring operational performance.
- 246.124 Mentoring.
- 246.125 Certification determinations made by other railroads.

Subpart C—Administration of the Certification Program

- 246.201 Time limitations for certification.
- 246.203 Retaining information supporting determinations.
- 246.205 List of certified signal employees and recordkeeping.
- 246.207 Certificate requirements.
- 246.213 Multiple certifications.
- 246.215 Railroad oversight responsibilities.

Subpart D—Denial and Revocation of Certification

- 246.301 Process for denying certification.
- 246.303 Criteria for revoking certification.
- 246.305 Periods of ineligibility.
- 246.307 Process for revoking certification.

Subpart E—Dispute Resolution Procedures

- 246.401 Review board established.
- 246.403 Petition requirements.
- 246.405 Processing certification review petitions.
- 246.407 Request for a hearing.
- 246.409 Hearings.
- 246.411 Appeals.
- Appendix A to Part 246—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data
- Appendix B to Part 246—Medical Standards Guidelines

Authority: 49 U.S.C. 20103, 20107, 20162, 21301, 21304, 21311; 28 U.S.C. 2461 note; 49 CFR 1.89; and Public Law 110-432, sec. 402, 122 Stat. 4884.

Subpart A—General

§ 246.1 Purpose and scope.

(a) The purpose of this part is to ensure that only those persons who meet minimum Federal safety standards serve as certified signal employees, to reduce the rate and number of accidents and incidents, and to improve railroad safety.

(b) This part prescribes minimum Federal safety standards for the eligibility, training, testing, certification and monitoring of all signal employees to whom it applies. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements consistent with this part.

(c) The signal employee certification requirements prescribed in this part apply to any person who meets the definition of signal employee contained in § 246.7, regardless of the fact that the

person may have a job classification title other than that of signal employee.

§ 246.3 Application and responsibility for compliance.

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

(1) Railroads that do not have a signal system as defined in § 246.7;

(2) Railroads that operate only on track inside an installation that is not part of the general railroad system of transportation (*i.e.*, plant railroads, as defined in § 246.7);

(3) Tourist, scenic, historic, or excursion operations conducted only on track used exclusively for that purpose (*i.e.*, there is no freight, intercity passenger, or commuter passenger railroad operations on the track) and only on track inside an installation that is insular; *i.e.*, the operations are limited to a separate enclave in such a way that there is no reasonable expectation that the safety of the public—except a business guest, a licensee of the railroad or an affiliated entity, or a trespasser—would be affected by the operation. An operation will not be considered insular, for purposes of this part, if one or more of the following exists on its line:

(i) A public highway-rail grade crossing that is in use;

(ii) A public pathway grade crossing that is in use;

(iii) An at-grade rail crossing that is in use;

(iv) A bridge over a public road or waters used for commercial navigation; or

(v) A common corridor with a railroad, *i.e.*, its operations are within 30 feet of those of any railroad; or

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

(b) Although the duties imposed by this part are generally stated in terms of the duty of a railroad, each person, as defined in § 246.7, who performs any function required by this part must perform that function in accordance with this part.

§ 246.5 Effect and construction.

(a) FRA does not intend, by use of the term signal employee in this part, to alter the terms, conditions, or interpretation of existing collective bargaining agreements that employ other job classification titles when identifying a person who is engaged in installing, troubleshooting, testing, repair, or maintenance of railroad signal systems.

(b) FRA does not intend by issuance of these regulations to alter the authority

of a railroad to initiate disciplinary sanctions against its employees, including managers and supervisors, in the normal and customary manner, including those contained in its collective bargaining agreements.

(c) Except as provided in § 246.213, nothing in this part shall be construed to create or prohibit an eligibility or entitlement to employment in other service for the railroad as a result of denial, suspension, or revocation of certification under this part.

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

§ 246.7 Definitions.

As used in this part:

Administrator means the Administrator of the FRA or the Administrator's delegate.

Alcohol means ethyl alcohol (ethanol) and includes use or possession of any beverage, mixture, or preparation containing ethyl alcohol.

Contractor means a person under contract with a railroad, including but not limited to, a prime contractor or a subcontractor.

Controlled substance has the meaning assigned by 21 U.S.C. 802 and includes all substances listed on Schedules I through V as they may be revised from time to time (21 CFR parts 1301 through 1316).

Disable means to render a device or system incapable of proper and effective action or to materially impair the functioning of that device or system.

Drug means any substance (other than alcohol) that has known mind or function-altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

Drug and alcohol counselor (DAC)

means a person who meets the credentialing and qualification requirements of a "Substance Abuse Professional" (SAP), as provided in 49 CFR part 40.

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

FRA means the Federal Railroad Administration.

FRA representative means the FRA Associate Administrator for Railroad

Safety/Chief Safety Officer and the Associate Administrator's delegate, including any safety inspector employed by the Federal Railroad Administration and any qualified State railroad safety inspector acting under part 212 of this chapter.

Ineligible or *ineligibility* means that a person is legally disqualified from serving as a certified signal employee. The term covers a number of circumstances in which a person may not serve as a certified signal employee. Revocation of certification pursuant to § 246.307 and denial of certification pursuant to § 246.301 are two examples in which a person would be ineligible to serve as a certified signal employee. A period of ineligibility may end when a condition or conditions are met, such as when a person meets the conditions to serve as a certified signal employee following an alcohol or drug violation pursuant to § 246.115.

Knowingly means having actual knowledge of the facts giving rise to the violation or that a reasonable person acting in the circumstances, exercising due care, would have had such knowledge.

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

Mentor means a certified signal employee who has at least one year of experience as a certified signal employee. For purposes of this part, a mentor also provides direct supervision and oversight over the work of one or more signal employees.

On-the-job training means job training that occurs in the workplace, *i.e.*, the employee learns the job while doing the job.

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.

Physical characteristics means the actual track profile of and physical location for points within a specific yard or route that affect the movement of a locomotive or train. Physical characteristics includes how signal systems and related technology are deployed within the territory, for purposes of this part.

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

Qualified instructor means a person who:

- (1) Has demonstrated, pursuant to the railroad's written program, an adequate knowledge of the subjects under instruction;
- (2) Where applicable, has the necessary experience to effectively instruct in the field;
- (3) Is a certified signal employee under this part; and
- (4) If the railroad has designated employee representation, has been selected by a designated railroad officer, in concurrence with the designated employee representative, or has a minimum of one year of service working as a certified signal employee.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any entity providing such transportation, including:

- (1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; 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; but does not

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

Railroad officer means any supervisory employee of a railroad.

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

Signal employee means a person who is engaged in installing, troubleshooting, testing, repairing, or maintaining railroad signal systems or related technology.

Signal system, for purposes of this part, includes the following: block signal systems, cab signal systems, train control systems, positive train control systems, highway-rail and pathway grade crossing warning systems, unusual contingency detection devices, power-assisted switches, broken rail detection systems, switch point indicators, as well as other safety-related devices, appliances, technology, and systems installed on the railroad in signaled or non-signaled territory.

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

Substance Abuse Professional (SAP) means a person who meets the qualifications of a substance abuse professional, as provided in 49 CFR part 40.

Unusual contingency detection device means a device used in the detection of defective conditions on locomotives and rolling stock (*e.g.*, high-wide load, hot or defective bearing, defective wheel detectors) or other unsafe conditions (*e.g.*, high-water, high wind, sliding or slumping soil, rock or snow slide detectors). These devices need not be connected to a signal system for this part to apply.

§ 246.9 Waivers.

(a) A person subject to a requirement of this part may petition FRA for a waiver of compliance with such requirement. The filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

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

§ 246.11 Penalties and consequences for noncompliance.

(a) Any person, as defined in § 246.7, who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least the minimum civil monetary penalty and not more than the ordinary maximum civil monetary penalty per violation. However, penalties may be assessed against individuals only for willful violations, and a penalty not to exceed the aggravated maximum civil monetary penalty per violation may be assessed, where:

(1) A grossly negligent violation, or a pattern of repeated violations, has created an imminent hazard of death or injury to persons, or

(2) A death or injury has occurred. See 49 CFR part 209, appendix A.

(b) Each day a violation continues constitutes a separate offense.

(c) A person who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from all safety-sensitive service in accordance with part 209 of this chapter.

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

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

(f) FRA's website at <https://railroads.dot.gov/> contains a schedule of civil penalty amounts used in connection with this part.

Subpart B—Program and Eligibility Requirements**§ 246.101 Certification program required.**

(a) Each railroad subject to this part shall have a written signal employee certification program.

(b) Each certification program shall include all of the following:

(1) If applicable, an explanation and discussion of the occupational categories of certified signal service that comply with the requirements in § 246.107;

(2) A procedure for evaluating prior safety conduct as a motor vehicle operator that complies with the criteria established in § 246.111;

(3) A procedure for evaluating prior safety conduct with other railroads that complies with the criteria established in § 246.113;

(4) A procedure for evaluating potential substance abuse disorders and compliance with railroad alcohol and drug rules that complies with the criteria established in § 246.115;

(5) A procedure for evaluating visual and hearing acuity that complies with the criteria established in §§ 246.117 and 246.118;

(6) A procedure for training that complies with the criteria established in § 246.119;

(7) A procedure for knowledge testing that complies with the criteria established in § 246.121;

(8) A procedure for monitoring operational performance that complies with the criteria established in § 246.123; and

(9) A procedure for mentoring uncertified signal employees that complies with the criteria established in § 246.124.

(c) Each certification program shall be version controlled. Any change from the previous version of the certification program must be tracked.

§ 246.103 FRA review of certification programs.

(a) *Certification program submission schedule for railroads with signal systems in operation.* With the exception of railroads exempted by § 246.3(a), each railroad with a signal system in operation as of [EFFECTIVE DATE OF FINAL RULE] shall submit its signal employee certification program to FRA, in accordance with the procedures and requirements contained in § 246.106, according to the following schedule:

(1) All Class I railroads (including the National Railroad Passenger Corporation) and railroads providing commuter service shall submit their programs to FRA no later than [DATE 8

MONTHS AFTER EFFECTIVE DATE OF FINAL RULE].

(2) All Class II railroads and Class III railroads (including a switching and terminal or other railroad not otherwise classified) shall submit their programs to FRA no later than [DATE 16 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE].

(b) *Certification program submission for new railroads.* Each railroad that commences operations after [EFFECTIVE DATE OF FINAL RULE] shall submit, and obtain approval of, its written signal employee certification program to FRA, in accordance with the procedures and requirements contained in § 246.106, prior to installing, implementing, or operating a signal system subject to this part.

(c) *Method for submitting certification programs to FRA.* Railroads must submit their written certification programs and their requests for approval (described in § 246.106(a)) by uploading the program to FRA's secure document submission site.

(d) Each railroad that submits a program to FRA must:

(1) Simultaneously with its submission, provide a copy of the program and the request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who are subject to this part; and

(2) Include in its submission to FRA, a statement affirming that the railroad has provided a copy of the program and request for approval to the president of each labor organization that represents the railroad's signal employees and to all of the railroad's signal employees who are subject to this part, along with a list of the names and email addresses of each president of a labor organization who was provided a copy of the program.

(e) *Comment period.* Any designated representative of signal employees subject to this part or any directly affected person who does not have a designated representative may comment on a railroad's program provided that:

(1) The comment is submitted no later than 45 days after the date the program was submitted to FRA;

(2) The comment includes a concise statement of the commenter's interest in the matter;

(3) The commenter affirms that a copy of the comment was provided to the railroad; and

(4) The comment was emailed to FRASIGNALCERTPROG@dot.gov.

(f) *FRA review period.* Upon receipt of a complete program, FRA will commence a thorough review of the

program to ensure that it satisfies all of the requirements under this part.

(1) If FRA determines that the program satisfies all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been approved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA.

(2) If FRA determines that the program does not satisfy all of the requirements under this part, FRA will issue a letter notifying the railroad that its program has been disapproved. Such letter will typically be issued within 90 days of the date the program was submitted to FRA and will identify the deficiencies found in the program that must be corrected before the program can be approved. After addressing these deficiencies, railroads can resubmit their programs in accordance with paragraph (h) of this section.

(3) If a railroad does not receive an approval or disapproval letter from FRA within 90 days of the date the program was submitted to FRA, FRA's decision on the program will remain pending until such time that FRA issues a letter either approving or disapproving the program. A certification program is not approved until FRA issues a letter approving the program.

(g) *Material modifications.* A railroad that intends to make one or more material modifications to its FRA-approved program must submit a description of how it intends to modify the program and a copy of the modified program which indicates changes from the last approved version.

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

(2) The description of the modification and the modified program must conform with the procedures and requirements contained in § 246.106.

(3) The process for submission and review of material modifications shall conform with paragraphs (c) through (f) of this section.

(4) A railroad shall not implement a material modification to its program until FRA issues its approval of the material modification in accordance with paragraph (f)(1) of this section.

(h) *Resubmissions.* If FRA disapproves a railroad's program or material modification, as described in paragraph (f)(2) of this section, the railroad may resubmit its program or material modification after addressing all of the deficiencies noted by FRA.

(1) The resubmission must conform with the procedures and requirements contained in § 246.106.

(2) The process for submission and review of resubmitted programs and

resubmitted material modifications shall conform with paragraphs (c) through (f) of this section.

(3) The following deadlines apply for railroads that have their programs or material modifications disapproved by FRA:

(i) For a railroad that submitted its program pursuant to paragraph (a) of this section, the railroad must resubmit its program within 30 days of the date that FRA notified the railroad of the deficiencies in its program. If a railroad fails to resubmit its program within this timeframe and continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(ii) For a railroad that submitted its program pursuant to paragraph (b) of this section, there is no FRA-imposed deadline for resubmitting its program. However, pursuant to § 246.105(b), the railroad shall not install, implement, or operate signal systems subject to this part until its program has been approved by FRA.

(iii) For a railroad that submitted a material modification to its FRA-approved program, there is no FRA-imposed deadline for resubmitting the material modification. However, pursuant to paragraph (g)(4) of this section, the railroad cannot implement the material modification until it has been approved by FRA.

(i) *Rescinding prior approval of program.* FRA reserves the right to revisit its prior approval of a railroad's program at any time.

(1) If upon such review FRA discovers deficiencies in the program, FRA shall issue the railroad a letter rescinding its prior approval of the program and notifying the railroad of the deficiencies in its program that must be addressed.

(2) Within 30 days of FRA notifying the railroad of the deficiencies in its program, the railroad must address these deficiencies and resubmit its program to FRA. The resubmitted program must conform with the procedures and requirements contained in § 246.106.

(3) The process for submission and review of resubmitted programs under this paragraph shall conform with paragraphs (c) through (f) of this section.

(4) If a railroad fails to resubmit its program to FRA within the timeframe prescribed in paragraph (i)(2) of this section and the railroad continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(5) If FRA issues a letter disapproving the railroad's resubmitted program, the railroad shall continue to resubmit its

program in accordance with this paragraph (i).

(6) A program that has its approval rescinded under paragraph (i)(1) of this section may remain in effect until whichever of the following happens first:

(i) FRA approves the railroad's resubmitted program; or

(ii) FRA disapproves the railroad's second attempt at resubmitting its program.

(7) If FRA disapproves a railroad's second attempt at resubmitting its program under this paragraph and the railroad continues its rail operations, FRA may consider such actions to be a failure to implement a program.

(j) *Availability of certification program documents.* The following documents will be available on FRA's website (*railroads.dot.gov*):

(1) A railroad's originally submitted program, a resubmission of its program, or a material modification of its program;

(2) Any comments, submitted in accordance with paragraph (e) of this section, to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program; and

(3) Any approval or disapproval letter issued by FRA in response to a railroad's originally submitted program, a resubmission of its program, or a material modification of its program.

§ 246.105 Implementation schedule for certification programs.

(a) Each railroad that submits its signal employee certification program to FRA in accordance with § 246.103(a), must comply with 49 CFR parts 233, 234, 235, and 236 while it awaits approval of its program by FRA.

However, if FRA disapproves a railroad's program on two occasions and the railroad continues rail operations, FRA may consider such actions to be a failure to implement a program.

(b) Each railroad that submits its signal employee certification program to FRA in accordance with § 246.103(b), must have its program approved by FRA prior to installing, implementing, or operating signal systems subject to this part. If a railroad installs, implements, or operates a signal system before its program is approved by FRA, FRA may consider such actions to be a failure to implement a program.

(c) By [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as certified signal employees all persons authorized by the railroad to perform the duties of a certified signal employee or, if

applicable, each category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 as of [EFFECTIVE DATE OF FINAL RULE]; and

(2) Issue a certificate that complies with § 246.207 to each person that it designates.

(d) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], each railroad shall:

(1) In writing, designate as a certified signal employee any person who has been authorized by the railroad to perform the duties of a certified signal employee or, if applicable, any category or subcategory of certified signal employee identified by the railroad pursuant to § 246.107 between [EFFECTIVE DATE OF FINAL RULE] and the date FRA approves the railroad's certification program; and

(2) Issue a certificate that complies with § 246.207 to each person that it designates.

(e) After [DATE 8 MONTHS AFTER EFFECTIVE DATE OF FINAL RULE], no railroad shall permit or require a person to perform service as a certified signal employee unless that person is a certified signal employee.

(f) No railroad shall permit or require a person, designated as a certified signal employee under the provisions of paragraph (c) or (d) of this section, to perform service as a certified signal employee for more than three years after the date FRA approves the railroad's certification program unless that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

(1) Except as provided in paragraph (f)(3) of this section, a person who has been designated as a certified signal employee under the provisions of paragraph (c) or (d) of this section and who is eligible to receive a retirement pension in accordance with the terms of an applicable agreement or in accordance with the terms of the Railroad Retirement Act (45 U.S.C. 231) within three years from the date the certifying railroad's program is approved, may request, in writing, that a railroad not recertify that person, pursuant to subpart B of this part, until three years from the date the certifying railroad's program is approved.

(2) Upon receipt of a written request pursuant to paragraph (f)(1) of this section, a railroad may wait to recertify the person making the request until the end of the three-year period after FRA has approved the railroad's certification program. If a railroad grants any request, it must grant request all eligible persons to every extent possible.

(3) A person who is subject to recertification under part 240 or 242 of this chapter may not make a request pursuant to paragraph (f)(1) of this section.

(g) After a railroad's certification program has been approved by FRA, the railroad shall only certify or recertify a person as a signal employee if that person has been tested and evaluated in accordance with procedures that comply with subpart B of this part.

§ 246.106 Requirements for certification programs.

(a) *Railroad certification program submission.* (1) A railroad's certification program submission must include a copy of its certification program and a request for approval.

(2) The request for approval can be in letter or narrative format.

(3) A railroad will receive approval or disapproval notices from FRA by email.

(4) FRA may electronically store any materials required by this part.

(b) *Organization of the certification program.* Each certification program must be organized to present the required information in the six sections described in paragraphs (b)(1) through (6) of this section. Each section of the certification program must begin with the name, title, telephone number, and email address of the person to be contacted concerning the matters addressed by that section. If a person is identified in a prior section, it is sufficient to merely repeat the person's name in a subsequent section.

(1) *Section One of the certification program: General information and elections.* (i) The first section of the certification program must contain the name of the railroad, the person to be contacted to discuss that section (including the person's name, title, telephone number, and email address), and a statement electing either to accept responsibility for training persons not previously certified as signal employees or to not accept this responsibility.

(ii) If a railroad elects not to provide certification training to persons not previously certified as signal employees, the railroad will be limited to recertifying signal employees initially certified by another railroad. A railroad may change its election by obtaining FRA approval of a material modification to its certification program in accordance with § 246.103(g).

(iii) If a railroad elects to accept responsibility for training persons not previously certified as signal employees, the railroad must submit information on how such persons will be trained but is not required to actually perform such training. A railroad that elects to accept

responsibility for the training of such persons may authorize another railroad or a non-railroad entity to provide the training. The electing railroad remains responsible for ensuring that the authorized training provider(s) adhere to the training program the railroad submits.

(iv) If a railroad elects to classify its certified signal employees into more than one occupational category or subcategory by class, task, location, or other suitable terminology, the railroad shall include the following in this section of its certification program:

(A) An up-to-date list and description of each occupational category or subcategory of certified signal employee;

(B) A statement of the roles and responsibilities of each occupational category or subcategory of certified signal employee; and

(C) A detailed list of the safety-related tasks and subtasks performed by each category or subcategory of certified signal employee.

(2) *Section Two of the certification program: Training previously certified signal employees.* The second section of the certification program must contain information concerning the railroad's program for training previously certified signal employees, including all of the following information:

(i) As provided for in § 246.119(j), each railroad must have a program for the ongoing education of its certified signal employees to ensure that they maintain the necessary knowledge concerning all applicable Federal safety laws, regulations, and orders; knowledge concerning all applicable railroad signal system safety and operating rules; and knowledge concerning all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of signal systems and related technology deployed on the railroad. The railroad must describe in this section of its certification program how it will ensure that its certified signal employees maintain the necessary knowledge and skills to safely discharge their responsibilities so as to comply with the standard set forth in § 246.119(j);

(ii) In accordance with § 246.119(h), the railroad must provide sufficient detail in the second section of its certification program to permit effective evaluation of the contents and scope of the railroad's training program on the signal systems and signal-related technology deployed on its territory. FRA anticipates that railroads will address, in this section of their

certification programs, the frequency and duration of training sessions (including the interval between attendance at such training sessions), the training environment(s) that will be employed (e.g., classroom, computer-based training, use of film or slide presentations, or on-the-job training) and which aspects of the training program will be voluntary or mandatory;

(iii) How the training will address a certified signal employee's loss of retained knowledge over time; and

(iv) How the training will address changed circumstances over time, such as the introduction of new or modified signal system equipment and related technology (including software modifications), so as to comply with the training standard set forth in § 246.119.

(3) *Section Three of the certification program: Testing and evaluating previously certified signal employees.* The third section of the certification program must contain information about the railroad's program for testing and evaluating previously certified signal employees, including all of the following information:

(i) The railroad must describe in this section how it will ensure that its previously certified signal employees demonstrate their knowledge concerning the safe discharge of their responsibilities, so as to comply with the standards set forth in § 246.121; and

(ii) The railroad must describe in this section how it will have ongoing testing and evaluation to ensure that its previously certified signal employees have the required vision and hearing acuity as provided in §§ 246.117 and 246.118. This section must also address how the railroad will ensure that its medical examiners have sufficient information concerning the railroad's operations, as well as the safety-related tasks performed by certified signal employees, to allow for effective and appropriate determinations about the ability of a particular individual to safely perform as a certified signal employee.

(4) *Section Four of the certification program: Training, testing, and evaluating persons who have not been certified as signal employees.* Unless a railroad has made an election not to accept responsibility for conducting the initial signal employee certification training, the fourth section of the certification program must contain information about the railroad's program for educating, testing, and evaluating persons who have not been previously certified as signal employees, including all of the following information:

(i) As provided for in § 246.119, a railroad that is issuing an initial signal employee certification to a person must have a program for the training, testing, and evaluation of its signal employee certification candidates to ensure that they acquire the necessary knowledge and skills. A railroad must describe in this section of its certification program how it will ensure that its signal employee certification candidates acquire sufficient knowledge and skills and demonstrate their knowledge and skills concerning the safe discharge of their responsibilities. A railroad must also discuss in this section of its certification program its procedures for mentoring candidates for signal employee certification, in accordance with § 246.124;

(ii) This section of the railroad's certification program must contain the same level of detail concerning the initial training program and testing and evaluation of previously uncertified signal employees as is required for previously certified signal employees in § 246.106(b)(2) and (3) (Sections Two and Three of the railroad's certification program);

(iii) Railroads that elect to rely on other entities to conduct signal employee certification training away from the railroad's own territory must explain how training will be provided to signal employee certification candidates on the signal systems and related technology deployed on the railroad's territory.

(5) *Section Five of the certification program: Monitoring operational performance by certified signal employees.* The fifth section of the certification program must contain information about the railroad's program for monitoring the operational performance of its certified signal employees, including all of the following information:

(i) Section 246.123 requires that a railroad conduct ongoing monitoring of its certified signal employees and that each certified signal employee have an annual unannounced compliance test. A railroad must describe in this section of its certification program how the railroad will ensure that it has an ongoing program for monitoring its certified signal employees that requires them to demonstrate their ability to safely discharge their responsibilities.

(ii) A railroad must describe in this section the scoring system used by the railroad during operational monitoring observations and unannounced compliance tests that are administered in accordance with § 246.123.

(6) *Section Six of the certification program: Procedures for routine*

administration of the signal employee certification program. The final section of the certification program must contain a summary of how the railroad's program and procedures will implement various aspects of the regulatory provisions in this part that relate to the routine administration of the railroad's certification program for signal employees. Specifically, this section must address the procedural aspects of the following provisions and must describe the manner in which the railroad will implement its program so as to comply with each of the following provisions:

(i) Section 246.301 which provides that each railroad must have procedures for review and comment on adverse information;

(ii) Sections 246.111, 246.113, 246.115, and 246.303 which require each railroad to have procedures for evaluating data concerning prior safety conduct as a motor vehicle operator and as a railroad worker;

(iii) Sections 246.109, 246.201, and 246.301 which place a duty on the railroad to make a series of determinations. When describing how it will implement its certification program to comply with these sections, a railroad must describe: the procedures it will utilize to ensure that all of the necessary determinations have been made in a timely fashion; who will be authorized by the railroad to determine whether a person will or will not be certified; and how the railroad will communicate adverse decisions;

(iv) Sections 246.109, 246.117, 246.118, 246.119, and 246.121, which place a duty on the railroad to make a series of determinations. When describing how the railroad will implement its program to comply with these sections, a railroad must describe how it will document the factual basis the railroad relied upon when making determinations under these sections;

(v) Section 246.124 which require each railroad to have procedures for mentoring signal employees who have not been certified;

(vi) Section 246.125 which permits reliance on signal employee certification determinations made by other railroads; and

(vii) Sections 246.207 and 246.307 which contain the requirements for replacing lost certificates and the conduct of certification revocation proceedings.

§ 246.107 Signal service classifications.

(a) A railroad may classify its certified signal employees in occupational categories or subcategories by class, task, location, or other suitable

terminology, in accordance with an FRA-approved certification program that complies with the requirements of this part.

(b) Any certified signal employee called to work on a signal system or signal-related technology on which they have not been certified shall immediately notify the railroad or their employer that they are not certified to work on the signal system or signal-related technology.

(c) No railroad shall permit a certified signal employee to work on a signal system or signal-related technology on which the employee has not been certified, unless the certified signal employee works under the direct oversight and supervision of a mentor in accordance with § 246.124.

§ 246.109 Determinations required for certification and recertification.

(a) After FRA has approved a railroad's signal employee certification program, the railroad, prior to initially certifying or recertifying any person as a signal employee, shall, in accordance with its FRA-approved program, determine in writing that:

(1) The individual meets the prior safety conduct eligibility requirements of §§ 246.111 and 246.113;

(2) The individual meets the eligibility requirements of §§ 246.115 and 246.303;

(3) The individual meets the vision and hearing acuity standards of §§ 246.117 and 246.118;

(4) If applicable, the individual has completed a training program that meets the requirements of § 246.119;

(5) The individual has the necessary knowledge, as demonstrated by successfully completing testing and practical demonstration that meet the requirements of § 246.121.

(b) Nothing in this section, § 246.111, or § 246.113 shall be construed to prevent persons subject to this part from entering into an agreement that results in a railroad obtaining the information needed for compliance with this subpart in a different manner than that prescribed in § 246.111 or § 246.113.

§ 246.111 Prior safety conduct as motor vehicle operator.

(a) Except as provided in paragraphs (b) through (e) of this section, after FRA has approved a railroad's signal employee certification program, the railroad, prior to certifying or recertifying any person as a signal employee, shall determine that the person meets the eligibility requirements of this section involving prior conduct as a motor vehicle operator.

(b) A railroad shall certify a person as a signal employee for 60 days if the person:

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

(2) Otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(c) A railroad shall recertify a person as a signal employee for 60 days from the expiration date of that person's certification if the person:

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

(2) Otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(d) Except as provided in paragraph (e) of this section, if a railroad who certified or recertified a person for 60 days pursuant to paragraph (b) or (c) of this section does not obtain and evaluate the information requested pursuant to paragraph (g) of this section within 60 days, that person will be ineligible to perform as a certified signal employee until the information can be evaluated by the railroad.

(e) If a person requests the information required pursuant to paragraph (g) of this section but is unable to obtain it, that person or the railroad certifying or recertifying that person may petition for a waiver of the requirements of paragraph (a) of this section in accordance with the provisions of part 211 of this chapter. A railroad shall certify or recertify a person during the pendency of the waiver request if the person otherwise meets the eligibility requirements provided in § 246.109(a)(1) through (5).

(f) Except for persons designated as signal employees under § 246.105(c) or (d) or for persons covered by paragraph (j) of this section, each person seeking certification or recertification under this part shall, within one year prior to the date of the railroad's decision on certification or recertification:

(1) Take the actions required by paragraphs (g) through (i) of this section to make information concerning their driving record available to the railroad that is considering such certification or recertification; and

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

(g) Each person seeking certification or recertification under this part shall request, in writing, that the chief of each

driver licensing agency identified in paragraph (h) of this section provide a copy of that agency's available information concerning their driving record to the railroad that is considering such certification or recertification.

(h) Each person shall request the information required under paragraph (g) of this section from:

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

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

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

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

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

(j) Any person who has never obtained a motor vehicle driving license is not required to comply with the provisions of paragraph (g) of this section but shall notify the railroad of that fact in accordance with procedures established by the railroad in its certification program.

(k) Each certified signal employee or person seeking certification as a signal employee shall report motor vehicle incidents described in paragraphs (m)(1) and (2) of this section to their employer(s) (if employed by a railroad or contractor to a railroad), all prospective certifying railroads (if applicable), and all railroad(s) with whom the person holds a signal employee certificate within 48 hours of:

(1) Being convicted for such violations, or

(2) A completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license for such violations. For purposes of this paragraph and paragraph (m) of this section, "State action" means action of the jurisdiction that has issued the motor vehicle driver's license, including a foreign country. For purposes of signal employee certification, no railroad shall require reporting earlier than 48 hours

after the conviction, or completed State action to cancel, revoke, suspend, or deny a motor vehicle driver's license.

(l) When evaluating a person's motor vehicle driving record, a railroad shall not consider information concerning motor vehicle driving incidents that occurred:

(1) Prior to the effective date of this rule; or

(2) More than three years before the date of the railroad's certification decision; or

(3) At a time other than that specifically provided for in § 246.111, § 246.113, § 246.115, or § 246.303.

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

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

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

(n) If such an incident, described in paragraph (m) of this section, is identified:

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

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

(3) If the person is evaluated as not currently affected by an active substance abuse disorder, the subject data shall not be considered further with respect to certification. However, the railroad shall, on recommendation of the DAC, condition certification upon participation in any needed aftercare and/or follow-up testing for alcohol or drugs deemed necessary by the DAC consistent with the technical standards specified in 49 CFR part 219, subpart H, as well as 49 CFR part 40.

(4) If the person is evaluated as currently affected by an active substance abuse disorder, the provisions of § 246.115(c) will apply.

(5) If the person fails to comply with the requirements of paragraph (n)(2) of

this section, the person shall be ineligible to perform as a certified signal employee until such time as the person complies with the requirements.

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

§ 246.113 Prior safety conduct with other railroads.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the certification candidate meets the eligibility requirements of this section.

(b) If the certification candidate has not been employed or certified by any other railroad in the previous five years, they do not have to submit a request in accordance with paragraph (c) of this section, but they must notify the railroad of this fact in accordance with procedures established by the railroad in its certification program.

(c) Except as provided for in paragraph (b) of this section, each person seeking certification or recertification under this part shall submit a written request to each railroad that employed or certified the person within the previous five years to provide the following information to the railroad that is considering whether to certify or recertify that person as a signal employee:

(1) Information about that person's compliance with § 246.111 within the three years preceding the date of the request;

(2) Information about that person's compliance with § 246.115 within the five years preceding the date of the request; and

(3) Information about that person's compliance with § 246.303 within the five years preceding the date of the request.

(d) Each person submitting a written request required by paragraph (c) of this section shall:

(1) Submit the request no more than one year before the date of the railroad's decision on certification or recertification; and

(2) Take any additional actions, including providing any necessary consent required by State or Federal law to make information concerning their service record available to the railroad.

(e) Within 30 days after receipt of a written request that complies with paragraph (c) of this section, a railroad provide the information requested to the railroad designated in the written request.

(f) If a railroad is unable to provide the information requested within 30 days after receipt of a written request that complies with paragraph (c) of this section, the railroad shall provide an explanation, in writing, of why it cannot provide the information within the requested time frame. If the railroad will ultimately be able to provide the requested information, the explanation shall state approximately how much more time the railroad needs to supply the requested information. If the railroad will not be able to provide the requested information, the railroad shall provide an adequate explanation for why it cannot provide this information. Copies of this explanation shall be provided to the railroad designated in the written request and to the person who submitted the written request for information.

(g) When evaluating a person's prior safety conduct with a different railroad, a railroad shall not consider information concerning prior safety conduct that occurred:

(1) Prior to [EFFECTIVE DATE OF FINAL RULE]; or

(2) At a time other than that specifically provided for in § 246.111, § 246.113, § 246.115, or § 246.303.

(h) Each railroad shall adopt and comply with a program that complies with the requirements of this section. When any person (including but not limited to a railroad; any manager, supervisor, official, or agent of a railroad; any owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; any employee of such owner, manufacturer, lessor, lessee, or contractor) violates any requirement of a program that complies with the requirements of this subject, that person shall be considered to have violated the requirements of this section.

§ 246.115 Substance abuse disorders and alcohol drug rules compliance.

(a) *Eligibility determination.* After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the eligibility requirements of this section.

(b) *Documentation.* In order to make the determination required under paragraph (c) of this section, a railroad shall have on file documents pertinent to that determination, including a written document from its DAC which

states their professional opinion that the person has been evaluated as not currently affected by a substance abuse disorder or that the person has been evaluated as affected by an active substance abuse disorder.

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

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

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

(3) In the case of a current employee of a railroad evaluated as having an active substance abuse disorder (including a person identified under the procedures of § 246.111), the employee may, if otherwise eligible, voluntarily self-refer for substance abuse counseling or treatment under the policy required by § 219.1001(b)(1) of this chapter; and the railroad shall then treat the substance abuse evaluation as confidential except with respect to ineligibility for certification.

(d) *Prior alcohol/drug conduct; Federal rule compliance.* (1) In determining whether a person may be or remain certified as a signal employee, a railroad shall consider conduct described in paragraph (d)(2) of this section that occurred within a period of five consecutive years prior to the review. A review of certification shall be initiated promptly upon the occurrence and documentation of any incident of conduct described in this paragraph (d).

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

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

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

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

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

(i) In the case of one violation of § 219.102 of this chapter, the person shall be ineligible to hold a certificate

during evaluation and any required primary treatment as described in paragraph (e) of this section. In the case of two violations of § 219.102 of this chapter, the person shall be ineligible to hold a certificate for a period of two years. In the case of more than two such violations, the person shall be ineligible to hold a certificate for a period of five years.

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

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

(iv) If a person refuses to provide a breath or body fluid sample for testing under the requirements of part 219 of this chapter when instructed to do so by a railroad representative, the person shall be ineligible to hold a certificate for a period of nine months.

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

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

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

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

(iii) In accordance with the testing procedures of 49 CFR part 219, subpart H, has had a return-to-duty alcohol test with an alcohol concentration of less than .02 and a return-to-duty body fluid sample that tested negative for controlled substances.

(2) A certified signal employee placed in service or returned to service under the above-stated conditions shall continue in any program of counseling

or treatment deemed necessary by the SAP and shall be subject to a reasonable program of follow-up alcohol and drug testing without prior notice for a period of not more than five years following return to service. Follow-up tests shall include not fewer than six alcohol tests and six drug tests during the first year following return to service.

(3) Return-to-duty and follow-up alcohol and drug tests shall be performed consistent with the requirements of 49 CFR part 219, subpart H.

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

(f) *Confidentiality protected.* Nothing in this part shall affect the responsibility of the railroad under § 219.1003(f) of this chapter to treat qualified referrals for substance abuse counseling and treatment as confidential; and the certification status of a signal employee who is successfully assisted under the procedures of that section shall not be adversely affected. However, the railroad shall include in its referral policy, as required pursuant to § 219.1003(j) of this chapter, a provision that, at least with respect to a certified signal employee or a candidate for certification, the policy of confidentiality is waived (to the extent that the railroad shall receive from the SAP or DAC official notice of the substance abuse disorder and shall suspend or revoke the certification, as appropriate) if the person at any time refuses to cooperate in a recommended course of counseling or treatment.

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

§ 246.117 Vision acuity.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the standards for visual acuity prescribed in this section and Appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

(c) Except as provided in paragraph (d) of this section, each certified signal employee shall have visual acuity that meets or exceeds the following thresholds:

(1) For distant viewing, either:

(i) Distant visual acuity of at least 20/40 (Snellen) in each eye without corrective lenses; or

(ii) Distant visual acuity separately corrected to at least 20/40 (Snellen) with corrective lenses and distant binocular acuity of at least 20/40 (Snellen) in both eyes with or without corrective lenses;

(2) A field of vision of at least 70 degrees in the horizontal meridian in each eye; and

(3) The ability to recognize and distinguish between the colors of railroad signals as demonstrated by successfully completing one of the tests in Appendix B to this part.

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a certified signal employee. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in Appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a certified signal employee.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a certified signal employee, the railroad may conclude that the person satisfies the vision acuity requirements of this section to be a certified signal employee. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the

following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the vision acuity standards prescribed in paragraph (c) of this section.

(2) If necessary under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the vision acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's vision acuity prevents the candidate from being able to safely perform as a certified signal employee.

(f) If the examination required under this section shows that the person needs corrective lenses to meet the standards for vision acuity prescribed in this section and appendix B to this part, that person shall use corrective lenses at all times while performing as a certified signal employee unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a certified signal employee without corrective lenses.

(g) When a certified signal employee becomes aware that their vision has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a certified signal employee. The individual cannot return to service as a certified signal employee until they are reexamined and determined by the railroad's medical examiner to satisfy the vision acuity standards prescribed in this section and appendix B to this part.

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

§ 246.118 Hearing acuity.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person meets the standards for hearing acuity

prescribed in this section and appendix B to this part.

(b) Any examination required under this section shall be performed by or under the supervision of a medical examiner or a licensed physician's assistant.

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

(1) As required in 29 CFR 1910.95(h) (Occupational Safety and Health Administration);

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

(3) Conducted using an audiometer that meets the specifications of, and is maintained and used in accordance with, a formal industry standard, such as American National Standards Institute (ANSI) S3.6, "Specifications for Audiometers."

(d) A person not meeting the thresholds in paragraph (c) of this section shall, upon request of the certification candidate, be subject to further medical evaluation by a railroad's medical examiner to determine that person's ability to safely perform as a certified signal employee. In such cases, the following procedures will apply:

(1) In accordance with the guidance prescribed in Appendix B to this part, a person is entitled to:

(i) One retest without making any showing; and

(ii) An additional retest if the person provides evidence that circumstances have changed since the last test to the extent that the person may now be able to safely perform as a certified signal employee.

(2) The railroad shall provide its medical examiner with a copy of this part, including all appendices.

(3) If, after consultation with a railroad officer, the medical examiner concludes that, despite not meeting the threshold(s) in paragraph (c) of this section, the person has the ability to safely perform as a certified signal employee, the railroad may conclude that the person satisfies the hearing acuity requirements of this section to be a certified signal employee. Such certification will be conditioned on any special restrictions the medical examiner determines in writing to be necessary.

(e) In order to make the determination required under paragraph (a) of this section, a railroad shall have on file the following for each certification candidate:

(1) A medical examiner's certificate that the candidate has been medically examined and either does or does not meet the hearing acuity standards prescribed in paragraph (c) of this section.

(2) If necessary under paragraph (d) of this section, a medical examiner's written professional opinion which states the basis for their determination that:

(i) The candidate can be certified, under certain conditions if necessary, even though the candidate does not meet the hearing acuity standards prescribed in paragraph (c) of this section; or

(ii) The candidate's hearing acuity prevents the candidate from being able to safely perform as a certified signal employee.

(f) If the examination required under this section shows that the person needs a hearing aid to meet the standards for hearing acuity prescribed in this section and appendix B to this part, that person shall use a hearing aid at all times while performing as a certified signal employee unless the railroad's medical examiner subsequently determines in writing that the person can safely perform as a certified signal employee without a hearing aid.

(g) When a certified signal employee becomes aware that their hearing has deteriorated, they shall notify the railroad's medical department or other appropriate railroad official of the deterioration. Such notification must occur prior to performing any subsequent service as a certified signal employee. The person cannot return to service as a certified signal employee until they are reexamined and determined by the railroad's medical examiner to satisfy the hearing acuity standards prescribed in this section and appendix B to this part.

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

§ 246.119 Training requirements.

(a) After FRA has approved a railroad's certification program, the railroad shall determine, prior to issuing

any person a signal employee certificate, that the person has successfully completed training, in accordance with the requirements of this section.

(b) As further explained in § 246.106, a railroad's certification program shall state the railroad's election either:

(1) To accept responsibility for training persons who have not been previously certified as signal employees and thereby obtain authority to provide signal employee certification; or

(2) To recertify signal employees previously certified by other railroads.

(c) A railroad that elects to accept responsibility for the training of persons who have not been previously certified as signal employees shall state in its certification program whether it will conduct the training or employ a training program conducted by another entity on its behalf, but adopted and ratified by the railroad.

(d) A railroad that elects to train persons not previously certified as signal employees shall address the following requirements in its certification program:

(1) An explanation of how training will be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, practical demonstration, on-the-job training, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. The training shall document a person's knowledge of, and ability to comply with, Federal railroad safety laws, regulations, and orders, as well as railroad rules and procedures.

(2) An on-the-job training component which shall include the following:

(i) A syllabus describing content, required tasks, and related steps the employee learning the job shall be able to perform within a specified timeframe;

(ii) A statement of the conditions (*e.g.*, prerequisites, tools, equipment, documentation, briefings, demonstrations, and practice) necessary for learning transfer; and

(iii) A statement of the standards by which proficiency is measured through a combination of task/step accuracy, completeness, and repetition.

(3) A description of the processes to review and modify its training program when new safety-related laws, regulations, orders, and procedures are issued and when new signal systems, technologies, software or equipment are

introduced into the workplace. This description shall also explain how the railroad will determine if additional or refresher training is needed.

(e) Prior to beginning the initial signal employee tasks associated with on-the-job exercises referenced in paragraph (d)(2) of this section, each railroad shall make any relevant information or materials, such as signal standards, test procedures, operating rules, safety rules, or other rules, available for referencing by certification candidates.

(f) Prior to initial certification of a person as a certified signal employee, a railroad shall require the person to:

(1) Successfully complete the formal initial training program developed pursuant to paragraph (d) of this section and any associated examinations covering the skills and knowledge the person will need to perform the tasks necessary to be a certified signal employee;

(2) Demonstrate on-the-job proficiency, with input from a qualified instructor, by successfully completing the tasks and using the signal systems and technology necessary to be a certified signal employee on the certifying railroad. A certification candidate may perform such tasks under the direct onsite supervision of a certified signal employee who has at least one year of experience as a signal employee; and

(3) Demonstrate knowledge of the signal systems, technology, software, and equipment deployed on the railroad's territory. If the railroad uses a written test to fulfill this requirement, the railroad must provide the certification candidate with an opportunity to consult with a qualified instructor to explain a question.

(g) In making the determination required under paragraph (a) of this section, a railroad shall have written documentation showing that:

(1) The person completed a training program that complies with paragraph (d) of this section (if the person has not previously been certified as a signal employee); and

(2) The person demonstrated their knowledge by achieving a passing grade under the testing, practical demonstration, and evaluation procedures of the training program.

(h) Notwithstanding the railroad's election in paragraph (b) of this section, each railroad shall provide comprehensive training on the installation, operation, testing, maintenance, and repair of the signal systems (including software and equipment) and signal-related technology deployed on its territory as part of its certification program required

under this part and submitted in accordance with the procedures and requirements in § 246.106. In its certification program, each railroad shall address:

(1) How comprehensive training will be provided on the installation, operation, testing, maintenance, and repair of the signal systems (including software and equipment) and signal-related technology deployed on the railroad's territory; and

(2) How the railroad will ensure that the comprehensive training discussed in this paragraph is provided to each certified signal employee before the employee is required to install, operate, test, maintain, or repair any signal system (including software and equipment) or signal-related technology deployed on the railroad's territory; and

(3) The maximum time periods in which a certified signal employee can be absent from performing safety-sensitive work on signal systems before refresher training will be required. This time period cannot exceed 12 months.

(i) If ownership of a railroad is being transferred from one company to another, the signal employees of the acquiring company may receive familiarization training from the selling company prior to the acquiring company commencing operation.

(j) Each railroad shall provide for the continuing education of its certified signal employees to ensure that each certified signal employee maintains the necessary knowledge and skills concerning:

(1) Compliance with all applicable Federal laws, regulations, and orders;

(2) Compliance with all applicable railroad signal system safety and operating rules; and

(3) Compliance with all applicable standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of new and existing signal systems (including new and existing software and equipment) and new and existing signal-related technology deployed on the railroad.

(k) Each railroad shall provide comprehensive training on the installation, operation, testing, maintenance, and repair of new signal systems (including software and equipment) and signal-related technology to its certified signal employees before requiring any certified signal employee to install, operate, test, maintain, or repair any new signal system (including software or equipment) or new signal-related technology on its territory.

(l) Each railroad shall adopt and comply with a program meeting the

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

§ 246.121 Knowledge testing.

(a) After FRA has approved a railroad's signal employee certification program, the railroad shall determine, prior to issuing any person a signal employee certificate, that the person has demonstrated sufficient knowledge of the railroad's signal standards, test procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems in accordance with the requirements of this section.

(b) In order to make the knowledge determination required by paragraph (a) of this section, a railroad shall have procedures for testing a person being evaluated for certification as a signal employee that shall be:

(1) Designed to examine a person's knowledge of:

(i) All applicable Federal railroad safety laws, regulations, and orders governing signal systems and related technology;

(ii) All applicable railroad safety and operating rules; and

(iii) All applicable railroad standards, procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems and related technology, including:

(A) The railroad's rules and standards for disabling and removing signal systems from service; and

(B) The railroad's rules and standards for placing signal systems back in service;

(2) Objective in nature;

(3) Include a practical demonstration component;

(4) In written or electronic form;

(5) Sufficient to accurately measure the person's knowledge of the subjects listed in paragraph (b)(1) of this section; and

(6) Conducted without open reference books or other materials except to the degree the person is being tested on their ability to use such reference books or materials.

(c) The railroad shall provide the certification candidate with an opportunity to consult with a qualified instructor to explain one or more test questions.

(d) If a person fails the test, no railroad shall permit or require that

person to work as a certified signal employee prior to that person's achieving a passing score during a reexamination of the test.

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

§ 246.123 Monitoring operational performance.

(a) Each railroad's certification program shall describe how it will monitor the operational performance of its certified signal employees by including procedures for:

(1) Giving each certified signal employee at least one unannounced compliance test each calendar year on the railroad's signal system standards, test procedures, and Federal regulations concerning signal systems, except as provided for in paragraph (d) of this section;

(2) Giving unannounced compliance tests to certified signal employees who return to signal service after performing service that does not require certification pursuant to this part, as described in paragraph (d) of this section;

(3) What actions the railroad will take if it finds deficiencies in a certified signal employee's performance during an unannounced compliance test; and

(4) Monitoring the performance of signal-related tasks.

(b) An unannounced compliance test shall:

(1) Test certified signal employees for compliance with one or more signal system standards or test procedures in accordance with the railroad's certification program and § 217.9 of this chapter;

(2) Be performed by a certified signal employee;

(3) Be given to each certified signal employee at least once each calendar year, except as provided for in paragraph (d) of this section; and

(4) If the railroad's certification program classifies signal employees, the unannounced compliance test shall be within scope of the signal employee's classification.

(c) A certified signal employee who is not performing service that requires certification pursuant to this part does not need to be given an unannounced compliance test. However, when the certified signal employee returns to

service that requires certification pursuant to this part, the railroad shall:

(1) Give the certified signal employee an unannounced compliance test within 30 days of their return to signal service; and

(2) Retain a written record that includes the following information:

(i) The date the certified signal employee stopped performing service that required certification pursuant to this part;

(ii) The date the certified signal employee returned to performing service that required certification pursuant to this part; and

(iii) The date and the result of the unannounced compliance test was performed following the signal employee's return to service requiring certification.

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

§ 246.124 Mentoring.

(a) Each railroad's certification program shall include procedures for mentoring signal employees who have not been certified by the railroad.

(b) After FRA has approved a railroad's certification program, the railroad shall not permit or require any person to perform work on a signal system or signal-related technology on its territory that requires certification unless the railroad first determines that:

(1) The person is a certified signal employee who has been certified by the railroad; or

(2) The person is a signal employee who is working under the direct observation and supervision of a mentor.

(c) If the railroad elects to classify its certified signal employees into more than one occupational category or subcategory pursuant to § 246.107, the railroad shall address in its certification program how mentoring will be provided for certified signal employees who move into a different occupational category or subcategory of certified signal service.

(d) If allowed by the railroad's certification program, any work on a signal system performed by a signal employee whose certification has been revoked shall be performed under the direct oversight and supervision of a mentor.

(e) Each railroad's certification program shall address how mentors will be held accountable for the work performed by signal employees when they are working under the mentor's direct oversight and supervision.

§ 246.125 Certification determinations made by other railroads.

(a) A railroad that is considering certification of a person as a signal employee may rely on certain determinations made by another railroad concerning that person's certification.

(b) A railroad's certification program shall address how the railroad will administer the training of previously uncertified signal employees with extensive signal experience or previously certified signal employees who have had their certification expire. If a railroad's certification program fails to specify how it will train these signal employees, then the railroad shall require these signal employees to successfully complete the certifying railroad's entire training program.

(c) A railroad relying on certification determinations made by another railroad shall be responsible for determining that:

(1) The prior certification is still valid in accordance with the provisions of §§ 246.201 and 246.307;

(2) The person has received training on the railroad's signal standards, test procedures, and instructions for the installation, operation, testing, maintenance, troubleshooting, and repair of the railroad's signal systems, technology, software, and equipment deployed on a railroad's territory pursuant to § 246.119; and

(3) The person has demonstrated the necessary knowledge concerning the railroad's operating rules, territory, signal systems, technology, software, and equipment deployed on a railroad's territory in accordance with § 246.121.

Subpart C—Administration of the Certification Program

§ 246.201 Time limitations for certification.

(a) After FRA approves a railroad's signal employee certification program, that railroad shall not certify or recertify a person as a signal employee if the railroad is making:

(1) A determination concerning eligibility under §§ 246.111, 246.113, 246.115, and 246.303 and the eligibility data being relied on was furnished more than one year before the date of the railroad's certification decision;

(2) A determination concerning visual or hearing acuity and the medical examination being relied on was

conducted more than 450 days before the date of the railroad's certification decision;

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

(4) A determination concerning demonstrated knowledge and the knowledge examination being relied on was conducted more than two years before the date of the railroad's recertification decision if the railroad administers a knowledge testing program pursuant to § 246.121 at intervals that do not exceed two years.

(b) The time limitations of paragraph (a) of this section do not apply to a railroad that is making a certification decision in reliance on determinations made by another railroad in accordance with § 246.125.

(c) Except if a person is designated as a certified signal employee under § 246.105(c) or (d), no railroad shall certify a person as a signal employee for an interval of more than three years.

(d) Each railroad shall issue each certified signal employee a certificate that complies with § 246.207 no later than 30 days from the date of its decision to certify or recertify that person.

§ 246.203 Retaining information supporting determinations.

(a) After FRA approves a railroad's signal employee certification program, any time the railroad issues, denies, or revokes a certificate after making the determinations required under § 246.109, it shall maintain a record for each certified signal employee and certification candidate. Each record shall contain the information, described in paragraph (b) of this section, that the railroad relied on in making the determinations required under § 246.109.

(b) A railroad shall retain the following information:

(1) Relevant data from the railroad's records concerning the person's prior safety conduct and eligibility;

(2) Relevant data furnished by another railroad;

(3) Relevant data furnished by a governmental agency concerning the person's motor vehicle driving record;

(4) Relevant data furnished by the person seeking certification concerning their eligibility;

(5) The relevant test results data concerning vision and hearing acuity;

(6) If applicable, the relevant data concerning the professional opinion of the railroad's medical examiner on the

adequacy of the person's vision or hearing acuity;

(7) Relevant data from the railroad's records concerning the person's success or failure on knowledge test(s) under § 246.121;

(8) A sample copy of the written knowledge test or tests administered; and

(9) The relevant data from the railroad's records concerning the person's success or failure on unannounced tests the railroad performed to monitor the signal employee's performance in accordance with § 246.123.

(c) If a railroad is relying on successful completion of a training program conducted by another entity, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the training entity concerning the person's demonstration of knowledge and relied on by the railroad in making its determinations.

(d) If a railroad is relying on a certification decision initially made by another railroad, the relying railroad shall maintain a record for each certification candidate that contains the relevant data furnished by the other railroad which it relied on in making its determinations.

(e) All records required under this section shall be retained by the railroad for a period of six years from the date of the certification, recertification, denial, or revocation decision and shall be made available to FRA representatives, upon request, in a timely manner.

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

(1) Make, cause to be made, or participate in the making of a false entry on the record(s) required by this section; or

(2) Otherwise falsify such records through material misstatement, omission, or mutilation.

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

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

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

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

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

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

(3) Any amendment to a record is either:

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

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

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

(5) The system employed by the railroad for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives in a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

§ 246.205 List of certified signal employees and recordkeeping.

(a) After a railroad's certification program has received its initial approval from FRA, pursuant to § 246.103(f)(1), the railroad must maintain a list of each person who is currently certified as a signal employee by the railroad. The list must include the date of the railroad's certification decision and the date the person's certification expires.

(b) The list shall:

(1) Be updated at least annually;

(2) Be made available, upon request, to FRA representatives in a timely manner; and

(3) Be available either:

(i) In electronic format pursuant to paragraph (c) of this section; or

(ii) At the divisional or regional headquarters of the railroad.

(c) If a railroad elects to maintain its list in an electronic format, it must:

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

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

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

(ii) An entry on the list cannot be deleted or altered by any individual after the entry is certified by the employee who created the entry;

(3) Have any amendment to the list either:

(i) Electronically stored apart from the entry on the list that it amends; or

(ii) Electronically attached to the entry on the list as information without changing the original entry;

(4) Ensure that each amendment to the list uniquely identifies the person making the amendment;

(5) Ensure that the system employed for data storage permits reasonable access and retrieval of the information which can be easily produced in an electronic or printed format that can be:

(i) Provided to FRA representatives within a timely manner; and

(ii) Authenticated by a designated representative of the railroad as a true and accurate copy of the railroad's records if requested to do so by an FRA representative.

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

(1) Make, cause to be made, or participate in the making of a false entry on the list required by this section; or

(2) Otherwise falsify such list through material misstatement, omission, or mutilation.

§ 246.207 Certificate requirements.

(a) Each person who becomes a certified signal employee in accordance with this part shall be issued a paper or electronic certificate that must:

(1) Identify the railroad that is issuing the certificate;

(2) Indicate that it is a signal employee certificate, along with any additional signal employee categories or subcategories developed by the railroad pursuant to § 246.107;

(3) Provide the following information about the certified signal employee:

(i) Name;

(ii) Employee identification number;

(iii) Year of birth; and

(iv) Either a physical description or photograph of the person;

(4) Identify any conditions or limitations, including conditions to ameliorate vision or hearing acuity deficiencies, that restrict, limit, or alter the person's abilities to work as a certified signal employee;

(5) Show the effective date of the certification;

(6) Show the expiration date of the certification, except as provided for in paragraph (b) of this section;

(7) Be signed by an individual designated in accordance with paragraph (c) of this section; and

(8) Be electronic or be of sufficiently small size to permit being carried in an ordinary pocket wallet.

(b) A certificate does not need to include an expiration date, as required under paragraph (a)(6) of this section, if the person was designated as a certified signal employee under § 246.105(c) or (d).

(c) Each railroad shall designate in writing any person it authorizes to sign the certificates described in this section. The designation shall identify such persons by name or job title.

(d) Nothing in this section shall prohibit any railroad from including additional information on the certificate or supplementing the certificate through other documents.

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

(1) Make, cause to be made, or participate in the making of a false entry on a certificate; or

(2) Otherwise falsify a certificate through material misstatement, omission, or mutilation.

(f) Except as provided for in paragraph (h) of this section, each certified signal employee shall:

(1) Have their certificate in their possession while on duty as a signal employee; and

(2) Display their certificate upon request from:

(i) An FRA representative;

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

(iii) An officer of the issuing railroad; or

(iv) An officer of the signal employee's employer if the signal employee is not employed by the issuing railroad.

(g) If a signal employee's certificate is lost, stolen, mutilated, or becomes unreadable, the railroad shall promptly replace the certificate at no cost to the signal employee.

(h) A certified signal employee is exempt from the requirements of paragraph (f) of this section if:

(1) The railroad made its certification or recertification decision within the last 30 days and the signal employee has not yet received their certificate; or

(2) The signal employee's certificate was lost, stolen, mutilated, or became unreadable, and the railroad has not yet issued a replacement certificate to the signal employee.

(i) Any signal employee who is notified or called to serve as a signal employee and such service would cause the signal employee to exceed certificate limitations, set forth in accordance with subpart B of this part, shall immediately notify the railroad that they are not

authorized to perform that anticipated service and it shall be unlawful for the railroad to require such service.

(j) Nothing in this section shall be deemed to alter a certified signal employee's duty to comply with other provisions of this chapter concerning railroad safety.

§ 246.213 Multiple certifications.

(a) A person who holds a signal employee certificate may:

(1) Hold a signal employee certificate for multiple types of signal service; and

(2) Be certified in other crafts, such as a locomotive engineer or conductor.

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

(c)(1) A person who holds a current signal employee certificate from more than one railroad shall immediately notify their employer(s) and all railroad(s) with whom they hold a signal employee certificate if they are denied signal employee certification or recertification under § 246.301 by a railroad or have their signal employee certification suspended or revoked under § 246.307 by a railroad.

(2) If a person has their signal employee certification suspended or revoked by a railroad under § 246.307, they shall not work as a certified signal employee for any railroad during the period that their certification is suspended or revoked, except as provided for in § 246.124(d).

(3) If a person has their signal employee certification suspended or revoked by a railroad under § 246.307, they shall notify any railroad from whom they are seeking signal employee certification that their signal employee certification has been suspended or revoked by another railroad.

(d) Paragraphs (d)(1) through (3) of this section apply to people who are currently certified as a signal employee and also currently certified in another railroad craft, such as a locomotive engineer or conductor:

(1) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(11), they shall not work in another certified railroad craft, such as a locomotive engineer or conductor, during the period of revocation.

(2) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(11), they shall not obtain certification for any other railroad craft pursuant to this chapter during the period of revocation.

(3) If a person's signal employee certification is revoked under § 246.307 for a violation of § 246.303(e)(1) through

(10), they may work in another certified railroad craft, such as a locomotive engineer or conductor, during the period of revocation.

(e) Paragraphs (e)(1) through (3) of this section also apply to people who are certified as a signal employee and certified in another railroad craft, such as a locomotive engineer or conductor:

(1) A person whose certification in any railroad craft has been revoked for failure to comply with § 219.101 of this chapter shall not work as a certified signal employee for any railroad during the revocation period.

(2) A person whose certification in any railroad craft has been revoked for failure to comply with § 219.101 of this chapter shall not obtain signal employee certification pursuant to this part from any railroad during the revocation period.

(3) A certified signal employee who has had their certification in another railroad craft suspended or revoked for any reason other than a failure to comply with § 219.101 of this chapter may work as a certified signal employee during the suspension or revocation period.

(f) A railroad that denies a person signal employee certification or recertification under § 246.301 shall not, solely on the basis of that denial, deny or revoke that person's certifications or recertifications in another railroad craft.

(g) A railroad that denies a person's certification or recertification, pursuant to this chapter, in any railroad craft other than signal employee shall not, solely on the basis of that denial, deny or revoke that person's signal employee certification or recertification.

(h) In lieu of issuing multiple certificates, a railroad may issue one certificate to a person who is certified in multiple crafts as long as the single certificate complies with all of the certificate requirements for those crafts.

(i) A person who is certified in multiple crafts and who is involved in a revocable event, as described in this chapter, may only have one certificate revoked for that event. The determination by the railroad as to which certificate to revoke must be based on the work the person was performing at the time the revocable event occurred.

§ 246.215 Railroad oversight responsibilities.

(a) No later than March 31 of each year (beginning in calendar year [YEAR THAT IS 3 YEARS AFTER EFFECTIVE DATE OF FINAL RULE]), each Class I railroad (including the National Railroad Passenger Corporation), each railroad providing commuter service,

and each Class II railroad shall conduct a formal annual review and analysis concerning the administration of its program for responding to detected instances of poor safety conduct by certified signal employees during the prior calendar year.

(b) Each review and analysis shall involve:

(1) The number and nature of the instances of detected poor safety conduct including the nature of the remedial action taken in response thereto;

(2) The number and nature of FRA reported accidents/incidents attributed to poor safety performance by signal employees; and

(3) The number and type of operational monitoring test failures recorded by certified signal employees conducting compliance tests pursuant to § 246.123.

(c) Based on that review and analysis, each railroad shall determine what action(s) it will take to improve the safety of railroad operations to reduce or eliminate future accidents/incidents of that nature.

(d) If requested in writing by FRA, the railroad shall provide a report of the findings and conclusions reached during such annual review and analysis effort.

(e) For reporting purposes, information about the nature of detected poor safety conduct shall be capable of segregation for study and evaluation purposes into the following categories:

(1) Incidents involving noncompliance with railroad rules and procedures governing the removal from service of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems;

(iii) Other devices or signal systems subject to this part.

(2) Incidents involving noncompliance with railroad rules and procedures governing the restoration of service of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems;

(iii) Other devices or signal systems subject to this part.

(3) Incidents involving interference with the normal functioning of:

(i) Highway-rail and pathway grade crossing warning devices and systems; and

(ii) Wayside signal devices and systems.

(4) Incidents involving noncompliance with railroad rules and

test procedures governing the inspection and testing of grade crossing warning devices and systems after installation, modification, disarrangement, maintenance, testing, and repair.

(5) Incidents involving noncompliance with railroad test procedures on devices or signal systems subject to this part.

(6) Incidents resulting in a signal false proceed, grade crossing activation failure, or accident or personal injury related to the same.

(7) Incidents involving noncompliance with the on-track safety requirements in part 214 of this chapter.

(8) Incidents involving noncompliance with part 219 of this chapter.

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

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

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

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

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

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

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

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

(i) The person was withheld from service;

(ii) The person was dismissed from employment; or

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

(iv) The person's classification or type of signal service was removed or reduced.

(h) For reporting purposes, each instance of detected poor safety conduct identified in paragraph (b) of this section which resulted in the imposition

of formal or informal discipline shall be annotated to reflect the following:

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

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

(i) For reporting purposes, an instance of poor safety conduct involving an individual who is a certified signal employee and is certified in another craft such as locomotive engineer or conductor, need only be reported once (e.g., either under this section or § 240.309 or § 242.215 of this chapter). The determination as to where to report the instance of poor safety conduct should be based on the work the person was performing at the time the conduct occurred.

Subpart D—Denial and Revocation of Certification

§ 246.301 Process for denying certification.

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

(b) If a railroad denies a person certification or recertification, it shall issue a decision that complies with all of the following requirements:

(1) It must be in writing;

(2) It must explain the basis for the railroad's denial decision;

(3) It must address any explanation or rebuttal information that the certification candidate provides pursuant to paragraph (a) of this section;

(4) It must include the date of the railroad's decision; and

(5) It must be served on the candidate no later than 10 days after the railroad's decision.

(c) A railroad shall not deny the person's certification for failing to comply with a railroad test procedure, signal standard, or practice which

constitutes a violation under § 246.303(e)(1) through (10) if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with that railroad test procedure, signal standard, or practice.

§ 246.303 Criteria for revoking certification.

(a) It shall be unlawful to fail to comply with any of the railroad rules or practices described in paragraph (e) of this section.

(b) A certified signal employee who has demonstrated a failure to comply with a railroad test procedure, signal standard or practice described in paragraph (e) of this section shall have their certification revoked.

(c) A certified signal employee who is monitoring, mentoring, or instructing a signal employee and fails to take appropriate action to prevent a violation of a railroad test procedure, signal standard or practice described in paragraph (e) of this section shall have their certification revoked. Appropriate action does not mean that a supervisor, mentor, or instructor must prevent a violation from occurring at all costs; the duty may be met by warning the signal employee of a potential or foreseeable violation.

(d) A certified signal employee who is called by a railroad to perform a duty other than that of a signal employee shall not have their signal employee certification revoked based on actions taken or not taken while performing that duty except for violations described in paragraph (e)(11) of this section.

(e) When determining whether to revoke a signal employee's certification, a railroad shall only consider violations of Federal regulatory provisions or railroad rules, procedures, signal standards, and practices that involve:

(1) Interfering with the normal functioning of a highway-rail grade crossing warning system under § 234.209 of this chapter, or signal system under § 236.4 of this chapter, without providing an alternative means of protection. (Railroads shall only consider those violations that result in an activation failure or false proceed signal.)

(2) Failure to comply with a railroad rule or procedure when removing from service:

(i) Highway-rail or pathway grade crossing warning devices and systems;

(ii) Wayside signal devices and systems; or

(iii) Other devices or signal systems subject to this part.

(3) Failure to comply with railroad rule or procedure when placing in service or restoring to service:

(i) Highway-rail and pathway grade crossing warning devices and systems;

(ii) Wayside signal devices and systems; or

(iii) Other devices or signal systems subject to this part.

(4) Failure to perform an inspection or test to ensure a highway-rail or pathway grade crossing warning device or system functions as intended, when required by railroad rule or procedure, after:

(i) Installation, maintenance, testing or repair of the warning device or system;

(ii) Modification or disarrangement of the warning device or system; or

(iii) Malfunction or failure of the warning device or system;

(5) Failure to restore power to train detection device or highway-rail or pathway grade crossing warning device or system after manual interruption of the power source. (Railroads shall consider only those violations that result in activation failures.)

(6) Failure to comply with railroad validation or cutover procedures.

(7) Failure to comply with §§ 214.313, 214.319, 214.321, 214.323, 214.325, 214.327, and 214.329. Railroads shall consider only those violations directly involving the signal employee who failed to ascertain whether on-track safety was being provided before fouling a track.

(8) Failure to comply with § 218.25 of this chapter (Workers on a main track);

(9) Failure to comply with § 218.27 of this chapter (Workers on other than main track);

(10) Failure to comply with § 218.29 of this chapter (Alternate methods of protection);

(11) Failure to comply with § 219.101 of this chapter.

(f) In making the determination as to whether to revoke a signal employee's certification, a railroad shall only consider conduct described in paragraphs (e)(1) through (10) of this section that occurred within the three years prior to the determination.

(g) If in any single incident the person's conduct contravened more than one Federal regulatory provision or railroad rule, procedure, signal standard, or practice listed in paragraph (e) of this section, that event shall be treated as a single violation for the purposes of this section.

(h) A violation of one or more railroad rules, procedures, signal standards, or practices described in paragraphs (e)(1) through (10) of this section that occurs during a properly conducted compliance test subject to the

provisions of this chapter shall be counted in determining the periods of ineligibility described in § 246.305.

(i) A compliance test that is not conducted in accordance with this part, the railroad's operating rules, or the railroad's program under § 217.9 of this chapter, will not be considered a legitimate test of skill or knowledge and will not be considered for revocation purposes.

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

§ 246.305 Periods of ineligibility.

(a) The starting date for a period of ineligibility described in this section shall be:

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

(2) For a person currently certified, the date of the railroad's notification to the person that recertification has been denied or certification has been suspended.

(b) A period of ineligibility shall be determined according to the following standards:

(1) In the case of a single incident involving a violation of one or more of the Federal regulatory provisions or railroad rules, procedures, signal standards, or practices described in § 246.303(e)(1) through (10), the person shall have their certificate revoked for a period of 30 calendar days.

(2) In the case of two separate incidents involving a violation of one or more of the railroad rules, procedures, signal standards, or practices described in § 246.303(e)(1) through (10), that occurred within 24 months of each other, the person shall have their certificate revoked for a period of 6 months.

(3) In the case of three separate incidents involving violations of one or more of the railroad rules, procedures, signal standards, or practices, described in § 246.303(e)(1) through (10), that occurred within 36 months of each other, the person shall have their certificate revoked for a period of 1 year.

(4) In the case of four separate incidents involving violations of one or more of the railroad rules, procedures, signal standards, or practices, described in § 246.303(e)(1) through (10), that

occurred within 36 months of each other, the person shall have their certificate revoked for a period of 3 years.

(5) Where, based on the occurrence of violations described in § 246.303(e)(1) through (10), different periods of ineligibility may result under the provisions of this section and § 246.115, the longest period of revocation shall control.

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

(d) A person whose certification is denied or revoked shall be eligible for grant or reinstatement of the certificate prior to the expiration of the initial period of ineligibility only if:

(1) The denial or revocation of certification in accordance with the provisions of paragraph (b) of this section is for a period of one year or less;

(2) Certification is denied or revoked for reasons other than noncompliance with § 219.101 of this chapter;

(3) The person is evaluated by a railroad officer and determined to have received adequate remedial training;

(4) The person successfully completes any mandatory program of training or retraining, if that is determined to be necessary by the railroad prior to return to service; and

(5) At least one half of the pertinent period of ineligibility specified in paragraph (b) of this section has elapsed.

§ 246.307 Process for revoking certification.

(a) If a railroad determines that a signal employee, who is currently certified by the railroad, has violated a railroad test procedure, signal standard or practice described in § 246.303(e), the railroad shall revoke the signal employee's certification in accordance with the procedures and requirements of this section.

(b) Except as provided for in § 246.115(f), if a railroad acquires reliable information that a signal employee, who is currently certified by the railroad, has violated a railroad rule, procedure, signal standard, or practice described in § 246.303(e), the railroad shall undergo the following process to determine whether revocation of the signal employee's certification is warranted:

(1) The signal employee's certification shall be suspended immediately.

(2) The signal employee's employer(s) (if different from the suspending railroad) shall be immediately notified of the certification suspension and the reason for the certification suspension.

(3) Prior to or upon suspending the signal employee's certification, the railroad shall provide the signal employee with notice of: the reason for the suspension; the pending revocation; and an opportunity for a hearing before a presiding officer other than the investigating officer. This notice may initially be given either verbally or in writing. If given verbally, the notice must be subsequently confirmed in writing in a manner that conforms with the notification provisions of the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement notification provision, the written notice must be made within four days of the date the certification was suspended.

(4) The railroad must convene the hearing within the time frame required under the applicable collective bargaining agreement. If there is no applicable collective bargaining agreement or the applicable collective bargaining agreement does not include such a requirement, the hearing shall be convened within 10 days of the date the certification is suspended unless the signal employee requests or consents to a delay to the start of the hearing.

(5) No later than the start of the hearing, the railroad shall provide the signal employee with a copy of the written information and a list of witnesses the railroad will present at the hearing. If this information was provided just prior to the start of the hearing and the signal employee requests a recess to the start of the hearing, such request must be granted. If this information was provided by an employee of the railroad, the railroad shall make that employee available for examination during the hearing.

(6) Following the hearing, the railroad must determine, based on the record of the hearing, whether revocation of the certification is warranted. The railroad shall have the burden of proving that revocation of the signal employee's certification is warranted under § 246.303.

(7) If the railroad determines that revocation of the signal employee's certification is warranted, the railroad shall impose the proper period of revocation provided for in §§ 246.305 and 246.115.

(8) The railroad shall retain the record of the hearing for three years after the date the decision is rendered.

(c) A hearing required by this section which is conducted in a manner that conforms procedurally to the applicable collective bargaining agreement shall satisfy the procedural requirements of this section.

(d) Except as provided for in paragraph (c) of this section, a hearing required under this section shall be conducted in accordance with the following procedures:

(1) The hearing shall be conducted by a presiding officer who can be any proficient person authorized by the railroad other than the investigating officer.

(2) The presiding officer shall convene and preside over the hearing and exercise the powers necessary to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in dispute.

(3) The presiding officer may:

(i) Adopt any needed procedures for the submission of evidence in written form;

(ii) Examine witnesses at the hearing; and

(iii) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may assist in achieving a prompt and fair determination of all material issues in dispute.

(4) All relevant and probative evidence shall be received into the record unless the presiding officer determines the evidence to be unduly repetitive or have such minimal relevance that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(5) Parties may appear at the hearing and be heard on their own behalf or through designated representatives. Parties may offer relevant evidence including testimony and may conduct such examination of witnesses as may be required for a full disclosure of the relevant facts.

(6) Testimony by witnesses at the hearing shall be recorded verbatim. Witnesses can testify in person, over the phone, or virtually.

(7) The record in the proceeding shall be closed at the conclusion of the hearing unless the presiding officer allows additional time for the submission of evidence.

(8) A hearing required under this section may be consolidated with any disciplinary action or other hearing arising from the same facts.

(9) A person may waive their right to a hearing. That waiver shall:

(i) Be made in writing;

(ii) Reflect the fact that the person has knowledge and understanding of these rights and voluntarily surrenders them; and

(iii) Be signed by the person making the waiver.

(e) Except as provided for in paragraph (c) of this section, a decision,

required by this section, on whether to revoke a signal employee's certification shall comply with the following requirements:

(1) No later than 10 days after the close of the record, a railroad official, other than the investigating officer, shall prepare and sign a written decision as to whether the railroad is revoking the signal employee's certification.

(2) The decision shall:

(i) Contain the findings of fact on all material issues as well as an explanation for those findings with citations to all applicable railroad rules, signal standards and procedures and any applicable Federal regulations;

(ii) State whether the railroad official found that the signal employee's certification should be revoked;

(iii) State the period of revocation under § 246.305 (if the railroad official concludes that the signal employee's certification should be revoked); and

(iv) Be served on the employee and the employee's representative, if any, with the railroad retaining proof of service for three years after the date the decision is rendered.

(f) The period that a signal employee's certification is suspended in accordance with paragraph (b)(1) of this section shall be credited towards any period of revocation that the railroad assesses in accordance with § 246.305.

(g) A railroad shall revoke a signal employee's certification if, during the period that certification is valid, the railroad acquires information that another railroad has revoked the person's signal employee certification in accordance with the provisions of this section. Such revocation shall run concurrently with the period of revocation imposed by the railroad that initially revoked the person's certification. The requirement to provide a hearing under this section is satisfied when any single railroad holds a hearing. No additional hearing is required prior to revocation by more than one railroad arising from the same facts.

(h) A railroad shall not revoke a signal employee's certification if sufficient evidence exists to establish that an intervening cause prevented or materially impaired the signal employee's ability to comply with the railroad test procedure, signal standard, or practice which constitutes a violation under § 246.303.

(i) A railroad may decide not to revoke a signal employee's certification if sufficient evidence exists to establish that the violation of the railroad test procedure, signal standard, or practice described in § 246.303(e) was of a

minimal nature and had no direct or potential effect on rail safety.

(j) If sufficient evidence meeting the criteria in paragraph (h) or (i) of this section becomes available, the railroad shall place the relevant information in the records maintained in compliance with:

(1) Section 246.215 for Class I railroads (including that National Railroad Passenger Corporation), railroads providing commuter service, and Class II railroads; and

(2) Section 246.203 for Class III railroads.

(k) If a railroad makes a good faith determination, after performing a reasonable inquiry, that the course of conduct provided for in paragraph (h) or (i) of this section is warranted, the railroad will not be in violation of paragraph (b)(1) of this section if it decides not to suspend the signal employee's certification.

Subpart E—Dispute Resolution Procedures

§ 246.401 Review board established.

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

(b) The Administrator has delegated initial responsibility for adjudicating such disputes to the Certification Review Board (Board). The Board shall be composed of FRA employees.

§ 246.403 Petition requirements.

(a) To obtain review of a railroad's decision to deny or revoke certification, or deny recertification, a person shall file a petition for review that complies with this section.

(b) Each petition shall:

(1) Be in writing;

(2) Be filed no more than 120 days after the date the railroad's denial or revocation decision was served on the petitioner, except as provided for in paragraph (d) of this section;

(3) Be filed on <https://www.regulations.gov>;

(4) Include the following contact information for the petitioner and petitioner's representative (if petitioner is represented):

(i) Full name;

(ii) Daytime telephone number; and

(iii) Email address;

(5) Include the name of the railroad and the name of the petitioner's

employer (if different from the railroad that revoked petitioner's certification);

(6) Contain the facts that the petitioner believes constitute the improper action by the railroad and the arguments in support of the petition; and

(7) Include all written documents in the petitioner's possession or reasonably available to the petitioner that document the railroad's decision.

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

(d) The Board may extend the petition filing period in its discretion, provided the petitioner provides good cause for the extension and:

(1) The request for an extension is filed before the expiration of the period provided for in paragraph (b)(2) of this section; or

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

(e) A party aggrieved by a Board decision to deny a petition as untimely or not in compliance with the requirements of this section may file an appeal with the Administrator in accordance with § 246.411.

§ 246.405 Processing certification review petitions.

(a) Each petition shall be acknowledged in writing by FRA. The acknowledgment shall be sent by email to the petitioner (if an email address is provided), petitioner's representative (if any), the railroad, and petitioner's employer (if different from the railroad that revoked petitioner's certification). The acknowledgment shall contain the docket number assigned to the petition and will notify the parties where the petition can be accessed.

(b) Within 60 days from the date of the acknowledgment provided in paragraph (a) of this section, the railroad may submit to FRA any information that the railroad considers pertinent to the petition and shall supplement the record with any relevant documents in its possession, such as hearing transcripts and exhibits, that were not submitted by the petitioner. Late filings will only be considered to the extent practicable. A railroad that submits such information shall:

(1) Identify the petitioner by name and the docket number for the petition;

(2) Provide the railroad's email address;

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

(4) Be filed on <https://www.regulations.gov>.

(c) The petition will be referred to the Board for a decision after a railroad's response is received or 60 days from the date of the acknowledgment provided in paragraph (a) of this section, whichever is earlier. Based on the record, the Board shall have the authority to grant, deny, dismiss, or remand the petition. If the Board finds that there is insufficient basis for granting or denying the petition, the Board may issue an order affording the parties an opportunity to provide additional information or argument consistent with its findings.

(d) When considering procedural issues, the Board will grant the petition if the petitioner shows:

(1) That a procedural error occurred; and

(2) The procedural error caused substantial harm to the petitioner.

(e) When considering factual issues, the Board will grant the petition if the petitioner shows that the railroad did not provide substantial evidence to support its decision.

(f) When considering legal issues, the Board will determine whether the railroad's legal interpretations are correct based on a *de novo* review.

(g) The Board will only consider whether the denial or revocation of certification or recertification was improper under this part and will grant or deny the petition accordingly. The Board will not otherwise consider the propriety of a railroad's decision. For example, the Board will not consider whether the railroad properly applied its own more stringent requirements.

(h) The Board's written decision shall be served on the petitioner, petitioner's representative (if any), the railroad, and petitioner's employer (if different from the railroad that revoked petitioner's certification).

§ 246.407 Request for a hearing.

(a) If adversely affected by the Board's decision, either the petitioner before the Board or the railroad involved shall have a right to an administrative proceeding as prescribed by § 246.409.

(b) To exercise that right, the adversely affected party shall file a written request for a hearing within 20 days of service of the Board's decision on that party. The request must be filed in the docket on <https://www.regulations.gov> that was used when the case was before the Board.

(c) A written request for a hearing must contain the following:

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

(2) The name, telephone number, and email address of the respondent;

(3) The docket number for the case while it was before the Board;

(4) The specific factual issues, industry rules, regulations, or laws that the requesting party alleges need to be examined in connection with the certification decision in question; and

(5) The signature of the requesting party or the requesting party's representative (if any).

(d) Upon receipt of a hearing request complying with paragraph (c) of this section, FRA shall arrange for the appointment of a presiding officer who shall schedule the hearing for the earliest practicable date.

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

§ 246.409 Hearings.

(a) An administrative hearing for a signal employee certification petition shall be conducted by a presiding officer, who can be any person authorized by the Administrator.

(b) The presiding officer shall convene and preside over the hearing. The hearing shall be a *de novo* hearing to find the relevant facts and determine the correct application of this part to those facts. The presiding officer may determine that there is no genuine issue covering some or all material facts and limit evidentiary proceedings to any issues of material fact as to which there is a genuine dispute.

(c) The presiding officer may exercise the powers of the Administrator to regulate the conduct of the hearing for the purpose of achieving a prompt and fair determination of all material issues in controversy.

(d) The presiding officer may authorize discovery of the types and quantities which in the presiding officer's discretion will contribute to a fair hearing without unduly burdening the parties. The presiding officer may impose appropriate non-monetary sanctions, including limitations as to the presentation of evidence and issues, for any party's willful failure or refusal to comply with approved discovery requests.

(e) Every petition, motion, response, or other authorized or required document shall be signed by the party filing the same, or by a duly authorized officer or representative of record, or by

any other person. If signed by such other person, the reason therefor must be stated and the power of attorney or other authority authorizing such other person to subscribe the document must be filed with the document. The signature of the person subscribing any document constitutes a certification that they have read the document; that to the best of their knowledge, information, and belief every statement contained in the document is true and no such statements are misleading; and that it is not interposed for delay or to be vexatious.

(f) After the request for a hearing is filed, all documents filed or served upon one party must be served upon all parties. Each party may designate a person upon whom service is to be made when not specified by law, regulation, or directive of the presiding officer. If a party does not designate a person upon whom service is to be made, then service may be made upon any person having subscribed to a submission of the party being served, unless otherwise specified by law, regulation, or directive of the presiding officer. Proof of service shall accompany all documents when they are tendered for filing.

(g) If any document initiating, filed in, or served in, a proceeding is not in substantial compliance with the applicable law, regulation, or directive of the presiding officer, the presiding officer may strike or dismiss all or part of such document, or require its amendment.

(h) Any party to a proceeding may appear and be heard in person or by an authorized representative.

(i) Any person testifying at a hearing or deposition may be accompanied, represented, and advised by an attorney or other representative, and may be examined by that person.

(j) Any party may request to consolidate or separate the hearing of two or more petitions by motion to the presiding officer when they arise from the same or similar facts or when the matters are for any reason deemed more efficiently heard together.

(k) Except as provided in § 246.407(e) and paragraph (s)(4) of this section, whenever a party has the right or is required to take action within a period prescribed by this part, or by law, regulation, or directive of the presiding officer, the presiding officer may extend such period, with or without notice, for good cause, provided another party is not substantially prejudiced by such extension. A request to extend a period which has already expired may be denied as untimely.

(l) An application to the presiding officer for an order or ruling not otherwise specifically provided for in this part shall be by motion. The motion shall be filed with the presiding officer and, if written, served upon all parties. All motions, unless made during the hearing, shall be written. Motions made during hearings may be made orally on the record, except that the presiding officer may direct that any oral motion be reduced to writing. Any motion shall state with particularity the grounds therefor and the relief or order sought and shall be accompanied by any affidavits or other evidence desired to be relied upon which is not already part of the record. Any matter submitted in response to a written motion must be filed and served within 14 days of the motion, or within such other period as directed by the presiding officer.

(m) Testimony by witnesses at the hearing shall be given under oath and the hearing shall be recorded verbatim. The presiding officer shall give the parties to the proceeding adequate opportunity during the course of the hearing for the presentation of arguments in support of or in opposition to motions, and objections and exceptions to rulings of the presiding officer. The presiding officer may permit oral argument on any issues for which the presiding officer deems it appropriate and beneficial. Any evidence or argument received or proffered orally shall be transcribed and made a part of the record. Any physical evidence or written argument received or proffered shall be made a part of the record, except that the presiding officer may authorize the substitution of copies, photographs, or descriptions, when deemed to be appropriate.

(n) The presiding officer shall employ the Federal Rules of Evidence for United States Courts and Magistrates as general guidelines for the introduction of evidence. Notwithstanding paragraph (m) of this section, all relevant and probative evidence shall be received unless the presiding officer determines the evidence to be unduly repetitive or so extensive and lacking in relevancy that its admission would impair the prompt, orderly, and fair resolution of the proceeding.

(o) The presiding officer may:

(1) Administer oaths and affirmations;
 (2) Issue subpoenas as provided for in § 209.7 of this chapter;

(3) Adopt any needed procedures for the submission of evidence in written form;

(4) Examine witnesses at the hearing;

(5) Convene, recess, adjourn, or otherwise regulate the course of the hearing; and

(6) Take any other action authorized by or consistent with the provisions of this part and permitted by law that may expedite the hearing or aid in the disposition of the proceeding.

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

(q) The party requesting the administrative hearing shall be the "hearing petitioner." The party that the Board issued its decision in favor of will be a respondent. At the start of each proceeding, FRA will be a respondent as well. The hearing petitioner shall have the burden of proving its case by a preponderance of the evidence.

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

(s) At the close of the record, the presiding officer shall prepare a written decision in the proceeding. The decision:

(1) Shall contain the findings of fact and conclusions of law, as well as the basis for each, concerning all material issues of fact or law presented on the record;

(2) Shall be served on all parties to the proceeding;

(3) Shall not become final for 35 days after issuance;

(4) Constitutes final agency action unless an aggrieved party files an appeal within 35 days after issuance; and

(5) Is not precedential.

§ 246.411 Appeals.

(a) Any party aggrieved by the presiding officer's decision may file an appeal in the presiding officer's docket. The appeal must be filed within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The appeal shall set forth objections to the presiding officer's decision, supported by reference to applicable laws and regulations and with specific reference to the record. If no appeal is timely filed, the presiding officer's decision constitutes final agency action.

(b) A party may file a reply to the appeal within 25 days of service of the appeal. The reply shall be supported by

reference to applicable laws and regulations and with specific reference to the record, if the party relies on evidence contained in the record.

(c) The Administrator may extend the period for filing an appeal or a response for good cause shown, provided that the written request for extension is served before expiration of the applicable period provided in this section.

(d) The Administrator has sole discretion to permit oral argument on the appeal. On the Administrator's own initiative or written motion by any party, the Administrator may grant the parties an opportunity for oral argument.

(e) The Administrator may remand, vacate, affirm, reverse, alter, or modify the decision of the presiding officer and the Administrator's decision constitutes final agency action except where the terms of the Administrator's decision (for example, remanding a case to the presiding officer) show that the parties' administrative remedies have not been exhausted.

(f) An appeal from a Board decision pursuant to § 246.403(e) must be filed in the Board's docket within 35 days of issuance of the decision. A copy of the appeal shall be served on each party. The Administrator may affirm or vacate the Board's decision and may remand the petition to the Board for further proceedings. An Administrator's decision to affirm the Board's decision constitutes final agency action.

Appendix A to Part 246—Procedures for Obtaining and Evaluating Motor Vehicle Driving Record Data

(1) The purpose of this appendix is to outline the procedures available to individuals and railroads for complying with the proposed requirements of § 246.111. This provision requires that railroads consider the motor vehicle driving record of each person prior to issuing them certification or recertification as a signal employee.

(2) To fulfill that obligation, a railroad is required to review a certification candidate's recent motor vehicle driving record. Generally, that will be a single record on file with the State agency that issued the certification candidate's current motor vehicle driver's license. However, a motor vehicle driving record can include multiple documents if the certification candidate has been issued a motor vehicle driver's license by more than one State agency or a foreign country.

Access to State Motor Vehicle Driving Record Data

(3) The right of railroad workers, their employers, or prospective employers to have access to a State motor vehicle licensing agency's data concerning an individual's driving record is controlled by State law. Although many states have mechanisms through which employers and prospective

employers, such as railroads, can obtain such data, there are some states where privacy concerns make such access very difficult or impossible. Since individuals are generally entitled to obtain access to their driving record data that will be relied on by a State motor vehicle licensing agency when that agency is taking action concerning their driving privileges, FRA places the responsibility on individuals who want to serve as certified signal employees to request that their current State motor vehicle licensing agency (or agencies) furnish such data directly to the railroad that is considering certification (or recertification) of the individual as a signal employee. Depending on the procedures established by the State motor vehicle licensing agency, the individual may be asked to send the State agency a brief letter requesting such action or to execute a State agency form that accomplishes the same effect. Requests for an individual's motor vehicle driving record normally involve payment of a nominal fee established by the State agency as well. In rare instances, when a certification (or recertification) candidate has been issued multiple licenses, an individual may be required to submit multiple requests.

(4) Once the railroad has obtained the individual's motor vehicle driving record(s), the railroad is required to afford the certification (or recertification) candidate an opportunity to review and comment on the record(s) in writing pursuant to § 246.301. The railroad is also required to provide this review opportunity before the railroad renders a decision based on information in the record(s). The railroad is required to evaluate the information in the certification (or recertification) candidate's motor vehicle driving record(s) pursuant to the provisions of this part.

Appendix B to Part 246—Medical Standards Guidelines

(1) The purpose of this appendix is to provide greater guidance on the procedures that should be employed in administering the vision and hearing requirements of §§ 246.117 and 246.118.

(2) For any examination performed to determine whether a person meets the vision acuity requirements in § 246.117, it is recommended that such examination be performed by a licensed optometrist or a technician who reports to a licensed optometrist. It is also recommended that any

test conducted pursuant to § 246.117 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(3) For any examination performed to determine whether a person meets the hearing acuity requirements in § 246.118, it is recommended that such examination be performed by a licensed or certified audiologist or a technician who reports to a licensed or certified audiologist. It is also recommended that any test conducted pursuant to § 246.118 be performed according to any directions supplied by the test's manufacturer and any ANSI standards that are applicable.

(4) In determining whether a person has the visual acuity that meets or exceeds the requirements of this part, the following testing protocols are deemed acceptable testing methods for determining whether a person has the ability to recognize and distinguish among the colors used as signals in the railroad industry. The acceptable test methods are shown in the left hand column and the criteria that should be employed to determine whether a person has failed the particular testing protocol are shown in the right hand column.

TABLE 1 TO APPENDIX B TO PART 246

Accepted tests	Failure criteria
Pseudoisochromatic Plate Tests	
American Optical Company 1965	5 or more errors on plates 1–15.
AOC—Hardy-Rand-Ritter plates—second edition	Any error on plates 1–6 (plates 1–4 are for demonstration—test plate 1 is actually plate 5 in book).
Dvorine—Second edition	3 or more errors on plates 1–15.
Ishihara (14 plate)	2 or more errors on plates 1–11.
Ishihara (16 plate)	2 or more errors on plates 1–8.
Ishihara (24 plate)	3 or more errors on plates 1–15.
Ishihara (38 plate)	4 or more errors on plates 1–21.
Richmond Plates 1983	5 or more errors on plates 1–15.
Multifunction Vision Tester	
Keystone Orthoscope	Any error.
OPTEC 2000	Any error.
Titmus Vision Tester	Any error.
Titmus II Vision Tester	Any error.

(5) In administering any of these protocols, the person conducting the examination should be aware that railroad signals do not always occur in the same sequence and that “yellow signals” do not always appear to be the same. It is not acceptable to use “yarn” or other materials to conduct a simple test to determine whether the certification candidate has the requisite vision. No person shall be allowed to wear chromatic lenses during an initial test of the person's color vision; the initial test is one conducted in accordance with one of the accepted tests in the chart and § 246.117(c)(3).

(6)(i) An examinee who fails to meet the criteria in the chart may be further evaluated as determined by the railroad's medical examiner. Ophthalmologic referral, field testing, or other practical color testing may be utilized depending on the experience of the examinee. The railroad's medical examiner

will review all pertinent information and, under some circumstances, may restrict an examinee who does not meet the criteria for serving as a signal employee. The intent of §§ 246.117(d) and 246.118(d) is not to provide an examinee with the right to make an infinite number of requests for further evaluation, but to provide an examinee with at least one opportunity to prove that a hearing or vision test failure does not mean the examinee cannot safely perform as a certified signal employee.

(ii) Appropriate further medical evaluation could include providing another approved scientific screening test or a field test. All railroads should retain the discretion to limit the number of retests that an examinee can request, but any cap placed on the number of retests should not limit retesting when changed circumstances would make such retesting appropriate. Changed circumstances

would most likely occur if the examinee's medical condition has improved in some way or if technology has advanced to the extent that it arguably could compensate for a hearing or vision deficiency.

(7) Certified signal employees who wear contact lenses should have good tolerance to the lenses and should be instructed to have a pair of corrective glasses available when on duty.

Issued in Washington, DC.

Amitabha Bose,
Administrator.

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