**DEPARTMENT OF TRANSPORTATION**
**FEDERAL RAILROAD ADMINISTRATION**

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**DOCKET NO. FRA-2024-0034**
**FEDERAL RAILROAD ADMINISTRATION ACCIDENT/INVESTIGATION POLICY FOR GATHERING INFORMATION AND CONSULTING WITH STAKEHOLDERS**
**DIRECT FINAL RULE**

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**COMMENT SUBMITTED BY**
**THE ASSOCIATION OF AMERICAN RAILROADS**
**AND**
**THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION**

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The Association of American Railroads (AAR) and the American Short Line and Regional Railroad Association (ASLRRA) (jointly, the Associations), on behalf of themselves and their member railroads, submit the following comments in response to the Federal Railroad Administration's (FRA's) October 1, 2024, Direct Final Rule (DFR) to amend 49 CFR part 225, which would codify a new accident/incident investigation policy for gathering information and consulting with stakeholders.[1]

## Statement of Interest

AAR is a non-profit trade association whose membership includes freight railroads that operate 83% of the line-haul mileage, employ 95% of the workers, and account for 97% of the freight revenues of all railroads in the U.S.; and passenger railroads that operate intercity passenger trains and provide commuter rail service. ASLRRA is a non-profit trade association representing the interests of

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[1] The DFR limited the comment period to 30 days, and stated that the DFR would become effective on October 31, 2024, unless FRA received an adverse, substantive comment. 89 FR 79767. In a subsequent Federal Register notice, FRA kept the 30-day comment period intact but delayed the anticipated effective date to November 15, 2024. 89 FR 85450 (Oct. 28, 2024). Normal administrative practice is to provide at least 60 days for the public to comment on a new rulemaking. The Associations are filing these comments now to meet the abbreviated 30-day schedule established by FRA when it published this rulemaking as a DFR. However, the filing of these comments should not be interpreted by FRA as the Associations' only comments related to this regulatory action. If the rulemaking is re-issued as NPRM, then FRA should provide a minimum of a 60-day comment period to ensure that the public has sufficient time to digest the rulemaking and provide fully considered feedback.

approximately 600 short line and regional railroad members in legislative and regulatory matters. Short lines operate nearly 50,000 miles of track in the United States, or a nearly 30% of the national freight network. The members of the Associations would be directly affected by the DFR changes because FRA's regulations apply to railroads operating on the general system, and the DFR would particularly apply to railroads that implement post-accident response plans that include, but is not limited to, determining the cause of an accident, performing remedial actions to clean and clear an accident site, and assessing what future actions are warranted to help to prevent a similar incident.

## Introduction

In the preamble to the DFR, FRA states that it is publishing the rule without a prior opportunity for notice and comment because it views the rule as "noncontroversial" and because the rule is codifying "FRA's current process for accident investigations." The DFR is silent on when FRA implemented this policy, and the Associations are unaware of FRA making a formal public announcement or other communication to the Associations or their member railroads notifying them that the policy is in effect. According to FRA's website, the "Accident and Incident Investigations – Policy for Gathering Information and Consulting with Stakeholders" (Policy Document) appears to have been uploaded on April 18, 2024, barely five months prior to FRA publishing the DFR in the Federal Register.[2] However, it is not clear to the Associations that FRA has actually used the Policy Document as a framework for gathering information and including stakeholders during the course of its investigation into an accident or incident. Indeed, the Associations consulted with their members and have not been able to identify an accident or incident where FRA conducted an investigation using the information gathering and stakeholder consultation process that is identified in the Policy Document. As to the issue of whether the rulemaking is noncontroversial, there are several provisions in the DFR that are either

[2] https://railroads.dot.gov/elibrary/bipartisan-infrastructure-law-section-22417-fra-accident-and-incident-investigations-0 (Last checked on October 31, 2024).

not included in or substantially revised from the Policy Document, and there are additional issues raised by the new regulations where the rulemaking would benefit from public input. Therefore, pursuant to the Administrative Procedure Act (APA), FRA must withdraw the DFR, refrain from making the regulation effective on November 15, 2024, and take no final agency action until FRA has properly noticed the rulemaking and provided an opportunity for public comment. 5 U.S.C. 553(c).

**FRA's "catch-all" provision for determining which accidents will trigger the information gathering and stakeholder consultation requirements is vague and fails to properly implement the IIJA mandate.**

Section 22417 of the IIJA requires the development of a process for investigators to use during accident and incident investigations that defines (1) when it is appropriate, and (2) the appropriate method, for gathering information from stakeholders and consulting with stakeholders for technical expertise. FRA's DFR includes a process for gathering information and consulting with stakeholders, but it lacks a defined process for determining when it is appropriate to do so. Instead, § 225.31(b) merely states that FRA will provide an opportunity for stakeholder involvement in investigations of accidents or incidents involving—based on initial information—an on-duty employee fatality, an on-duty employee amputation, an on-duty employee suffering life-threatening injuries, or where "FRA's Chief Safety Officer (or their delegate) determines appropriate." Railroads often must act quickly following an accident, but the rule makes it impossible for railroads to determine when FRA will launch an investigation that triggers the regulation's information sharing and stakeholder access requirements because that determination is left entirely to the discretion of FRA's Chief Safety Officer. The unbounded discretion granted to the FRA Chief Safety Officer fails to make a determination—as required by the IIJA—about when it is appropriate for FRA's information sharing and stakeholder engagement policy to be triggered. The rule therefore fails to properly implement the congressional directive.

**FRA's description of "stakeholders" fails to properly implement the IIJA mandate.**

Section 22417 of the IIJA states that stakeholders include "railroad carriers, contractors or employees of railroad carriers or representatives of employees of railroad carriers, and others, as determined relevant by the Secretary, for technical expertise on the facts of the accident or incident under investigation." In § 225.31(b), FRA would modify the statutory text as follows:

> Stakeholders may include, but are not limited to, railroads, contractors, employees, employee representatives, industry associations, academia, Volpe Center, and any other persons or entities FRA determines to be relevant.

This language differs from the text and intent of the statute in several meaningful ways. First, the statutory intent is that railroad carriers will be consulted as stakeholders when they are involved in an accident or incident. Second, it decouples "contractors or employees of railroad carriers or representatives of employees of railroad carriers," which are included as a singular grouping in § 22417, by including them separately in a list of potential stakeholders, which gives FRA the ability to establish unbalanced stakeholder groups that favor labor interests. Third, FRA explicitly adds industry associations, the Volpe Center and academia as potential stakeholders. The Associations do not object to this change as it appears to fall within the statutory mandate of identifying other potentially relevant stakeholders who may have technical expertise concerning the specific facts of the incident at hand. Fourth, FRA drops from its regulatory text the essential statutory text that requires "other" relevant stakeholders, as determined by the Secretary, to have "technical expertise on the facts of the accident or incident under investigation." In making this last change, FRA has expanded the definition of stakeholder well beyond the statutory mandate. As a result, FRA's definition of a stakeholder essentially gives itself limitless discretion in choosing who will be a stakeholder. For instance, under the text in the DFR, there is nothing preventing FRA from naming a plaintiff's attorney as a stakeholder even though such an individual does not possess special technical expertise. The Associations are particularly concerned about such a scenario because, although the Policy Document outlines expectations for

stakeholders that include the following: "[s]takeholders should cooperate with investigators by following procedures contained in this policy;" no such expectation exists in the DFR. Thus, a plaintiff's attorney could be named as a stakeholder and refuse to cooperate with the railroad as part of the investigation—simply collecting information for purposes of future litigation.

**FRA fails to explain substantive regulatory changes in 49 CFR 225.31(a).**

Currently, FRA regulations state that FRA's policy is "to investigate rail transportation accidents/incidents which result in the death of a railroad employee or the injury of five or more persons" and "other accidents/incidents [] when it appears that an investigation would substantially serve to promote railroad safety." 49 CFR 225.31(a). In the DFR, FRA revises this section to state that FRA will investigate accidents/incidents resulting in the serious injury or death of a railroad employee or passenger. In doing so, FRA frames the change as a "clarification." However, the change does nothing to clarify how FRA will exercise its authority. The DFR does not define "serious injury."[3] So, railroads are left without meaningful guidance on how the change will impact future investigations. At a baseline level, though, the revision to § 225.31(a) appears to be a substantive change to the regulation because it eliminates the existing regulatory text stating that FRA's policy is to investigate incidents resulting in the injury of five or more persons. In doing so, FRA appears to be expanding the number and type of accidents and incidents that fall within FRA's investigation policy, but FRA provides no justification to support the change in the regulation.

**Loopholes allow for information to be shared with third parties during an investigation.**

Section 225.31(b)(5)(iii) states that "[u]ntil FRA publishes its report on the investigation, a stakeholder participating in an investigation may not disseminate any information or comment on an

[3] The FRA Guide for Preparing Accident/Incident Reports provides examples of serious injury that include "an injury that results in the amputation of any appendage, the loss of sight in an eye, bone fracture, or confinement in a hospital for a period of more than 24 consecutive hours." Pg. 5, DOT/FRA/RRS-22, Published: May 23, 2011. However, there is no evidence that FRA is incorporating these examples into the DFR to describe the type of accidents or incidents that result in "serious injury."

investigation to non-stakeholders through any means." However, in the preamble, FRA explains that "[t]he limitation does not limit participating stakeholders from sharing information with individuals within their organization." 89 FR at 79769. And it does not include any apparent limit on the ability of "individuals within their organization" to share the information with anyone, at any time, because the limit is only on stakeholders' ability to disseminate information. At the very least, the regulation should make clear that non-stakeholders, including those within a stakeholder organization, are strictly prohibited from publicly sharing or disseminating information or commenting on an investigation.

**It is unclear that FRA's web-based document sharing site will protect against the disclosure of confidential information.**

Section 225.31(b)(3)(i) would develop a web-based document sharing site. FRA states in the preamble that "stakeholders submitting documents and information to FRA's investigation team must submit those materials electronically through the site." 89 FR at 79768-69. The Associations understand that all stakeholders have access to the web-based document sharing site. Once a stakeholder submits the material to the document sharing site, they lose control over who has access to the material because FRA controls the database. It is unclear how FRA plans to protect confidential information submitted to the site and what protections will be in place to ensure that confidential information submitted to the site will be protected from disclosure to stakeholders not entitled to access to the information.

**There are no protections against post-investigation disclosures of confidential information.**

Notwithstanding a party's ability to designate documents as confidential using 49 CFR 209.11, a wide variety of information gathered by FRA in an investigation would potentially become available to non-involved entities who would not otherwise have access to it—for example, through stakeholders' inclusion in meetings or calls. The DFR would limit further disclosure until FRA issues its report on the investigation, but the rule does not protect against misuse of such information after the close of an

investigation even though the confidential information provided during the course of the investigation would remain confidential following the publication of FRA's investigation report.

**The identity of a stakeholder should not be kept confidential from other stakeholders.**

Section 225.31(b)(5)(i) would allow stakeholders to remain confidential from other stakeholders. In doing so, FRA oversteps the statutory mandate in § 22417 of the IIJA. Although the statute requires a process for keeping stakeholders confidential under certain circumstances, the intent of the statute is to keep the stakeholder identity protected from public disclosure, not for the stakeholder's identity to be kept secret from other stakeholders. Allowing secret stakeholders goes against the general goal of increasing transparency. Uncertainty within the stakeholder group about who is included as a stakeholder will inhibit the flow of information during the investigation and information sharing process, particularly when other stakeholders are unable to assess if the secret stakeholder actually meets the requirements of being considered a stakeholder. FRA's approach is especially concerning because § 225.31(b)(3)(i) would allow FRA to share non-confidential information or documents with other stakeholders participating in information gathering or investigative activities, which creates a situation where a railroad stakeholder may share information in good faith with FRA without knowing with whom the information will be shared. This could result in a situation where railroad information is leaked to a third party during the investigation process and the railroad that shared the information with FRA would have no ability to determine who leaked the information to a third party. If FRA intends to share information with a stakeholder, then the other stakeholders deserve to know the identity of that stakeholder, particularly the stakeholder who provided the information that was shared with other stakeholders.

**FRA's investigation policy would create untenable conflicts with NTSB practice in situations where NTSB and FRA conduct overlapping investigations.**

Section 22417 of the IIJA explicitly states that FRA's policy for gathering information and consulting with stakeholders "shall not apply to any investigation carried out by the National

Transportation Safety Board." Notwithstanding the statutory directive, FRA suggests that it will use its new policy in the course of overlapping National Transportation Safety Board (NTSB) and FRA investigations. This will result in situations where FRA's rule improperly conflicts with NTSB practice—and with the plain meaning of the IIJA.

FRA attempts to sidestep this issue in the DFR, which includes a statement that "FRA and the NTSB are subject to distinct statutory requirements concerning the participation of external parties in accident investigations. *Nothing in this document impacts an NTSB investigation*." (Emphasis added.) However, FRA acknowledges in the DFR that there could be overlap between NTSB and FRA regarding an accident investigation, and it is not clear that FRA will defer to the NTSB's primary jurisdiction in that situation. FRA's position results in railroads being put in an untenable position where they must abide by separate and conflicting confidentiality requirements as FRA and NTSB conduct overlapping and duplicative investigations of a single incident. For example, unlike NTSB's corresponding rule, which restricts communications about pending NTSB investigations, including to employees within parties of an investigation, FRA intends to allow stakeholders to share investigative information within their organizations. FRA needs to clearly state that—consistent with § 22417—its policy for gathering information and consulting with stakeholders will not apply when NTSB is carrying out an investigation into a railroad accident or incident. This is the only way to ensure that railroad safety investigations are conducted in a singular, orderly, and efficient manner that is devoid of conflicting rules and requirements between NTSB and FRA.

**FRA improperly limits the basis for restricting stakeholder access to an accident site.**

Section 225.31(b)(2)(i) would require a railroad to promptly notify FRA in writing of the railroad rule it is relying upon if a stakeholder is not granted entry to an accident site. This provision assumes that railroads may only limit access to their property based on a specific rule. However, there is no basis for limiting the ability of a railroad to exclude a stakeholder from access to a railroad-owned site only to

situations where the railroad has a specific "rule" prohibiting a stakeholder from accessing the accident site during the investigation. Railroads may decide to limit access to an accident site for many reasons not tied to a specific railroad rule. For example, a railroad may determine that allowing a stakeholder to access an accident site creates safety or security risks or potential liability concerns that are not reasonably mitigated. FRA does not have authority to require a railroad to have a rule in order to restrict the access of "stakeholder" to an accident site. And, as FRA seems to acknowledge, railroads are under no obligation to let an individual onto their property just because FRA identifies that person as a stakeholder. Indeed, this point is underscored by the fact that FRA specifically says that stakeholders are not agents of FRA, so stakeholders cannot derive their authority to be present at an accident site from the FRA's authority to conduct investigations pursuant 49 U.S.C. 20107. As such, a railroad is not required to let a stakeholder onto its property simply because the railroad has not pointed to a specific rule prohibiting entry.

**FRA does not have the authority to grant a stakeholder "virtual" access to railroad property.**

Section 225.31(b)(2)(i) states that when a stakeholder does not have access to an accident site, "FRA may consult with any affected stakeholder by other means (e.g., through real-time participation in on-site meetings via video or conference call, off-site in-person meetings, virtual meetings, or phone calls)." Railroads are willing to make good faith efforts to allow relevant stakeholders access to property provided that safety, security, and liability concerns can be mitigated. Railroads also do not object to FRA briefing relevant stakeholders who are not allowed access to an accident site on relevant non-confidential information that is discovered from a visit to an accident site. This could be done—consistent with § 225.31(b)(2)(i)—through, for example, a virtual meeting or conference call from a meeting room or other alternative location. However, the railroads would object to FRA effectively "live streaming" an accident site to a stakeholder who has not been allowed access to a railroad-owned investigation site. FRA does not have authority to essentially overrule the railroad decision by giving

that stakeholder access to the site through an alternative means. Any such actions must have the railroad property owner's consent. Therefore, FRA must make clear in the rule that any video or conference call meetings at an accident site can only take place if the railroad's concerns about safety, security and/or access to confidential information are resolved.

**The investigation policy will result in undue delays in clearing accident sites.**

As noted above, railroads often need to clear an accident site quickly following an accident. There are multiple reasons for this, including avoiding possible cascading effects from bottlenecks in the supply chain and ensuring that time-sensitive hazardous materials shipments and other commodities reach their destination in a timely manner. Railroads have consistently worked with FRA on reasonable solutions to ensure that FRA personnel obtain relevant information that is needed to conduct a proper investigation, and they expect continue to do so, but paragraphs (b)(2)(iii) & (iv) of the DFR seem to leave all decisions regarding the timing of the FRA's investigation and stakeholder participation at the site up to the FRA without any consideration of these valid concerns. FRA's regulations should acknowledge the need for transportation services, which necessitates that FRA, to the extent practicable, not interfere or obstruct transportation services provided by the railroad. This language closely follows the regulatory text used by NTSB in its regulations, and ensures that Inspectors-In-Charge will act expeditiously when conducting an investigation at an accident site. *See* 49 CFR 831.40(b)(1) and 49 CFR 840.5(b).

**FRA adopts an incident command model but fails to provide details on its structure, tasks, etc.**

Section 225.31(b)(2)(i) states that stakeholders may only gain access to an accident site through the incident command or on-site railroad personnel. However, the term "incident command" is not defined in Part 225 or elsewhere in FRA regulations. As the Associations understand the term, incident command systems are used to facilitate incident management, often in emergency response situations. It is not clear that the incident command is the appropriate entity for granting access to an accident site

for FRA's investigation purposes. Indeed, requiring stakeholders to get approval from the incident command to enter an accident site may distract from the immediate duties of the incident command. The Associations request that FRA provide a detailed explanation of its intent in this paragraph.

**FRA underestimates the cost of compliance of the new regulations.**

FRA estimates that stakeholders will require a total of four hours to gather and submit all documents for an investigation. Based on railroad experience in previous investigations, FRA generally requests a significant amount of information, which requires collaboration with various departments and internal stakeholders. For accidents that trigger an FRA investigation, the Associations estimate that railroads spend approximately 40 hours gathering and submitting information requested by FRA during the initial phase of an investigation, but FRA investigations can continue for months or more than a year and when this happens the burden of responding to FRA's requests far exceeds 40 hours. The Associations' estimate is based on the railroads' experiences under FRA's previous investigation practices, but there is no reason to think that the policy that would be codified by the DFR will result in less burdens. Indeed, adding stakeholders and new formalized document submission requirements will only add to the time spent responding to information requests. This is particularly burdensome for small business railroads who have limited resources.

**FRA's outreach to the Class I railroads was limited and insufficient and nonexistent to short line railroads.**

FRA's outreach to Class I railroads consisted of a single meeting with AAR in 2023. During the one meeting with AAR, FRA presented what appears to have been a draft version of the Policy Document.[4] FRA stated that it was required to issue the Policy Document by § 22417 of the IIJA. During

[4] The document that was shared with AAR for the 2023 meeting differs from the Policy Document posted on FRA's website in several ways, including revisions to the Disclaimers; Response Planning Phase, Notifications; Investigation Phase; and Analysis Phase sections of the Policy Document. While some of the changes are ministerial, other changes are substantive. For instance, the Disclaimer section of the Policy Document includes a definition of "confidential information" that was not included in the draft document that was shared with AAR for the 2023 meeting.

the meeting, AAR enquired about potential revisions to the document. Although § 22417 only provides a general framework for establishing a policy for information gathering and stakeholder engagement, FRA's singular response to AAR's enquiries was that it was constrained by requirements of § 22417. FRA presented the draft Policy Document as something that would be implemented and did not offer AAR or their members an opportunity to submit written comments.

Further, FRA did not meet with ASLRRA or its member railroads on this topic at all. This lack of outreach is particularly egregious, given FRA's Policy Statement Concerning Small Entities. In Appendix C to 49 CFR Part 209, FRA states that it is "FRA's policy to maintain frequent and open communications with the national representatives of the primary small entity associations and to consult with these organizations before embarking on new policies that may impact the interests of small businesses." FRA also states that it "understands that small entities in the railroad industry have significantly different characteristics than larger carriers and shippers" and "believes that these differences necessitate careful consideration in order to ensure that those entities receive appropriate treatment on compliance and enforcement matters and enhance the safety of railroad operations." A complete lack of communication on a policy change that stands to have significant impact on short line railroads, clearly identified in Appendix C to 49 CFR Part 209 is inexcusable.

FRA is silent in the DFR on what specific outreach it conducted, and it is unclear what additional outreach occurred with other members of the railroad industry. FRA should be transparent and provide additional details about the outreach that was undertaken prior to publishing the DFR. FRA normally provides extensive detail on the outreach process when they work with RSAC to develop a rule, including the number and dates of meetings held and what was discussed at those meetings. Similar details should be provided here so that the public can better evaluate the extent of FRA's stakeholder outreach.

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Thank you for your consideration of these comments.

Respectfully submitted,

Stephen N. Gordon
Associate General Counsel – Safety
Association of American Railroads
425 3rd Street, SW, Suite 1000
Washington, DC 20024

Sarah Yurasko
General Counsel
American Short Line and Regional Railroad Association
50 F Street NW, Suite 500
Washington, DC  20001

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