

small entity to meet ASLRA's proposed definition.

Several other entities suggested a narrower definition, limiting the definition of a small entity to those entities having less than a total of 400,000 annual employee hours. Some commenters also included other qualifiers, such as including operating revenue as a qualifying threshold. Commenters generally believed applying these measures would ensure consistent treatment to all entities throughout the railroad industry, regardless of whether they are a carrier, switching or terminal operation, hazardous materials shipper, or contractor. The National Railroad Construction and Maintenance Association (NRC) believed that for contractors specifically, this approach was fairer than applying the STB's Class I, II, and III monetary thresholds. The NRC claimed that operating revenues for contractors are sometimes artificially high because labor and material costs are included in the contract price, thereby potentially putting a small contractor above the \$20 million threshold set by the STB.

Other commenters agreed with NRC that 400,000 annual employee hours was an appropriate measure that would ensure consistency, yet felt that further limiting those entities to \$20 million in annual operating revenues would eliminate the possibility that larger railroads would sneak into the "small entity" category if they increase operating efficiencies, and thereby limit employee hours. The Brotherhood of Maintenance of Way Employees also proposed that all hours of persons engaged in the operation or maintenance of a railroad or its infrastructure (*i.e.*, railroad contract employees or volunteers) be included in the total annual employee hours calculation to avoid underreporting of actual work performed for one railroad. The theory is that if contractor hours are not included in the total employee hour calculation, a railroad who is above the 400,000 annual employee hour threshold could contract out most of its work to reduce its total employee hours, so that it could still receive "small entity" treatment.

Although FRA has used the 400,000 annual employee hour designation when conducting regulatory analyses for several rules, FRA has also used the Class I, II, and III categories to differentiate compliance dates when necessary to lessen the burden on small entities. FRA believes that, although the 400,000 annual employee hour criterion is useful in certain rules, the use of STB's Class III definition as its measure

of a small entity for carriers, switching and terminal operations, hazardous materials shippers, and contractors is more appropriate for the purposes of this broad policy. Under the Final Policy Statement issued today, FRA retains the ability to use different criteria to tailor the applicability of any regulations it issues to address appropriately the specific safety problem at issue. For example, even though FRA is retaining the Class III standard for "small entity" for its communication and enforcement policy purposes, FRA may issue a rule that applies only to railroads with more than a certain number of annual employee hours or to all railroads, regardless of size.

The American Public Transit Association (APTA), which represents several commuter operations, proposed that FRA define rail systems with less than 200 cars as small entities. APTA believes there are very few entities that would fit the definition of operations serving populations of 50,000 or less. FRA did not believe the 200-car limit was a useful distinction, and determined it is appropriate to retain commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less (a standard based on SBREFA's own definition of a small governmental jurisdiction) as its definition of a small commuter railroad.

The September 28, 1999 public meeting gave commenters an opportunity to iterate many of the same ideas expressed in the written comments FRA received. Aside from the merits of each definition, the attendees discussed the logistics of tracking the number of small entities for the proposed definitions. For example, if FRA adopts STB's definition, how will FRA ensure that STB is keeping accurate records of Class III carriers? STB requires regular reporting of the necessary information, and FRA has complete confidence in that process. Attendees also discussed what effect the number of entities considered "small entities" would have on FRA's litigation costs under the EAJA. FRA notes that the only provisions of EAJA affected by this definition are 5 U.S.C. 504 (a)(4), and 28 U.S.C. 2412 (d)(1)(D). These provisions permit recovery of costs and fees only if a civil penalty demand is held to be substantially in excess of the judgment finally obtained, and is unreasonable when compared with that judgment. Because FRA pays special attention to the circumstances of small entities in assessing or collecting civil penalties, such a situation is extremely unlikely. The definition of "small entity" contained in this policy has no

effect on EAJA claims brought in response to other types of agency action; such claims are governed by the EAJA definition of "party." Note that the principles concerning the aggregation of company affiliates set forth in DOT's regulations at 49 CFR 6.7(f) apply to this definition for purposes of claims brought under EAJA.

FRA indicated in the Interim Policy Statement that the Final Policy Statement would establish a definition of "small entity" for Regulatory Flexibility Act (RFA) purposes. While FRA will generally use the "small entity" definition adopted here in doing RFA analyses, it needs to retain sufficient flexibility to use a different definition if appropriate in the context of a particular RFA analysis. FRA has, and will continue to comply with the RFA's provisions requiring notice and comment, and consultation with the Small Business Administration's Office of Advocacy, when it uses a definition of "small entity" that differs from that adopted here to complete RFA analyses.

IV. FRA's Small Business Communication and Enforcement Programs

FRA's purpose in publishing this policy statement is to formally announce and explain its communication and enforcement policies concerning small entities in the railroad industry, which have already existed for some time. FRA is hopeful that this publication will, in addition to achieving compliance with the SBREFA requirements, enhance railroad safety in several ways: (1) Increase the number of small entities that participate cooperatively in the safety compliance and enforcement program; (2) better inform small businesses of railroad safety requirements; (3) encourage small entities to communicate more freely with agency personnel to alleviate potential safety risks before they become hazardous; and (4) improve FRA's understanding of small operations.

FRA's small business communication program has existed for some time, and continues to grow to meet the needs of our customers in the railroad industry. FRA Office of Safety and Office of Chief Counsel personnel, at the headquarters, regional and local level, devote a great deal of attention to the inquiries and concerns of small entities. FRA's program is flexible and responsive to the particular need expressed. The agency's response takes a variety of forms: oral and written answers to questions received, training sessions for new or existing small businesses on the substance of railroad safety regulations, and advice on a particular standard or