

(as defined in § 224.5), railroads, and (with respect to certification of material) manufacturers of retroreflective material, are primarily responsible for compliance with the rule. The responsibility of manufacturers is discussed in more detail in the analysis of proposed § 224.103(a) below.

Paragraph (a) also clarifies FRA's position that the requirements contained in the rule are applicable to any "person" (as defined in the rule) that performs any function or task required by the proposed rule. Although various sections of the rule address the duties of freight rolling stock owners, railroads, and manufacturers of retroreflective material, FRA intends that any person who performs any action on behalf of any of these parties or any person who performs any action covered by the rule is required to perform that action in the same manner as required of the freight rolling stock owner, railroad, or manufacturer, or be subject to FRA enforcement action. For example, employees or agents of freight rolling stock owners, or railroad contractors that perform duties covered by these regulations would be required to perform those duties in the same manner as required of a freight rolling stock owner or railroad. Likewise, employees or agents of manufacturers of retroreflective sheeting being manufactured pursuant to this part, would be required to perform those duties in the same manner as the manufacturer.

Paragraph (b) states that any person performing any function or task required by this part will be deemed to have consented to FRA inspection of the person's facilities and records to the extent necessary to ensure that the function or task is being performed in accordance with the requirements of this part. This provision is intended to put freight rolling stock owners, railroads, manufacturers, and contractors performing functions or tasks required by this part on notice that they are consenting to FRA's inspection for rail safety purposes of that portion of their facilities and records relevant to the function or task required by this part. Pursuant to 49 U.S.C. 20107, FRA has the statutory authority to inspect any facilities and relevant records pertaining to the performance of functions or tasks required under this part, and this provision is merely intended to make that authority clear to all persons performing such tasks or functions.

Section 224.11 Civil Penalties

This section identifies the civil penalties that FRA may impose upon

any person that violates any requirement of this part. These penalties are authorized by 49 U.S.C. 21301, 21302, and 21304. The penalty provision parallels penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least \$500 and not more than \$11,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed \$22,000 per violation may be assessed. In addition, each day a violation continues will constitute a separate offense. Maximum penalties of \$11,000 and \$22,000 are required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410) (28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–373) which requires each agency to regularly adjust certain civil monetary penalties in an effort to maintain their remedial impact and promote compliance with the law.

Section 224.13 Preemptive Effect

This section informs the public as to FRA's intention regarding the preemptive effect of the final rule. While the presence or absence of such a section does not conclusively establish the preemptive effect of a final rule, it informs the public concerning the statutory provisions which govern the preemptive effect of the rule.

This section points out that the preemptive effect of this rule is governed by 49 U.S.C. 20106 ("section 20106"). Section 20106 provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard that is not incompatible with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce. With the exception of a provision directed at an essentially local safety hazard that is not inconsistent with a Federal law, regulation, or order, and that does not unreasonably burden interstate commerce, section 20106 will preempt any State or local law or regulatory agency rule covering the same subject matter as the regulation proposed today when issued as a final rule.

The Supreme Court has consistently interpreted section 20106 to confer on the Secretary the power to preempt not only State statutes, but State common law as well. See *CSX Transp. v. Easterwood*, 507 U.S. 658, 664 (1993) ("(L)egal duties imposed on railroads by the common law fall within the scope of (the) broad phrases of section 20106."). See also *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344 (2000). The Court has further held that Federal regulations under the Federal Railroad Safety Act will preempt common law where the regulations "substantially subsume" the subject matter of the relevant State law. *Easterwood*, 507 U.S. at 664.

As is evident in the language of proposed § 224.1, FRA intends to cover the subject matter of standards for the use of retroreflective materials on freight rolling stock and the specific duties of freight rolling stock owners in this regard. FRA intends this part to preempt any State law, rule, or regulation, or common law theory of liability that might attempt to impose a duty on freight rolling stock owners pertaining to the reflectorization of freight rolling stock that is not specifically set forth in this part. For example, FRA intends to preempt any State law or common law theory of liability which might attempt to impose a duty on freight rolling stock owners to apply additional retroreflective material other than that specified in this part, to apply retroreflective material on a different schedule than that specified in this part, or to inspect, or maintain retroreflective material on a more frequent basis than that specified in this part. Inference of any duties not specifically set forth in this part may cause the costs of the proposed rule to outweigh the safety benefits of the rule in direct conflict with the Congressional mandate of 49 U.S.C. 20148 (requiring that FRA initiate a rulemaking proceeding prescribing regulations requiring enhanced visibility standards for railroad cars if such regulations would likely improve safety in a cost-effective manner).

Section 224.15 Special Approval Procedures

This section contains the procedures to be followed when seeking to obtain FRA approval of alternative standards under proposed § 224.103(e). FRA anticipates continued technological improvements and product advances in the field of reflective materials. Accordingly, this section is intended to provide a relatively quick approval process to allow the incorporation of new technology into the standards of