

**U.S. DEPARTMENT OF TRANSPORTATION**

**FEDERAL RAILROAD ADMINISTRATION**

**Study of Existing Legal Protections for Safety-Related Information and Analysis of  
Considerations for and Against Protecting  
Railroad Safety Risk Reduction Program Information**

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## I. EXECUTIVE SUMMARY

In the Rail Safety Improvement Act of 2008 (the “RSIA”), Congress directed the Secretary of Transportation to issue regulations requiring each of certain railroads–

(A) to develop a railroad safety risk reduction program . . . that systematically evaluates railroad safety risks on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities;

(B) to submit its program, including any required plans, to the Secretary for review and approval; and

(C) to implement the program and plans approved by the Secretary.<sup>1</sup>

Separately, in 49 U.S.C. § 20119(a), Congress also directed the Federal Railroad Administration (the “FRA”) to complete a study evaluating–

whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under this chapter including a railroad carrier’s analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.<sup>2</sup>

Upon completion of the study, the Secretary “may prescribe a rule subject to notice and comment to address the results of the study” if “in the public interest, including public safety and

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<sup>1</sup> 49 U.S.C. § 20156(a)(1)(A)–(C).

<sup>2</sup> *Id.* § 20119(a).

the legal rights of persons injured in railroad accidents.”<sup>3</sup> This Study addresses the issues set forth in Section 20119(a).<sup>4</sup>

Parts II and III of this Study provide an introductory background. Part II summarizes the railroad safety risk reduction programs required by the RSIA and the exemption from disclosure under the Freedom of Information Act created by the RSIA. It also discusses the proposed FRA System Safety Program, which this Study’s conclusions may also affect. Part III provides an overview of the discovery process in civil litigation and of the existing regulations regarding discovery requests seeking material in possession of the U.S. DOT.

In Part IV, this Study summarizes the results of a comprehensive survey of Federal statutory and regulatory provisions prohibiting the disclosure of safety-related information and protecting safety-related information from use in litigation.<sup>5</sup> Part IV identifies several specific instances in which Congress has previously determined that it was in the public interest to establish statutory limitations on the use of information in civil litigation.

Part V describes the public comments received in connection with the comprehensive survey discussed in Part IV. Collectively, the comments represent the views of over twenty-five different affected entities, organizations, and individuals, including railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the public.

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<sup>3</sup> *Id.* § 20119(b).

<sup>4</sup> This Study has been prepared by Baker Botts L.L.P. under contract to FRA. The conclusions of this Study are the consultant’s alone, and not FRA’s. FRA has not directed this Study’s conclusions and FRA has not yet made any decision on the issues addressed herein. FRA will conduct a formal rulemaking process, subject to notice and public comment, prior to adopting any rule.

<sup>5</sup> U.S. Dep’t of Transp., FRA, Report on Federal Safety Programs and Legal Protections for Safety-Related Information (2011) (“Report”), 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0002.

Part VI reviews the policy and legal positions set forth in the public comments, and analyzes the factors that may bear upon whether it is in the public interest to protect the information compiled or collected for FRA railroad safety risk reduction programs from discovery or admission into evidence in a civil action where a plaintiff seeks damages for personal injury or wrongful death.

As discussed further below, the information reviewed in connection with this Study indicates that there is substantial precedent for a conclusion that the broad public interest would be served by protecting railroad safety risk reduction program information from use in civil litigation involving claims for individual personal injuries or wrongful death. Historically, in connection with a wide variety of other government programs, Congress has found it in the public interest to place explicit statutory limitations on the disclosure or use of information compiled or collected for use by the Federal government. FRA's railroad safety risk reduction programs implicate broad public interest considerations similar to those Congress has protected in the past through statutory limitations on the use of information in civil litigation or discovery. Such provisions have been upheld by the courts. This Study carefully examines the arguments of commenters supporting and opposing a regulation providing such limitations and concludes that the arguments favoring a regulation are, on balance, stronger.

## **II. INTRODUCTION**

### **A. The Rail Safety Improvement Act of 2008**

In the RSIA, Congress directed the Secretary of Transportation (the "Secretary") to issue regulations requiring certain railroads—

(A) to develop a railroad safety risk reduction program . . . that systematically evaluates railroad safety risks on its system and manages those risks in order to reduce the numbers and rates of railroad accidents, incidents, injuries, and fatalities;

(B) to submit its program, including any required plans, to the Secretary for review and approval; and

(C) to implement the program and plans approved by the Secretary.<sup>6</sup>

Each railroad safety risk reduction program must include a risk analysis for every aspect of the railroad that affects safety.<sup>7</sup> Risk reduction programs must also include a risk mitigation plan, a technology implementation plan, and a fatigue management plan.<sup>8</sup> In developing these plans, railroads must consult with their affected employees, including any “non-profit employee labor organizations,” with the goal of agreeing on the contents of the plan.<sup>9</sup>

The chief safety official of a railroad submitting a railroad safety risk reduction program must personally certify that “the contents of the program are accurate and that the railroad carrier will implement” it.<sup>10</sup> The Secretary may “assess civil penalties” for failing “to submit, certify, or comply with” railroad safety risk reduction programs.<sup>11</sup> A railroad must participate in this program if it is “a Class I railroad, a railroad carrier that has inadequate safety performance (as determined by the Secretary), or a railroad carrier that provides intercity rail passenger or

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<sup>6</sup> 49 U.S.C. § 20156(a)(1)(A)–(C).

<sup>7</sup> *Id.* § 20156(c).

<sup>8</sup> *Id.* § 20156(d)–(f).

<sup>9</sup> *Id.* § 20156(g).

<sup>10</sup> *Id.* § 20156(b).

<sup>11</sup> *Id.* § 20156(h).

commuter rail passenger transportation.”<sup>12</sup> The Secretary has delegated the responsibilities under the RSIA to the Administrator of the Federal Railroad Administration (the “FRA”).<sup>13</sup>

**B. The Use of Railroad Safety-Related Information in Civil Litigation**

FRA’s proposed rail safety reauthorization bill, as transmitted to Congress by the Secretary in February 2007, would have protected information that railroads had previously compiled under railroad safety risk reduction programs or pilot programs, from discovery or admission into evidence in litigation.<sup>14</sup> As the section-by-section analysis of the proposal stated—

The purpose of the proposed shielding of this information would be to encourage the railroad to describe its safety vulnerabilities, including its security vulnerabilities, and the mitigation measures it has identified with which it will address those risks, in documents that are not simply recitations of platitudes or pamphlets suitable for public relations campaigns but instead serious, comprehensive, and in-depth analyses. In other words, because railroads will not want to produce professional risk reduction analyses if they may be released under FOIA or in response to discovery requests, safety is enhanced by prohibiting their release. In addition, because terrorists could use these analyses to plot attacks against railroads, security requires that the analyses not be released.<sup>15</sup>

The admissibility and discovery provisions in the proposal were modeled after 23 U.S.C. § 409, which prohibits disclosure in discovery, or admission into evidence of, safety-related information that State and local governments provide to the Federal Highway Administration.<sup>16</sup> The

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<sup>12</sup> *Id.* § 20156(a)(1). Other railroads may voluntarily participate. *Id.* § 20156(a)(4).

<sup>13</sup> 49 C.F.R. § 1.49(o); 74 Fed. Reg. 26981 (June 5, 2009); *see also* 49 U.S.C. § 103(g).

<sup>14</sup> See proposed legislation entitled the Federal Railroad Safety Accountability and Improvement Act, § 102 (section entitled “Protection of Railroad Safety Risk Reduction Program Information”), which was submitted to Congress on February 12, 2007, and introduced by request as H.R. 1516 and S. 918 (“the Proposal”), *see also* S. Rep. No. 110-270 (2007) (Railroad Safety Enhancement Act of 2007, S. 1889).

<sup>15</sup> Proposal § 102 cmt.

<sup>16</sup> *Id.*

proposal would have protected both information that railroads had submitted to FRA and information that was never in the Federal government's possession.

Ultimately, the RSIA, as enacted, did not include the proposed confidentiality provisions, but instead directed FRA to complete a study evaluating–

[w]hether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under this chapter including a railroad carrier's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.<sup>17</sup>

As part of that study, FRA “shall solicit input from the railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public.”<sup>18</sup>

Following completion of the study, FRA “may prescribe a rule subject to notice and comment to address the results of the study.”<sup>19</sup> Such a rule may not become effective until one year after adoption.<sup>20</sup>

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<sup>17</sup> 49 U.S.C. § 20119(a).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* § 20119(b).

<sup>20</sup> *Id.*

### C. Railroad System Safety Programs

Separately from the RSIA's railroad safety risk reduction program regulations, FRA is currently formulating regulations that would require high-speed, intercity, and commuter passenger railroads to adopt and implement System Safety Programs.<sup>21</sup> As FRA has explained—

With the assistance of the Railroad Safety Advisory Committee (RSAC), FRA is currently developing a System Safety Program (SSP) regulation applicable to passenger railroads. An SSP is anticipated to be a comprehensive process for the application of engineering and management principles, criteria, and techniques to optimize safety. Like risk reduction, an SSP might require a railroad to assess and manage risk, and to develop proactive hazard management methods that would support safety improvement. As currently envisioned, SSP would be specifically tailored to the risks presented by passenger railroads. To the extent possible, FRA intends to incorporate risk reduction requirements into a complimentary safety and risk reduction framework.<sup>22</sup>

The same process will govern the development of a railroad safety risk reduction program for freight railroads. While these programs are still under development, FRA has begun requiring system safety plans in FRA-funded passenger rail projects.<sup>23</sup> The proposed FRA System Safety Program would be a "railroad safety program" as defined in the RSIA,<sup>24</sup> and System Safety Programs would "receive the same protections from public disclosure as those

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<sup>21</sup> G. Cothen, Deputy Associate Administrator for Safety Standards, *High-Speed Passenger Rail Safety Strategy*, Presentation to Standing Committee on Rail Transportation 35 (Sept. 22, 2009), available at <http://rail.transportation.org/Documents/Cothen.ppt>.

<sup>22</sup> FRA, ANPRM, Risk Reduction Program, 75 Fed. Reg. 76345, 76346 (December 2, 2010) (RIN: 2130-AC11; Docket No. FRA-2009-0038).

<sup>23</sup> FRA, Notice, High-Speed Intercity Passenger Rail (HSIPR) Program, 75 Fed. Reg. 38344, 38351 (July 1, 2010); *see also* 49 C.F.R. § 238.603 (requiring system safety plans for Tier 2 operations); *id.* § 236.1007 (requiring system safety plans for high-speed railroads in connection with positive train control).

<sup>24</sup> Passenger Safety Working Group, Update to the Railroad Safety Advisory Committee 15 (June 25, 2009).

provided to other railroad safety risk reduction programs.”<sup>25</sup> Therefore, the public interest analysis required as part of the Section 20119(a) study by the RSIA may also affect the protections afforded to information submitted under the proposed System Safety Program.

### **III. BACKGROUND ON GOVERNMENT DISCLOSURE OF INFORMATION**

To place this Study in its proper context, it is helpful to have a basic understanding of the laws governing disclosure of information by the government. This Part reviews the Federal Freedom of Information Act (“FOIA” or “Act”), the general rules of civil discovery, and DOT regulations governing responses to subpoenas and other discovery requests.

#### **A. The RSIA and the Freedom of Information Act**

In 49 U.S.C. § 20118(a), the RSIA established an exemption from the requirements of the Freedom of Information Act (“FOIA”) for “any part of any record” submitted to the FRA pursuant to a railroad safety risk reduction program or pilot program.<sup>26</sup> Subject to certain specified exemptions, FOIA requires government entities to disclose most government documents upon request.<sup>27</sup> The Act establishes a policy of broad disclosure of government materials to promote “an informed citizenry, vital to the functioning of a democratic society.”<sup>28</sup> That prohibition includes, but is not limited to, a railroad carrier’s analysis of its safety risks and its statement of mitigation measures.<sup>29</sup>

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<sup>25</sup> *Id.* at 16.

<sup>26</sup> 49 U.S.C. § 20118(a).

<sup>27</sup> 5 U.S.C. § 552 *et seq.* For more information on FOIA generally, and on legal limits placed upon disclosures of other information in response to a FOIA request, see Report, *supra* note 5. For information on how DOT processes FOIA requests and classified information, see 49 C.F.R. Pts. 7–8.

<sup>28</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

<sup>29</sup> *Id.*

The RSIA allows only two exceptions to the prohibition of disclosure under FOIA. FRA may disclose safety-related information (1) if disclosure is necessary for enforcement of Federal law by the Secretary “or another Federal agency,” or (2) if the Secretary determines that disclosure of “any part of any record comprised of facts otherwise available to the public” is consistent with the confidentiality needed for the railroad safety risk reduction program or pilot program.<sup>30</sup> Nevertheless, FRA has discretion to “prohibit the public disclosure of risk analyses or risk mitigation analyses” obtained pursuant to the RSIA if “the prohibition of public disclosure is necessary to promote railroad safety.”<sup>31</sup>

Importantly, FOIA’s disclosure requirements, as well as the RSIA’s limits on FOIA, only govern the disclosure of information held by the Federal government. The FOIA disclosure requirements do not apply to the disclosure of information held by States or private entities, such as railroads, even if the information has been prepared in response to Federal regulatory requirements. Thus, unless disclosure is otherwise prohibited, litigants may seek safety-related information held by railroads, or other persons, through discovery in civil litigation.

#### **B. The Civil Discovery Process**

In civil litigation, discovery rules generally require disclosure of materials that are relevant to issues in the case, which enables parties to access the evidence necessary to evaluate and resolve their dispute.<sup>32</sup> Generally, courts require both parties and non-parties to disclose relevant evidence unless a legal privilege, such as the attorney-client privilege, protects the

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<sup>30</sup> *Id.* § 20118(a)–(b).

<sup>31</sup> *Id.* § 20118 (c).

<sup>32</sup> MOORE’S FEDERAL PRACTICE § 26.02 (3d ed.).

information. The legal basis for a privilege may lie in either the common law or a statute.<sup>33</sup> Courts construe all privileges narrowly, favoring production of information.<sup>34</sup> Nevertheless, a conclusion that materials are subject to production through the discovery process does not necessarily mean that a court would admit those materials into evidence. A party may object to the introduction of evidence at trial, if there is a legal basis to exclude it.<sup>35</sup> Accordingly, the issue of whether safety-related reports should be inadmissible as evidence at trial differs from the issue of whether the Federal government should protect such reports from discovery.

To obtain relevant evidence, litigants may use discovery requests, such as interrogatories or document requests, or they may seek to compel non-parties to produce evidence in response to court-issued subpoenas. In cases between private litigants involving railroads, the parties might attempt to use discovery requests or subpoenas to obtain safety-related information from a railroad or other private party, or from FRA. A subpoena is generally required to obtain evidence from a non-party, and therefore, parties in litigation sometimes seek safety-related reports in the possession of the Federal government through a subpoena.

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<sup>33</sup> For a discussion of other, non-statutory privileges that courts have considered applying to transportation safety information, such as the self-critical analysis privilege, see *Dowling v. Am. Hawaii Cruises, Inc.*, 971 F.2d 423, 425–26 (9th Cir. 1992) (describing the self-critical analysis privilege); *In re Air Crash at Charlotte, N.C. on July 2, 1994*, Order, MDL Docket No. 1041 (D.S.C. Nov. 14, 1995) (rejecting application of the self-critical analysis privilege to internal airline documents), or a common law privilege, see *In re Air Crash Near Cali, Columbia on Dec. 20, 1995*, 959 F. Supp. 1529 (S.D. Fla. 1997) (rejecting the self-critical analysis privilege and recognizing a qualified common law privilege, before the enactment of subsequent statutes). See generally *Jaffee v. Redmond*, 518 U.S. 1 (1996) (describing generally how to evaluate claims of Federal common law privilege).

<sup>34</sup> See *Pierce County v. Guillen*, 537 U.S. 129, 144–45 (2003).

<sup>35</sup> The Federal Rules of Evidence, for example, specify certain legal grounds for excluding or admitting evidence.

### C. DOT Regulations Governing Discovery Requests

Within DOT, the Office of the Secretary of Transportation (“OST”) has adopted regulations setting forth required procedures when any DOT employee receives a subpoena for testimony, documents, or evidence in a legal action.<sup>36</sup> The purposes of these are to–

- (1) Conserve the time of employees for conducting official business;
- (2) Minimize the possibility of involving the Department in controversial issues not related to its mission;
- (3) Maintain the impartiality of the Department among private litigants;
- (4) Avoid spending the time and money of the United States for private purposes; and
- (5) To protect confidential, sensitive information and the deliberative processes of the Department.<sup>37</sup>

To achieve these goals, DOT adopted a general limitation on DOT production or disclosure in private legal proceedings–

No employee of the Department may provide testimony or produce any material contained in the files of the Department, or disclose any information relating to, or based upon, material contained in the files of the Department, or disclose any information or produce any material acquired as part of the performance of that employee’s official duties or because of that employee’s official status unless authorized in accordance with this part, or by other applicable law.<sup>38</sup>

In its discretion, DOT may also instruct its employees not to respond to subpoenas until DOT has moved to quash the subpoena, and, if a court orders compliance with a subpoena, DOT may

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<sup>36</sup> 49 C.F.R. Pt. 9. For information on how DOT processes FOIA requests and classified information, *see id.* Pts. 7–8.

<sup>37</sup> *Id.* § 9.1(b).

<sup>38</sup> *Id.* § 9.5.

advise its employees not to comply.<sup>39</sup> If an employee does testify in court or at a deposition, DOT may limit the scope of that testimony.<sup>40</sup>

Notwithstanding those limitations, DOT also has the discretion to *allow* production of documents or testimony in certain circumstances.

[An] exception may be granted only when the deviation will not interfere with matters of operational or military necessity, and when agency counsel determines that:

- (1) It is necessary to prevent a miscarriage of justice;
- (2) The Department has an interest in the decision that may be rendered in the legal proceeding; or
- (3) The exception is in the best interest of the Department or the United States.<sup>41</sup>

Although the DOT regulations provide some limitations on discovery of safety-related materials in the possession of DOT, these regulations do not apply to States or private parties, and would not limit litigants' access to copies of materials submitted to DOT that are also in the possession of States or private individuals or organizations, such as railroads.

#### **IV. EXISTING STATUTORY PROTECTIONS FOR SUBMITTED INFORMATION**

The first part of this Study was a comprehensive Report cataloging existing Federal statutory or regulatory provisions prohibiting the disclosure or use of safety-related information in litigation. That Report, which was published in the Federal Register,<sup>42</sup> also identified other

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<sup>39</sup> *Id.* § 9.11.

<sup>40</sup> *Id.* § 9.9.

<sup>41</sup> *Id.* § 9.1(c).

<sup>42</sup> *See* Report, *supra* note 5.

government programs that provide similar protections for information collected outside of the safety context.<sup>43</sup> This Part summarizes the findings of that Report.

Programs that limit the use of information in litigation fall within three main categories. First, there are programs that unambiguously prohibit both the admission of information into evidence and the discovery of information. Second, there are programs that prohibit the admission of information into evidence, but whose effect on the discoverability of information is not clear. Third, there are programs that unambiguously prohibit the admission of information into evidence but permit the discovery of the information during litigation. All three categories of programs are relevant to this Study because they represent other occasions when Congress has determined that the public interest would be served by limiting the litigation uses of information that private parties submit to a Federal entity. This Part examines each category and statute in turn.<sup>44</sup>

#### **A. Statutes Prohibiting the Discoverability or Admissibility of Information**

The first category of programs includes those that expressly prohibit discovery of protected information and prohibit admitting it into evidence. Four such programs fall under this

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<sup>43</sup> *See id.*

<sup>44</sup> The Report also noted a large number of other government programs, not discussed here, which collect information from the public, but which do not limit the litigation uses of that information. Those programs either provide confidentiality protections or grant no protection at all for submitted information. *See Report, supra* note 5 (discussing, *inter alia*, reporting programs of the Federal Aviation Administration, the Federal Transit Administration, the Federal Motor Carrier Safety Administration, the National Highway Traffic Safety Administration, the Pipeline and Hazardous Materials Safety Administration, the U.S. Coast Guard, the Department of Defense, the Nuclear Regulatory Commission, the Federal Trade Commission, the Environmental Protection Agency, the Department of Agriculture, the Consumer Product Safety Commission, the Securities and Exchange Commission, the Government Accountability Office, various financial regulatory agencies, the Farm Credit Administration, the Department of Health and Human Services, and the Department of State). One such government program is the FAA's Aviation Safety Reporting System ("ASRS"). *See infra* note 63.

category: (1) the Federal Highway Administration’s (“FHWA”) highway improvement programs; (2) the Joint Confidential Close Call Reporting System established by FRA, in conjunction with the Bureau of Transportation Statistics (“BTS”) and the National Aeronautics and Space Administration (“NASA”); (3) the U.S. Coast Guard’s treatment of marine casualty reports; and (4) the Department of Commerce’s protection of U.S. Census information.

**1. *Federal Highway Administration — Federal Highway Improvement Programs***

In 23 U.S.C. § 409 (“Section 409”), Congress has enacted statutory protections for information submitted in connection with Federal programs that help States plan and fund highway improvements.<sup>45</sup> Section 409 provides broad protections for documents created pursuant to Federal highway safety or construction programs—

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130 [Railway-Highway Crossings], 144 [Highway Bridge Replacement and Rehabilitation Program], and 148 [Hazard Elimination Program] of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.<sup>46</sup>

Section 409 protects documents from admission into evidence and from disclosure in discovery.<sup>47</sup> It covers both data compilations and raw data collections.<sup>48</sup> In practice, a litigant

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<sup>45</sup> *E.g.*, 23 U.S.C. §§ 130 (Railway-Highway Crossings), 144 (Highway Bridge Replacement and Rehabilitation Program), 152 (Hazard Elimination Program).

<sup>46</sup> *Id.* § 409. There are no regulations interpreting the scope of this confidentiality provision.

<sup>47</sup> *Id.*

may rely on Section 409 as a defense against a document request, in seeking a protective order, or as a basis for objecting to a line of questioning during a trial or deposition.<sup>49</sup> Section 409 thus extends protection to information that has never been in the possession of the FHWA, BTS, or any another Federal entity.

Congress enacted Section 409 in response to concerns raised by the States regarding compliance with Federal road hazard reporting requirements without confidentiality protections. “States feared that diligent efforts to identify roads eligible for aid under the Program would increase the risk of liability for accidents that took place at hazardous locations before improvements could be made.”<sup>50</sup> “Because a municipality’s efforts to make roads safer could be used against it, making it easier for plaintiffs to assemble evidence of liability and even create liability where none had previously existed, Congressional funding alone was not sufficient to induce all States to participate in the collection of accident data.”<sup>51</sup> After the enactment of

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<sup>48</sup> Intermodal Surface Transportation Efficiency Act of 1991, § 1035(a), 105 Stat. 1978; National Highway System Designation Act of 1995, § 323, 109 Stat. 591.

<sup>49</sup> See, e.g., *Stokes v. Nat’l R.R. Passenger Corp.*, Civil Action No. 08-3775, 2009 WL 3261928, at \*2 (E.D. Pa. Oct. 7, 2009) (granting a protective order for privileged reports and prohibiting deposition questions about privileged reports). Under Section 409, the burden of proving that the privilege applies is on the party invoking the privilege. *Id.* Courts disfavor blanket claims of privilege and require litigants to identify the privileged documents and explain why the Section 409 privilege applies. E.g., *Morris v. Union Pac. R.R. Co.*, No. CIV-05-390-S, 2006 WL 2583763, at \*9 (E.D. Okla. Sept. 5, 2006), *vacated pursuant to settlement* by 2007 WL 316906 (E.D. Okla. Jan. 29, 2007).

<sup>50</sup> *Pierce County v. Guillen*, 537 U.S. 129, 133–34 (2003) (citing H.R. Doc. No. 94-366, p. 36 (1976)).

<sup>51</sup> Daniel R. Hamilton, *Pierce County v. Guillen: Practical Answers to Privileged Questions*, 39 Gonz. L. Rev. 219, 227 (2004) (detailing the history of Section 409). This article was written by one of the counsel of record in *Pierce County*.

Section 409, as amended, the FHWA reportedly “made no further mention of” State compliance problems.<sup>52</sup>

The Supreme Court interpreted the scope of Section 409 and upheld its constitutionality in *Pierce County v. Guillen*.<sup>53</sup> *Guillen* concerned the application of Section 409 to documents created pursuant to the Hazard Elimination Program, which provides funding to State and local governments to improve dangerous sections of roads.<sup>54</sup> To be eligible for the program, a State or local government must evaluate hazardous conditions on its public roads in considerable detail.<sup>55</sup> All participating governments must (1) maintain a systematic engineering survey of all roads, with descriptions of all obstacles, hazards, and other dangerous conditions, and (2) create a prioritized plan for improving those conditions.<sup>56</sup>

The Court held that Section 409 applied to documents collected or compiled by any governmental entity for the purpose of participating in Federal highway programs,<sup>57</sup> but Section 409 did not protect information initially collected or compiled for other purposes, even if that information was at some point used in a Federal highway program.<sup>58</sup> The Court’s interpretation was influenced by Congress’s desire to strike a balance between (i) creating “an effort-free tool

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<sup>52</sup> *Id.* at 230.

<sup>53</sup> 537 U.S. 129, 144–46 (2003).

<sup>54</sup> *Id.* at 133.

<sup>55</sup> 23 U.S.C. § 152(a)(1).

<sup>56</sup> *Guillen*, 537 U.S. at 133.

<sup>57</sup> *Id.* at 144.

<sup>58</sup> *Id.*

in litigation against State and local governments” and (ii) “mak[ing] plaintiffs worse off than they would have been had [the Federal program] never existed.”<sup>59</sup>

The Supreme Court also held that Section 409 was a valid exercise of Congress’s powers under the Commerce Clause.<sup>60</sup> The Court found that Congress has the power to enact both the Hazard Elimination Program and Section 409, because both were “aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.”<sup>61</sup>

Some questions about the interpretation of Section 409 remain. For example, State administrators and courts frequently must interpret Section 409 in the context of deciding whether State and local governments must release highway records under State public information and open records laws. Another frequently arising issue is whether a specific document was prepared for Federal highway program purposes or for another purpose.

An open question is whether a State or local government entity may “waive” the protections of Section 409. For example, a governmental defendant may seek to introduce its safety program records to show that it had no notice of hazardous conditions at a certain site, or that extremely hazardous conditions at other accident sites prevented the government from funding improvements at a less dangerous site. While a litigant may usually waive any constitutional or statutory privilege, the FHWA has taken the position that such uses of

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<sup>59</sup> *Id.* at 146.

<sup>60</sup> *Id.* at 146–47.

<sup>61</sup> *Id.*

documents by governmental defendants do not constitute waivers of Section 409's protections because the statute precludes such waivers. At least two courts have agreed.<sup>62</sup>

## 2. *BTS, NASA, and FRA — Joint Confidential Close Call Reporting System*

FRA has established a voluntary Confidential Close Call Reporting System (“C<sup>3</sup>RS”) to encourage railroads and railroad employees to report safety “close calls” by protecting employees from railroad disciplinary actions and FRA enforcement or decertification.<sup>63</sup> The program is implemented by memoranda of understanding between FRA and the participating railroads. Data collection and analysis are performed by either BTS or NASA, pursuant to agreements with FRA. The program protects railroads from civil penalties related to the information they report.<sup>64</sup> A “close call” is not an accident causing personal injury or death;

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<sup>62</sup> See *Dugle v. Norfolk S. Ry. Co.*, Civil Action No. 07-40, 2010 WL 1948214 at \*3–4 (E.D. Ky. May 13, 2010) (rejecting a claim of waiver); *Boyd v. Nat'l R.R. Passenger Corp.*, 821 N.E.2d 95, 105–06 & n.11 (Mass. Ct. App. 2005) (applying privilege to prevent use of documents and commenting that “We find no merit in the plaintiff’s claim that the defendants waived the § 409 privilege by producing [responsive privileged documents in discovery]. . . . [T]he common law of privilege waiver . . . does not apply based on the statutory language of § 409 evincing an intent that its discoverability and admissibility standards supersede common law principles.” (citations omitted)), *rev'd on other grounds*, 845 N.E.2d 356 (Mass. 2006).

<sup>63</sup> C<sup>3</sup>RS was modeled after FAA’s ASRS. FAA implements ASRS through a Memorandum of Understanding with NASA. ASRS does not include statutory protections against the use of its reports in litigation. See *supra* note 44. For further discussion of ASRS, see Report, *supra* note 5.

<sup>64</sup> E.g., U.S. DOT, FRA, Petition for Waiver of Compliance, 75 Fed. Reg. 67451 (Nov. 2, 2010) (waiving enforcement sanctions for Amtrak under the confidential close call reporting system); Confidential Close Call Reporting System Implementing Memorandum of Understanding (C<sup>3</sup>RS/IMOU) for Amtrak (May 11, 2010) (hereinafter “Amtrak MOU”); Confidential Close Call Reporting System Implementing Memorandum of Understanding (C<sup>3</sup>RS/IMOU) of the Canadian Pacific, at 3–4, 7 (Aug. 21, 2007) (hereinafter “Can. Pac. MOU”); Confidential Close Call Reporting System Implementing Memorandum of Understanding (C<sup>3</sup>RS/IMOU) for New Jersey Transit, at 3–4, 7 (June 11, 2009) (hereinafter “N.J. Transit MOU”); Confidential Close Call Reporting System Implementing Memorandum of Understanding (C<sup>3</sup>RS/IMOU), North Platte Service Unit of the Union Pacific Railroad Company (Aug. 17, 2006) (hereinafter “Union Pac. MOU”). See generally FRA, Confidential Close Call Reporting System (C<sup>3</sup>RS), <http://www.closecallsrail.org/Default.aspx>. FRA’s model memorandum of understanding is the

accidents causing injuries or death fall under separate, mandatory reporting systems discussed in Part IV.B. Rather, a “close call” is a situation with the potential for serious future consequences, such as when an accident almost happened.<sup>65</sup>

Participating railroads and their employees submit close call reports to BTS or, in one instance, to NASA rather than to FRA.<sup>66</sup> BTS/NASA then share the information in redacted form with a Peer Review Team composed of representatives from FRA, the employer railroad, and employees.<sup>67</sup> BTS/NASA, rather than FRA, are “responsible for maintaining the security of the confidential database and all materials” that are part of C<sup>3</sup>RS.<sup>68</sup> BTS/NASA receive reports, redact personal identifying information, and provide periodic reports to participants in the program about what has been received.<sup>69</sup>

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template for the four individual agreements. *See* Model Memorandum of Understanding for Participating Stakeholders in C<sup>3</sup>RS (Confidential Close Call Reporting System) Demonstration Project, [http://www.closecallsrail.org/pubs/Model\\_MOU.pdf](http://www.closecallsrail.org/pubs/Model_MOU.pdf).

<sup>65</sup> *E.g.*, Amtrak MOU at 4–5; Can. Pac. MOU at 4; N.J. Transit MOU at 4; Union Pac. MOU at 5.

<sup>66</sup> Amtrak MOU at 5–6, 13; Can. Pac. MOU at 4; N.J. Transit MOU at 4; Union Pac. MOU at 5. BTS, a part of the Research and Innovative Technology Administration, is responsible for collecting and providing data, statistics, and analysis to transportation decision makers. 49 U.S.C. § 111(a), (c). In particular, it is responsible for “[c]ollecting, compiling, analyzing, and publishing statistics” on transportation sector productivity, traffic flows, vehicle characteristics, transportation costs, use of mass transit, and safety and security for travelers, vehicles, and transportation systems. *Id.* § 111(c).

<sup>67</sup> *E.g.*, Amtrak MOU at 5–6, 15–16; Can. Pac. MOU at 3, 5; N.J. Transit MOU at 3, 5; Union Pac. MOU at 4–6.

<sup>68</sup> *E.g.*, Amtrak MOU at 5–6, 13–15; Can. Pac. MOU at 3, 13–14; N.J. Transit MOU at 3, 12–13; Union Pac. MOU at 4, 12–14.

<sup>69</sup> *E.g.*, Amtrak MOU at 13–15; Can. Pac. MOU at 14; N.J. Transit MOU at 13; Union Pac. MOU at 12–14.

FRA implements C<sup>3</sup>RS through Memoranda of Understanding with railroads and labor unions, rather than through regulations.<sup>70</sup> The MOUs with the Canadian Pacific Railway, Union Pacific Railroad Company, and New Jersey Transit Rail Operations specify that reports will be submitted to BTS and the MOU with Amtrak specifies that reports will be submitted to NASA.<sup>71</sup>

In the Canadian Pacific, Union Pacific, and New Jersey Transit programs, reports submitted to BTS are protected by the statutory protections accorded to all information received by BTS,<sup>72</sup> as well as by the Confidential Information Protection and Statistical Efficiency Act of 2002 (“CIPSEA”).<sup>73</sup> In particular, reports submitted to BTS, whether held by BTS or the private party, are “immune from legal process.”<sup>74</sup> Accordingly, no litigant may subpoena the report in discovery or obtain it through any other legal proceeding. Further, reports to BTS “shall not, without the consent of the individual concerned, be admitted as evidence or used for any purpose

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<sup>70</sup> *E.g.*, Amtrak MOU at 3; Can. Pac. MOU at 3; N.J. Transit MOU at 3; Union Pac. MOU at 5.

<sup>71</sup> Amtrak MOU at 13; Can. Pac. MOU at 4; N.J. Transit MOU at 4; Union Pac. MOU at 5. NASA is not a signatory party to the Amtrak MOU, but the MOU was drafted in a way that made its performance contingent upon FRA entering into a separate agreement with NASA.

<sup>72</sup> By law, BTS may not disclose anything in which “the data provided by an individual or organization under subsection (c) can be identified.” 49 U.S.C. § 111(k)(a)(1)(A). Nor may BTS allow unauthorized persons access to a report submitted to BTS. *Id.* § 111(k)(a)(1)(C). BTS may only use the information reported to it for statistical purposes. *Id.* § 111(k)(a)(1)(B). When another statute specially authorizes BTS to collect information for a non-statistical purpose, BTS must indicate that purpose on the documents it uses to request information. *Id.* § 111(k)(3). Additional protections against disclosure apply to “reports that permit information concerning an individual or organization to be reasonably determined by direct or indirect means.” *Id.* § 111(k)(a)(2)(C). The statute limits the governmental entities and employees authorized to obtain reports submitted to BTS. *Id.* § 111(k)(a)(2)(A) (“No department, bureau, agency, officer, or employee of the United States (except the Director in carrying out this section) may require, for any reason, a copy of any report that has been filed . . . with the Bureau or retained by an individual respondent.”).

<sup>73</sup> Confidential Information Protection and Statistical Efficiency Act of 2002, Pub. L. 107-347, 116 Stat. 2899.

<sup>74</sup> 49 U.S.C. § 111(k)(a)(2)(B)(i).

in any action, suit, or other judicial or administrative proceedings.”<sup>75</sup> NASA’s statutes and internal policies provide protections for personal identifying information that railroads and employees submit to NASA as well.<sup>76</sup>

### **3. U.S. Coast Guard — Marine Casualty Reports**

The U.S. Coast Guard has the power to investigate marine casualties to determine (1) the cause of the casualty and (2) whether new safety regulations could prevent the recurrence of a similar casualty.<sup>77</sup> With respect to marine casualty reports, Congress has provided that—

[n]otwithstanding any other provision of law, no part of a report of a marine casualty investigation conducted under section 6301 of this title, including findings of fact, opinions, recommendations, deliberations, or conclusions, shall be admissible as evidence or subject to discovery in any civil or administrative proceedings, other than an administrative proceeding initiated by the United States.<sup>78</sup>

Accordingly, no litigant may subpoena the Coast Guard to obtain a marine casualty report. In addition, an Officer of the Coast Guard may not be deposed without permission of the Secretary

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<sup>75</sup> *Id.* § 111(k)(a)(2)(B)(ii).

<sup>76</sup> 51 U.S.C. § 20113(f) (authorizing NASA to agree to interagency projects); 42 U.S.C. § 2473(c)(5) (prior provision, under which the Amtrak MOU was adopted, authorizing NASA to agree to interagency projects); Interagency Agreement Between Federal Railroad Administration (FRA) and National Aeronautics and Space Administration (NASA) for Development of a Railroad Safety Reporting System (May 12, 2010); NASA, Confidential Close Call Reporting System, <http://c3rs.arc.nasa.gov/index.html> (generally detailing confidentiality policies). NASA’s authorizing statute, The National Aeronautics and Space Act, Pub. L. No. 111-314, 124 Stat. 3328 (Dec. 18, 2010), also provides a FOIA exemption for trade secrets or other confidential commercial or financial information submitted under this program. 51 U.S.C. § 20131(b).

<sup>77</sup> 46 U.S.C. § 6301.

<sup>78</sup> *Id.* § 6308(a).

of the department under which the Coast Guard is operating.<sup>79</sup> The House Report explained the purpose of these protections as follows:

Marine casualty investigations are intended to expeditiously determine the factors that cause accidents, to determine whether there is a need for regulatory or statutory changes, to determine whether a material failure caused or contributed to the casualty, and whether there is evidence that warrants enforcement action. The amendments made by this section will ensure that the deliberative process of Coast Guard casualty investigations will be unaffected by the prospects of future litigation.<sup>80</sup>

The goal of these protections is to ensure the Coast Guard receives full and candid accounts of what may have caused a casualty.<sup>81</sup> With that information, the Coast Guard will be in a better position to identify the cause of the accident and prevent a re-occurrence.<sup>82</sup>

However, even though the statute explicitly states that marine casualty reports shall not be admitted into evidence or subject to discovery, it has been subject to interpretive disputes. At least one court has indicated that this provision could be interpreted as allowing a litigant to use the reports for impeachment purposes.<sup>83</sup> In addition, photographs taken in connection with preparing a marine casualty report have been found admissible.<sup>84</sup>

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<sup>79</sup> *Id.* §§ 2101, 6308; see *In re Complaint of Danos & Curole Marine*, 278 F. Supp. 2d 783, 785 (E.D. La. 2003).

<sup>80</sup> H.R. Rep. No. 106, 104th Cong., 1st Sess. (1995).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See *In re Complaint of Danos & Curole Marine*, 278 F. Supp. 2d at 786 (reserving ruling).

<sup>84</sup> *Id.* at 785.

#### 4. *Department of Commerce — Census Information*

To encourage participation in the census, Congress has provided broad protections to information furnished by individuals for that purpose.<sup>85</sup> As early as 1879, Congress “expressed its concern that confidentiality of data reported by individuals be preserved.”<sup>86</sup> Congress has subsequently provided that—

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, or local government census liaison, may, except as [otherwise provided by law]—

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.<sup>87</sup>

This section does not allow census information to be admitted into evidence or used at all by any individual in civil litigation, without the consent of the “individual or establishment concerned.”

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<sup>85</sup> *Baldrige v. Shapiro*, 455 U.S. 345, 354 (1982).

<sup>86</sup> *Id.*

<sup>87</sup> 13 U.S.C. § 9.

In addition, no litigant may request or subpoena a census document in discovery. As the Supreme Court commented, “Congress concluded . . . that only a bar on disclosure of all raw data reported by or on behalf of individuals would serve the function of assuring public confidence. This was within congressional discretion, for Congress is vested by the Constitution with authority to conduct the census ‘as they shall by Law direct.’”<sup>88</sup>

**B. Statutes Prohibiting the Admission of Information into Evidence with Uncertain Effect on the Discovery of Information**

The second category of programs include those that unambiguously prohibit the admission of information into evidence, but whose effect on the discoverability of information is disputed, ambiguous, or as yet undetermined. In some instances, the only uncertainty about the scope of the statute is due to the fact that there are no reported cases interpreting the statute’s provisions. In other instances, however, courts have addressed legal disputes over interpretation of the statute. To the extent that uncertainty is due to the language the statute uses, the greatest confusion occurs over the precise effect of a prohibition on the “use” of a document in litigation. Some courts might consider “use” to cover only the introduction of the information as evidence for the truth of what the information asserts, while others might construe it as a total ban on the admission of the information in court, and others might consider the statute to imply a ban on the discovery of such information.

This Part discusses seven statutes that prohibit admission of information into evidence but which, because of their infrequent application or ambiguous language, have an uncertain effect on discovery. The seven statutes relate to FRA’s Accident and Incident Reporting Program; FRA’s Locomotive and Tender Failures Reporting Program; FRA’s Signal Systems Safety Program; the FAA’s Airport Noise Compatibility Program; the Federal Motor Carrier

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<sup>88</sup> *Baldrige*, 455 U.S. at 361 (note omitted).

Safety Administration’s Accident Reporting Program; the Food and Drug Administration’s reporting program for medical adverse events; and the National Transportation Safety Board’s Accident Reporting Program. Although the precise effect of these statutes on discovery is uncertain, the statutes are examples of past occasions when Congress has found it in the public interest to limit the litigation uses of information that private parties create or collect for the Federal government.

### **1. FRA — Accident and Incident Reporting Program**

Under 49 U.S.C. § 20901 (“Section 20901”), railroads must report to FRA “all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier’s operations during the month.”<sup>89</sup> Reports must “state the nature, cause, and circumstances of each reported accident or incident.”<sup>90</sup> Section 20901(a), in various forms, has been in effect for over a century.<sup>91</sup> The FRA uses this program, as well as other employee accident reporting requirements, to obtain information about hazards on the nation’s railroads.<sup>92</sup>

Under 49 U.S.C. § 20903 (“Section 20903”), no part of a railroad’s monthly report under Section 20901 or any FRA report prepared under 49 U.S.C. § 20902 “may be used in a civil

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<sup>89</sup> 49 U.S.C. § 20901(a); 49 C.F.R. § 1.49. For regulations implementing 49 U.S.C. § 20901 *et seq.* and other statutes, see 49 C.F.R. § 225.1 *et seq.*

<sup>90</sup> 49 U.S.C. § 20901(a).

<sup>91</sup> See Accident Reports Act of 1910, Pub. L. No. 165, Act of May 6, 1910, ch. 208, 36 Stat. 350 (1910), repealed by Pub. L. No. 103-272 (1994) and its provisions revised without substantive change, enacted, and codified as amended at 49 U.S.C. § 20901; Miscellaneous Amendments to the Federal Railroad Administration’s Accident/Incident Reporting Requirements, 75 Fed. Reg. 68,862, 68,862 (Nov. 9, 2010) (to be codified at 49 C.F.R. Pt. 225).

<sup>92</sup> See 49 C.F.R. § 225.1 *et seq.*

action for damages resulting from a matter mentioned in the report.”<sup>93</sup> Importantly, while Section 20903 prohibits the use of the railroads’ monthly reports in civil litigation,<sup>94</sup> it does not protect those reports from disclosure in response to a FOIA request.<sup>95</sup> Participating railroads must also provide employees with access to reported accident information.<sup>96</sup>

Even though these reports are generally available through FOIA, an open issue is whether they are also subject to disclosure through discovery in litigation.<sup>97</sup> No court has directly addressed the issue. While the statute broadly prohibits the “use” of the information in litigation, courts are divided on precisely what that covers. Some authority supports a broad reading of Section 20903, which would prevent any use of a report in civil litigation, including obtaining the report through civil discovery.<sup>98</sup> However, an administrative opinion of the Texas Attorney

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<sup>93</sup> 49 U.S.C. § 20903; 49 C.F.R. §§ 1.49, 225.7(b). The prior version of 49 C.F.R. § 225.7 is silent as to whether any attached or supplemental employee reports are protected as well. However, under new regulations effective on June 1, 2011, a railroad’s monthly report is deemed to include any attached or supplemental employee reports. 49 C.F.R. § 225.7(b) (effective June 1, 2011).

<sup>94</sup> See, e.g., *Scotto v. Long Island R.R.*, No. 05 Civ. 4757(PKL), 2007 WL 894332, at \*4–5 (S.D.N.Y. Mar. 20, 2007) (applying the provision and refusing to permit the introduction of any official FRA accident reports or investigation documents at trial).

<sup>95</sup> U.S. DOT, FRA, Office of Railroad Safety, *FRA Guide for Preparing Accident/Incident Reports* 13 (2011), available at <http://safetydata.fra.dot.gov/OfficeofSafety/>.

<sup>96</sup> 49 C.F.R. § 225.25(h).

<sup>97</sup> *Belisle v. BNSF Ry. Co.*, No. 08-2087-JWL, 2008 WL 4198514, at \*1 (D. Kan. Sept. 12, 2008) (finding that the statute protects some FRA forms and reports from discovery, but not others); *Winslow v. Mont. Rail Link, Inc.*, No. CDV-1997-552, 2003 WL 25656787 (D. Ct. Mont. Apr. 11, 2003) (holding that an “FRA report should have been produced because it indicated to MRL management that employees may be concerned about the policies and procedures” it uses to terminate injured employees, but not requiring the production of other FRA reports).

<sup>98</sup> E.g., *Bennett v. CSX Transp., Inc.*, Civil Action No. 1:05-CV-839-JEC, 2006 WL 5249702, at \*12 (N.D. Ga. Sept. 19, 2006) (assuming that the parties agree that Section 20903 precludes discovering all incident reports prepared for or submitted to FRA); *Stallings v. Union Pac. R. Co.*, No. 01 C 1056, 2003 WL 21317297, at \*10 (N.D. Ill. June 6, 2003) (same.).

General concluded that Section 20903 is a narrow rule that only acts as a bar against admission into evidence and not as an exemption from discovery.<sup>99</sup> The Texas Attorney General opinion compared Section 20903 to a prior Federal statute with identical language that courts had interpreted as not limiting discovery, until Congress amended that statute to make its applicability to discovery clear.<sup>100</sup>

Even with respect to the use of a report as evidence, there are still interpretive issues about the scope of Section 20903. For example, with an interpretation of Section 20903 to prohibit *any* use of a report in litigation, one court held that a report may not be used either as evidence in a case-in-chief or for impeachment purposes.<sup>101</sup> Similarly, another court held that a litigant may not circumvent Section 20903 by having an expert read an official accident report and then testify as to his opinion of what caused the accident.<sup>102</sup> Other courts, however, have interpreted Section 20903 narrowly and have limited its application to occasions when a litigant is attempting to use a report directly as evidence. For example, one court has held that, where a railroad cited a protected report in its discovery response, the report could be read aloud to the

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<sup>99</sup> Op. Tex. Att’y Gen. OR2006-01052, 2006 WL 332197 (2006) (“[T]he language in section 20903 does not clearly bar the information from discovery; it merely bars the information from being used as evidence.”).

<sup>100</sup> *Id.* (citing 23 U.S.C. § 409).

<sup>101</sup> *Adamy v. S. Buffalo Ry. Co.*, 742 N.Y.S.2d 459, 461 (N.Y. App. Div. 2002) (reversing and holding that a trial court had no discretion not to exclude a monthly report during a civil action for damages, even though the report was only used to impeach the credibility of the employee who prepared the report, where the report was not used as evidence proving a claim).

<sup>102</sup> *Vigil v. Burlington N. & Santa Fe Ry. Co.*, 521 F. Supp. 2d 1185, 1208–09 (D.N.M. 2007) (holding that to the extent an expert relied upon the reports in forming his opinion, his opinions are inadmissible).

jury, even though the report was not admissible into evidence.<sup>103</sup> Similarly, a court has held that testimony given to government investigators during an official government investigation may be used at trial for impeachment purposes.<sup>104</sup> Further, other courts have held that Section 20903 does not prevent official investigators of railroad accidents from testifying about what they saw, even though they were only at the scene to prepare an accident report.<sup>105</sup> Finally, at least one court has held that any report not actually filed with FRA, such as a railroad’s internal injury report form, does not fall under Section 20903.<sup>106</sup>

## **2. FRA — Locomotive and Tender Failures Reporting Program**

FRA requires a railroad carrier to submit certain safety-related information whenever one of its locomotives or tenders fails and causes “an accident or incident causing serious personal injury or death.”<sup>107</sup> The carrier must also preserve the accident site to the extent possible and immediately file with FRA “a written statement of the fact of the accident or incident.”<sup>108</sup>

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<sup>103</sup> *Torchia v. Burlington N., Inc.*, 568 P.2d 558, 566–67 (Mont. 1977) (finding no prejudicial error where counsel read the report aloud verbatim, as well as an interrogatory referring to the report, when the jury was not informed of that the statements came from an accident report or from official FRA findings, and when the defendant railroad prompted the use of the reports through its answer to the interrogatory).

<sup>104</sup> *Yanich v. Pa. R.R. Co.*, 192 F. Supp. 373, 375–77 (E.D.N.Y. 1961) (holding that the prior inconsistent testimony of a witness made to the government, while it was investigating the accident in order to prepare an investigative report, may be used at trial to impeach that witness or to refresh the witness’s recollection).

<sup>105</sup> *E.g., Gerow v. Seaboard Air Line Ry. Co.*, 123 S.E. 473, 473–74 (N.C. 1924); *Hines v. Kelley*, 252 S.W. 1033, 1037 (Tex. Comm’n App. 1923).

<sup>106</sup> *Villa v. Burlington N. & Santa Fe Ry. Co.*, 397 F.3d 1041, 1047 (8th Cir. 2005) (holding that Section 20903 only applies to reports actually filed with FRA and noting that it is a “narrow statutory privilege”).

<sup>107</sup> 49 U.S.C. § 20703(a); 49 C.F.R. §§ 229.17, 230.22.

<sup>108</sup> 49 U.S.C. § 20703(a)(1)-(2).

FRA has the authority to investigate each accident or incident, including inspecting all physical evidence. FRA then may exercise its authority to “make a complete and detailed report on the cause of the accident or incident.”<sup>109</sup> Although FRA may publish its accident investigation report, “[n]o part of [that] report may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.”<sup>110</sup> It appears that there are no reported court decisions interpreting this statutory provision.

### **3. FRA — Signal Systems Safety Program**

Pursuant to 49 U.S.C. § 20502(a), FRA may, after an investigation, “order a railroad carrier to install, on any part of its railroad line, a signal system that complies with requirements of the Secretary.”<sup>111</sup> Section 20502(a)(i) also provides that—

A railroad carrier ordered under paragraph (1) of this subsection to install a signal system on one part of its railroad line may not be held negligent for not installing the system on any part of its line that was not included in the order. If an accident or incident occurs on a part of the line on which the signal system was not required to be installed and was not installed, the use of the system on another part of the line may not be considered in a civil action brought because of the accident or incident.<sup>112</sup>

It appears that there have been no reported judicial decisions interpreting this provision.

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<sup>109</sup> *Id.* § 20703(b).

<sup>110</sup> *Id.* § 20703(c).

<sup>111</sup> *Id.* § 20502(a)(1).

<sup>112</sup> *Id.* § 20502(a)(2).

#### 4. *Federal Aviation Administration — Airport Noise Compatibility Programs*

The Airport Safety and Noise Abatement Act of 1979 (“ASNAA”) established a system to encourage the use of local land use planning to control airport noise.<sup>113</sup> Under ASNAA, an airport operator may voluntarily submit to DOT a noise exposure map showing the area and land uses around the airport, as well as an estimate of future aircraft operations and the effect of aircraft operations on local land use.<sup>114</sup> The map must be prepared in consultation with local authorities and members of the public.<sup>115</sup> Once an airport operator has submitted a noise exposure map to the Federal Aviation Administration (“FAA”), the operator may also submit for approval a noise compatibility plan setting forth measures to control noise, such as acquiring land near the airport, building noise barriers, or restricting the types of aircraft authorized to use the airport.<sup>116</sup>

Although the program is voluntary, airport operators have two main incentives to participate. First, “after a noise compatibility program is approved by [DOT], the airport becomes eligible for grants to carry out noise-related projects.”<sup>117</sup> Second, airport operators may reduce their liability for noise-related damages when they submit a noise exposure map because ASNAA limits recovery of noise-related damages by local property owners.<sup>118</sup>

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<sup>113</sup> Airport Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50; *see* 14 C.F.R. Pt. 150 (ASNAA’s implementing regulations). *See generally* 9A Philip Weinberg, et al., N.Y. PRAC., ENVIRONMENTAL LAW & REGULATION IN NEW YORK § 17:51–52.

<sup>114</sup> 49 U.S.C. § 47503.

<sup>115</sup> *Id.* § 47504(a).

<sup>116</sup> *Id.*

<sup>117</sup> Weinberg, *supra* note 113 at § 17:51 (citing 49 U.S.C. §§ 47504(c) and 48103).

<sup>118</sup> 49 U.S.C. § 47506; 14 C.F.R. § 150.21(f) to (g).

Under 49 U.S.C. § 47507 (“Section 47507”), ASNAA also protects noise maps from use in litigation.

No part of a noise exposure map or related information . . . submitted to, or prepared by, the Secretary of Transportation and no part of a list of land uses the Secretary identifies as normally compatible with various exposures of individuals to noise may be admitted into evidence or used for any other purpose in a civil action asking for relief for noise resulting from the operation of an airport.<sup>119</sup>

The constitutionality of this provision, as applied in State courts, has been upheld in at least one State court.<sup>120</sup> However, the text of the statute may be subject to competing interpretations.

### **5. Federal Motor Carrier Safety Administration — Accident Reporting Program**

Under 49 U.S.C. § 504(b) (“Section 504(b)”), the Federal Motor Carrier Safety Administration (“FMCSA”) may require motor carriers, lessors, associations, and those “furnishing cars or protective service against heat or cold to a rail carrier” to file reports answering the FMCSA’s questions about their operations.<sup>121</sup> Accident reports filed under this section may not be used in litigation—

No part of a report of an accident occurring in operations of a motor carrier, motor carrier of migrant workers, or motor private carrier and required by the [FMCSA], and no part of a report of an investigation of the accident made by the [FMCSA], may be

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<sup>119</sup> 49 U.S.C. § 47507.

<sup>120</sup> *City of Atlanta v. Watson*, 475 S.E.2d 896, 902-04 (Ga. 1996) (holding that the Supremacy Clause of the U.S. Constitution obligates the States to apply Section 47507 and therefore that the trial court properly excluded from evidence a guideline chart prepared as part of an ASNAA noise exposure map and collecting cases of other State courts that have upheld Federal laws excluding reports from admission in evidence in State courts).

<sup>121</sup> 49 U.S.C. § 504(b). The Secretary had previously delegated authority to implement Section 504 to the FHWA before that section came under the jurisdiction of the FMCSA. *See Airtrans, Inc., v. Mead*, 389 F.3d 594, 599 (6th Cir. 2004); 49 C.F.R. § 1.73.

admitted into evidence or used in a civil action for damages related to a matter mentioned in the report or investigation.<sup>122</sup>

Interpreting a prior version of Section 504, one court has explained that this section constitutes a “flat prohibition” on the use of an accident report in evidence, even if the person seeking to introduce the report is a defendant carrier who made the report, and not an injured plaintiff.<sup>123</sup>

A few courts have considered the scope of Section 504 and its effect on the discoverability of accident reports in civil actions. Although a Federal court, in *dicta*, stated that Section 504(f) is purely a rule against the admission of a document into evidence and that all reports were discoverable, that decision was reversed on appeal.<sup>124</sup> One State court held that an investigation or report made in compliance with Section 504(f) was not discoverable.<sup>125</sup> The most recent court to decide a discovery dispute held that Section 504(f) created a privilege against discovery, but distinguished between documents actually required or created by FMCSA, which fall under Section 504(f), and documents created or collected to comply with FMCSA requirements, which it held were beyond the scope of Section 504(f).<sup>126</sup> As with other programs

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<sup>122</sup> 49 U.S.C. § 504(f).

<sup>123</sup> *Blankenship v. Gen. Motors Corp.*, 428 F.2d 1006, 1007–09 (1970) (considering a report prepared for the Interstate Commerce Commission under 49 U.S.C. § 320(f) and rejecting the argument that the statute was a limited privilege, which only the carrier could invoke); *see also LaChance v. Serv. Trucking Co., Inc.*, 215 F. Supp. 159 (D. Md. 1963) (applying the privilege).

<sup>124</sup> *Adcox v. Medtronic, Inc.*, 131 F. Supp. 2d 1070, 1075 & n.5 (E.D. Ark. 1999). The Eighth Circuit subsequently issued a writ of mandamus vacating the district court’s decision. *In re Medtronic, Inc.*, 184 F.3d 807, 811 (8th Cir. 1999).

<sup>125</sup> *Tyson v. Old Dominion Freight Line, Inc.*, 608 S.E.2d 266, 269 (Ga. Ct. App. 2004).

<sup>126</sup> *Sajda v. Brewton*, 265 F.R.D. 334, 340–41 (N.D. Ind. 2009) (holding that the FMCSA Accident Register was not discoverable, but permitting discovery of a company’s accident report and computer template used to compile information made for the FMCSA accident report).

prohibiting the “use” of information in litigation, the text of the statute may be subject to competing interpretations.

#### **6. *Food and Drug Administration — Medical Adverse Event Reports***

When individuals experience a problem with a medical device, they may submit a medical device report to the Food and Drug Administration (“FDA”), and in some cases, such reports are required. Congress has provided that no such reports—

shall be admissible into evidence or otherwise used in any civil action involving private parties unless the facility, individual, or physician who made the report had knowledge of the falsity of the information contained in the report.<sup>127</sup>

By “providing some protections for those persons and entities doing the reporting,” Congress “intended to encourage full reporting by device users.”<sup>128</sup>

This section does not allow for protected information to be used by any individual in civil litigation. However, courts have disagreed over the scope of this provision. One court has held that this protection does not apply in all civil litigation, but instead only applies in litigation brought against the maker of the report.<sup>129</sup> Under this reading of the statute, this protection would not apply in a suit by a patient against the manufacturer of the device that is the subject of the report.<sup>130</sup> Another court, without discussion, has reached the opposite conclusion, holding that this section protected the manufacturer from having to produce medical adverse reports in

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<sup>127</sup> 21 U.S.C. § 360i(b) (“Section 360i(b)”).

<sup>128</sup> H.R. Rep. No. 101-808, at 22–23, 1990 U.S.C.C.A.N. 6305, 631-6315.

<sup>129</sup> *Contratto v. Ethicon, Inc.*, 225 F.R.D. 593, 596–97 (N.D. Cal. 2004).

<sup>130</sup> *Id.* (explaining that if Section 360i(b) were applicable in suits brought by patients against manufacturers it would produce the absurd result of allowing plaintiffs to discover only false reports).

discovery.<sup>131</sup> Again, a prohibition on the “use” of documents may result in differing interpretations of the statute.

### **7. National Transportation Safety Board — Accident Reports**

The National Transportation Safety Board (“NTSB”) “is a uniquely independent Federal agency responsible for investigating [transportation] accidents, determining the probable cause of accidents, and making recommendations to help protect against future accidents.”<sup>132</sup> With respect to reports prepared by the NTSB, Congress has provided that—

[n]o part of a report of the Board, related to an accident or an investigation of an accident, may be admitted into evidence or used in a civil action for damages resulting from a matter mentioned in the report.<sup>133</sup>

The purpose of the protection is to ensure a full and frank disclosure of the cause of an accident in order to help prevent future accidents.<sup>134</sup> Congress also sought to keep the NTSB from becoming embroiled in private litigation.<sup>135</sup> For the same reason, NTSB employees are prohibited from testifying in any matter absent advance approval by the General Counsel.<sup>136</sup>

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<sup>131</sup> *In re Medtronic, Inc.*, 184 F.3d 807, 811 (8th Cir. 1999) (concluding without analysis that Section 360i(b) precluded production).

<sup>132</sup> *Chiron Corp. v. NTSB*, 198 F.3d 935, 937 (D.C. Cir. 1999).

<sup>133</sup> 49 U.S.C. § 1154(b).

<sup>134</sup> *Berguideo v. Eastern Air Lines, Inc.*, 317 F.2d 628, 631 (3d Cir. 1963).

<sup>135</sup> 49 C.F.R. § 835.3(a) (citing Rep. No. 93-1192, 93d Cong., 2d Sess., 44 (1974)).

<sup>136</sup> *Id.* § 835.3(f).

Like other statutes in this category, this statute does not allow the use of NTSB reports in civil litigation. One court has held that, to the extent an investigator creates his own factual report, that report would not be an NTSB report and may therefore be admissible.<sup>137</sup>

**C. Statutes Prohibiting the Admissibility of Information But Permitting Discovery**

The third category of programs includes those that prohibit the admission of information into evidence but clearly do not limit the discoverability of the information during litigation. Two such programs exist: (1) the Nuclear Regulatory Commission's incident reporting program and (2) the Department of Labor's injury reporting program. These programs are situations where Congress deemed that it was in the public interest to protect submitted information from admission in evidence in civil litigation, but did not protect the information from civil discovery.

**1. *Nuclear Regulatory Commission — Incident Reports***

The Nuclear Regulatory Commission is authorized to issue licenses to persons for the transfer, production, use, and possession of nuclear materials.<sup>138</sup> In 42 U.S.C. § 2240, Congress provided that: "No report by any licensee of any incident arising out of or in connection with a licensed activity made pursuant to any requirement of the Commission shall be admitted as evidence in any suit or action for damages growing out of any matter mentioned in such report."<sup>139</sup>

The Nuclear Regulatory Commission's Atomic Safety and Licensing Appeal Board has interpreted the statute narrowly, stating—

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<sup>137</sup> *Chiron Corp.*, 198 F.3d at 940.

<sup>138</sup> *See* 42 U.S.C. §§ 2133, 2134.

<sup>139</sup> *Id.* § 2240.

the use limitations in Section 190 are strictly limited to particular reports submitted to the Commission and (as the applicants concede) would restrict neither (1) an individual's rights informally to request or formally to discover information and data possessed by the applicants (as licensees) concerning the offsite consequences of an accident; nor (2) his use of that information and data. In other words, while the use of the report itself may be circumscribed by Section 190, the use of the information and data undergirding the report is not.<sup>140</sup>

Despite this statutory privilege, therefore, it is possible for affected individuals to obtain the information compiled in the report and to use the information in litigation.

## **2. Department of Labor — Injury Reports**

Under the Longshore and Harbor Workers' Compensation Act, employers must file reports with the Department of Labor within ten days from the date of certain injuries.<sup>141</sup> A report must include the cause and nature of the injury.<sup>142</sup> Congress has provided that: "Any report provided for in subsection (a) or (b) of this section shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made."<sup>143</sup> As the Second Circuit commented, "It is rather clear that the purpose of these provisions . . . was to encourage full reporting and investigation by freeing the carrier from the risk that its statements could be used as admissions."<sup>144</sup> However, the statute does not address the discoverability of information in civil litigation.

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<sup>140</sup> *In re Metro. Edison Co. (Three Mile Island Nuclear Station, Unit No. 2)*, 8 N.R.C. 9, 25 (July 19, 1978).

<sup>141</sup> 33 U.S.C. § 930(a).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* § 930(c).

<sup>144</sup> *Taylor v. Baltimore & O. R. Co.*, 344 F.2d 281 (2d Cir. 1965).

## V. SUMMARY OF PUBLIC COMMENTS

In May 2011, FRA published a Notice and Request for Public Comment seeking public comments on—

whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or use in litigation in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under the RSIA, including a railroad carrier’s analysis of its safety risks and its statement of the mitigation measures with which it will address those risks.<sup>145</sup>

FRA received twenty-two comments representing the views of over twenty-five affected entities, organizations, and individuals, including “railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public.”<sup>146</sup> This Part describes the positions of the commenters in support of and in opposition to a regulation that would protect railroad safety risk reduction program information from discovery and admission into evidence in civil litigation.

### A. Comments in Support

The majority of the comments were submitted by local, regional, and national railroad carriers. These comments support protecting documents created for railroad safety risk reduction programs from discovery and admission into evidence in civil litigation.

The railroad carriers argue that such a regulation would serve the public interest by promoting “candor in preparing complete risk assessments,” which in turn would “reduc[e]

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<sup>145</sup> Study on Protection of Certain Railroad Risk Reduction Data From Discovery or Use in Litigation, 76 Fed. Reg. 26682, 26682 (May 9, 2011).

<sup>146</sup> See 49 U.S.C. § 20119(a).

accidents and increas[e] railway safety.”<sup>147</sup> The commenters expressed concern that allowing discovery or admission into evidence of this information would create a “chilling effect on railroads’ efforts to produce comprehensive safety reports” because railroad operations “carry some inherent level of risk.”<sup>148</sup> They state that it “would not be in the best interest of the public” for railroads to approach “safety concerns with a defensive mindset that will be more favorable to them in the event of litigation.”<sup>149</sup> Confidentiality, they argue, is “essential to the free flow of information” and would encourage “open communication” between the railroads and FRA.<sup>150</sup> Conversely, “allow[ing] individual juries and courts to second-guess the FRA-reviewed and approved safety analysis at individual railroads” would “lead to fragmented and inconsistent safety practices across the country.”<sup>151</sup> Moreover, several railroads state that it would be unfair

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<sup>147</sup> Comments of Southern California Regional Rail Authority, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0010, at 1 (hereinafter “Metrolink”); *see also* Comments of Lone Star Rail District, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0009 (hereinafter “Lone Star”); Comments of Los Angeles County Metro. Transp. Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0028 (hereinafter “LACMTA”); Comments of Nat’l R.R. Passenger Corp., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0021, at 4 (hereinafter “Amtrak”); Comments of Port Auth. Trans-Hudson Corp., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0017 (hereinafter “PATH”); Comments of Utah Transit Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0029 (hereinafter “UTA”).

<sup>148</sup> PATH, *supra* note 147.

<sup>149</sup> PATH, *supra* note 147; *see also* Amtrak, *supra* note 147, at 4; Comments of Am. Public Transp. Ass’n, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0018, at 2 (hereinafter “APTA”); Comments of Ass’n of Am. R.Rs., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0018, at 4 (hereinafter “AAR”); Comments of Iowa Interstate R.R., Ltd., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0019, at 3 (hereinafter “IAISRR”); Comments of NYS Metro. Transp. Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0030, at 1 (hereinafter “NYSMTA”); Comments of Se. Pa. Transp. Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0023 (hereinafter “SEPTA”).

<sup>150</sup> Amtrak, *supra* note 147, at 4.

<sup>151</sup> APTA, *supra* note 149, at 2.

“to insist that a railroad engage in these candid and forthright risk assessments and then permit it to be punished through disclosure and misuse of the assessments within the context of” litigation.<sup>152</sup> Several railroad operators also suggest that protecting this data from discovery would help ensure that terrorists could not use it to exploit weaknesses in railroad operations.<sup>153</sup>

Because such a regulation would be “limited and narrowly drawn,”<sup>154</sup> the railroads do not believe that the protection would impair the legal rights of potential litigants. They note that “[a]ll existing discovery and investigative methods utilized by injured parties to document the particular facts of their case will still be available and will be unaffected by” adoption of their proposed protection.<sup>155</sup> Further, “[t]he only restriction that would be placed on plaintiffs is denying the opportunity to bolster their case by using material generated pursuant” to the railroad safety risk reduction program, which is material that “would not even exist” but for the statutory mandate.<sup>156</sup>

In support, the railroads cite several existing statutes that provide protections similar to those under consideration here. Chief among these is 23 U.S.C. § 409, which established a

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<sup>152</sup> Amtrak, *supra* note 147, at 4; Comments of Am. Short Line & Reg’l R.R. Ass’n 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0011, at 6 (hereinafter “ASLRRA”); IAISRR, *supra* note 149, at 3; *see also* APTA, *supra* note 149, at 2; Comments of Denton County Transp. Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0027 (hereinafter “DCTA”).

<sup>153</sup> *See* Amtrak, *supra* note 147, at 4; DCTA, *supra* note 152; NYSMTA, *supra* note 149, at 2–3; Comments of Tom Jasien, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0015 (hereinafter “Houston Metro”).

<sup>154</sup> NYSMTA, *supra* note 149, at 3; *see also* ASLRRA, *supra* note 152, at 8.

<sup>155</sup> LACMTA, *supra* note 147; *see also* AAR, *supra* note 149, at 13; Amtrak, *supra* note 147, at 5–6; ASLRRA, *supra* note 152, at 7–8; IAISRR, *supra* note 149, at 3–4; Metrolink, *supra* note 147, at 1.

<sup>156</sup> AAR, *supra* note 149, at 13.

statutory framework for the FHWA that the railroads state “recogniz[es] the public interest in promoting candid risk assessment plans” by “prohibiting at trial use of any data or documentation used to prepared the risk assessment reports.”<sup>157</sup> The carriers also cite “similar prohibitions” under other DOT programs, including the Locomotive and Tender Failures Reporting Program under 49 U.S.C. § 20703(b) and the Signal Systems Safety Program under 49 U.S.C. § 20502, “as well as accident investigation reports prepared by the National Transportation Safety Board, marine casualty reports from the U.S. Coast Guard, and medical device reports submitted to the Federal Drug Administration.”<sup>158</sup> The railroads finally cite the self-critical analysis privilege, adopted in some jurisdictions, as further support for protecting railroad safety risk reduction program data from discovery and use in litigation.<sup>159</sup>

The railroads make several recommendations that they say are necessary to ensure that a future regulation is effective. First, they urge that the regulation include an unambiguous preemption of State laws, including State sunshine laws.<sup>160</sup> Second, they request that protection extend to railroad safety risk reduction program information in the custody of Federal agencies

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<sup>157</sup> LACMTA, *supra* note 147; *see also* AAR, *supra* note 149, at 6–10; DCTA, *supra* note 152; Metrolink, *supra* note 147, at 2; NYSMTA, *supra* note 149, at 2.

<sup>158</sup> NYSMTA, *supra* note 149, at 2; *see also* AAR, *supra* note 149, at 4–6.

<sup>159</sup> *See* AAR, *supra* note 149, at 11–12; ASLRRRA, *supra* note 152, at 9; UTA, *supra* note 147.

<sup>160</sup> APTA, *supra* note 149, at 2; DCTA, *supra* note 152; Comments of Greater Cleveland Reg’l Transit Auth., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0016 (hereinafter “RTA”); Lone Star, *supra* note 147; Metrolink, *supra* note 147, at 2; NYSMTA, *supra* note 149, at 3; PATH, *supra* note 147; Comments of Reg’l Transp. District, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0022, at 2 (hereinafter “RTD”); SEPTA, *supra* note 149; UTA, *supra* note 147.

and third parties.<sup>161</sup> Third, they ask that any court decision ordering disclosure of railroad safety risk reduction program information constitute a final, appealable order.<sup>162</sup> Finally, they recommend that a regulation be “broad and unambiguous,” to avoid protracted litigation over its applicability and meaning<sup>163</sup> (though one carrier also recommended “limited discovery” of “FRA officials [involved in] approving and monitoring the [railroad safety risk reduction] plans to prevent the miscarriage of justice”).<sup>164</sup>

## **B. Comments in Opposition**

In contrast, the comments submitted by employee labor organizations, plaintiffs’ attorneys commenting on behalf of injured workers and passengers, and organizations supporting consumer protection and victims’ rights generally oppose a regulation that would shield safety risk reduction program information from discovery and admission into evidence.<sup>165</sup> They

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<sup>161</sup> APTA, *supra* note 149, at 2; DCTA, *supra* note 152; Houston Metro, *supra* note 153; Lone Star, *supra* note 147; Metrolink, *supra* note 147, at 2; NYSTMATA, *supra* note 149, at 3; PATH, *supra* note 147; RTA, *supra* note 160; RTD, *supra* note 160, at 2.

<sup>162</sup> APTA, *supra* note 149, at 2; RTA, *supra* note 160.

<sup>163</sup> APTA, *supra* note 149, at 2; DCTA, *supra* note 152; Lone Star, *supra* note 147; Metrolink, *supra* note 149, at 2; NYSTMATA, *supra* note 149, at 3; PATH, *supra* note 147; RTA, *supra* note 160; RTD, *supra* note 160, at 2.

<sup>164</sup> Metrolink, *supra* note 147, at 2.

<sup>165</sup> See Comments of Am. Ass’n for Justice, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0013, at 1 (hereinafter “AAJ”); Comments of Am. Train Dispatchers Ass’n, Bhd. of Locomotive Eng’rs & Trainmen, Bhd. of Maint. of Way Employees Div., Bhd. of R.R. Signalmen, and Transp. Workers Union of Am., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0021, at 7–8 (hereinafter “Rail Labor Orgs.”); Comments of Pamela Rymer O’Dwyer, Orion’s Angels of Tenn., 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0025, at 2 (hereinafter “Orion’s Angels”); Comments of Paul T. Hofmann, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0007 (hereinafter “Hofmann & Schweitzer”); Comments of Public Citizen, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0020, at 2 (hereinafter “Public Citizen”); Comments of Robert A. Scardelletti, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0012, at 2 (hereinafter “TCU/IAM”);

explain (1) that the burden of showing a defendant railroad has violated a standard of care to the plaintiff falls on the plaintiff and (2) that safety information is important to establishing whether the railroad met that standard.<sup>166</sup>

Generally, these commenters argue that FRA should ensure that plaintiffs are not “worse off than they would have been had the Federal program never existed,” and express concern that “the quantum of evidence currently available to litigants” would be “reduced by any RSIA changes.”<sup>167</sup> They predict that “limiting or eliminating disclosure of safety documents would severely restrict pre-trial discovery,” resulting in “many meritorious claims” never being fully heard.<sup>168</sup> To allow “blanket immunity for all privileged information from discovery,” they argue, would “seriously compromise the capacity” of safety and compensation laws, such as “FELA litigation, crossing cases, and State law negligence actions,” to “function effectively.”<sup>169</sup> To allow the railroads to withhold data would create “a one-way system,” in which a railroad defendant may choose to use railroad safety risk reduction program information when beneficial to its defense but in which “the injured plaintiff cannot access the information when it is helpful to prove his or her case.”<sup>170</sup>

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Comments of United Transportation Union, 76 Fed. Reg. 26682 (May 9, 2011), Docket No. FRA-2011-0025-0024, at 2 (hereinafter “UTU”);

<sup>166</sup> See, e.g., Public Citizen, *supra* note 165, at 2.

<sup>167</sup> Rail Labor Orgs., *supra* note 165, at 12.

<sup>168</sup> AAJ, *supra* note 165, at 3; see also Hofmann & Schweitzer, *supra* note 165; Rail Labor Orgs., *supra* note 165, at 12; UTU, *supra* note 165, at 3.

<sup>169</sup> See Rail Labor Orgs., *supra* note 165, at 9–10.

<sup>170</sup> Public Citizen, *supra* note 165, at 2; see also Orion’s Angels, *supra* note 165, at 1–2; Rail Labor Orgs., *supra* note 165, at 6–7; UTU, *supra* note 165, at 2–3.

These commenters believe that the existing law already strikes the appropriate balance in “generally presum[ing] that railroad safety documents are available to the public,” and that it is “often in the public interest to have corporate safety data available to scrutiny.”<sup>171</sup> Several commenters assert that allowing the railroads to exclude certain data from discovery would “conflict with the President’s emphasis on transparency in government.”<sup>172</sup> One commenter cites a 1989 GAO report finding “that railroads systematically under-reported accident and injury data” and notes that this under-reporting was an impetus for Congress “to update whistleblower protections for rail employees” in 49 U.S.C. § 20109 in 2007 and 2008.<sup>173</sup> Another comment describes a particular case involving an accident victim and concludes from that victim’s experience that “the ability to hide the evidence removed the incentive for the railroad to correct” a safety hazard.<sup>174</sup>

These groups also state that discovery would create “a strong incentive” for railroads to closely follow their risk reduction plans and take “all appropriate precautions to prevent accidents.”<sup>175</sup> One labor organization comments that a railroad’s “potential liability will be different” when “the evidence demonstrates that an accident happened in spite of [the railroad’s] best efforts to avoid it” compared to when “the evidence reveals that an accident occurred which [the railroad] knew could have been avoided.”<sup>176</sup>

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<sup>171</sup> Rail Labor Orgs., *supra* note 165, at 4, *et seq.*

<sup>172</sup> UTU, *supra* note 165, at 2; *see also* AAJ, *supra* note 165, at 3; Orion’s Angels, *supra* note 165, at 2.

<sup>173</sup> AAJ, *supra* note 165, at 4.

<sup>174</sup> Orion’s Angels, *supra* note 165, at 1–2.

<sup>175</sup> TCU/IAM, *supra* note 165, at 2; *see also* Orion’s Angels, *supra* note 165, at 2.

<sup>176</sup> TCU/IAM, *supra* note 165, at 2.

In support of their arguments, the commenters opposing a rule identify several statutes and procedural rules that they believe strike the appropriate balance. First, they argue, the Freedom of Information Act sometimes grants disclosure of safety-related information and does “not create a restriction on the use of documents as evidence in adjudications or impact discovery of documents that are held by the railroads.”<sup>177</sup> Second, they cite Rules 403 and 407 of the Federal Rules of Evidence as sufficient protection for railroads because the former “provides that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” and the latter “provides that subsequent safety measures are not admissible to prove negligence or culpability.”<sup>178</sup> Third, they suggest that Federal Employers’ Liability Act (FELA) cases provide an example of how “[b]road discovery of corporate safety documents can be an effective solution” because FELA creates both an enforcement scheme “compelling specific safety devices and reforms” as well as “a civil cause of action for injured rail workers.”<sup>179</sup> Fourth, they suggest that 49 U.S.C. § 20903 strikes an appropriate balance because it “generally allows disclosure of [documents relating to accident and investigation reports], but prohibits admission of the railroad’s required report or FRA’s conclusions and opinions, in evidence.”<sup>180</sup> Fifth, they assert that “[t]he closest Federal program to the proposed FRA’s risk reduction rule is the FAA’s regulation requiring airports to adopt a

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<sup>177</sup> Rail Labor Orgs., *supra* note 165, at 5.

<sup>178</sup> UTU, *supra* note 165, at 2; *see also* Rail Labor Orgs., *supra* note 165, at 8 (identifying Fed. R. Evid. 407 as drawing the proper balance between disclosure and exclusion because it maintains “the public’s interest” in “the free flow of information” by excluding only “evidence of the subsequent measures” taken by the railroad following a rail accident).

<sup>179</sup> Rail Labor Orgs., *supra* note 165, at 8. The AAJ states that excluding risk reduction program data from discovery or use in litigation would “effectively” bar rail workers “from bringing FELA actions.” AAJ, *supra* note 165, at 3.

<sup>180</sup> Rail Labor Orgs., *supra* note 165, at 9.

safety management system,” which includes “no provisions prohibiting disclosure of information.”<sup>181</sup> Sixth, several groups believe that court decisions regarding the self-critical analysis privilege weigh against adoption of the proposed protection, explaining that some “courts are rejecting the so-called ‘self-critical analysis’ privilege as being an interference with truth seeking and fair play in litigation.”<sup>182</sup> In this regard, one commenter points out a decision of the U.S. District Court for the Southern District of New York rejecting the argument that “unless internal agency investigations are protected from public disclosure, those investigations will not be honest.”<sup>183</sup>

Further, several commenters raise issues regarding the legal validity of the kinds of protection under consideration. In particular, AAJ states that “it is beyond the authority of Congress to supervise state tort law or to require state courts to replace state law” and cites the *Erie* doctrine for the principle that Federal agencies lack “authority to prescribe the procedural rules state courts must apply during discovery and litigation.”<sup>184</sup>

These commenters also recommend: (1) that FRA properly consider the quantity of data that any new discovery protection would affect, and (2) that labor organizations be involved in helping to define the parameters of the ultimate rule.<sup>185</sup> Should FRA favor protection from discovery or admissibility, one commenter argues that any such protection should be narrow, so

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<sup>181</sup> UTU, *supra* note 165, at 2.

<sup>182</sup> Hofmann & Schweitzer, *supra* note 165; *see also* Rail Labor Orgs., *supra* note 165, at 11 (noting that the self-critical analysis doctrine has not “achieved wide acceptance”).

<sup>183</sup> *See* Hofmann & Schweitzer, *supra* note 165 (citing *Boyd v. New York*, 1987 WL 6915 (S.D.N.Y. 1987)).

<sup>184</sup> AAJ, *supra* note 165, at 2 & nn. 1–2. UTU also asserts without citation that the protection would be “in violation of Federal law.” UTU, *supra* note 165, at 2.

<sup>185</sup> *See* Rail Labor Orgs., *supra* note 165, at 14–16.

that “[a]ny shield should cover only information the disclosure of which would substantially detract from the effectiveness of the risk reduction program” because “[n]o other considerations justify protecting information from disclosure.”<sup>186</sup>

## **VI. ANALYSIS OF THE PUBLIC INTEREST CONSIDERATIONS**

This Part discusses the major public interest considerations in support of, and in opposition to, a regulation protecting railroad safety risk information from discovery or admission into evidence in civil litigation. First, Section A reviews FRA’s legal authority to adopt such a regulation. Section B examines the significant public interest considerations supporting and opposing such a regulation, addressing the major concerns expressed by some commenters. After reviewing the competing arguments, Section C discusses the balancing of interests.

### **A. FRA Has the Legal Authority to Adopt a Regulation in this Area.**

As a threshold matter, several commenters questioned whether FRA has the legal authority to adopt a regulation affecting the discoverability and admissibility of evidence in civil litigation. These commenters questioned (1) whether Congress has the power to authorize a regulation affecting State court procedures in this way, and (2) even if Congress has the power, whether Congress could lawfully delegate that power to FRA. In response to those concerns, this Section reviews the relevant constitutional provisions and case law, and concludes that FRA has the legal authority to adopt such a regulation.

#### **1. *The Commerce Clause Authorizes Congress to Enact Law on this Issue***

The Supreme Court has held that Congress has broad power to regulate transportation safety. In *Pierce County v. Guillen*, 537 U.S. 129, 144-46 (2003), the Court upheld as

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<sup>186</sup> Public Citizen, *supra* note 165, at 2.

constitutional an analogous statute, 23 U.S.C. § 409, which excluded from discovery or admission into evidence certain safety risk documents that State and local governments created to obtain funding under the FHWA’s Hazard Elimination Program.<sup>187</sup>

The Supreme Court held that Section 409 was a valid exercise of Congress’s powers under the Commerce Clause<sup>188</sup> because Congress has the authority to “regulate the use of the channels of interstate commerce.”<sup>189</sup> Congress may also “regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.”<sup>190</sup> Applying these principles, the Court found that Congress has the power to enact the Hazard Elimination Program and Section 409 because both are “aimed at improving safety in the channels of commerce and increasing protection for the instrumentalities of interstate commerce.”<sup>191</sup> The Court reasoned that—

Congress adopted § 152 [the Hazard Elimination Program] to assist State and local governments in reducing hazardous conditions in the Nation’s channels of commerce. That effort was impeded, however, by the States’ reluctance to comply fully with the requirements of § 152, as such compliance would make State and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions. In view of these circumstances, Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement of § 152 would result in more diligent efforts to collect the relevant information, more

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<sup>187</sup> *Pierce County v. Guillen*, 537 U.S. 129, 133 (2003); *see* 23 U.S.C. § 152(a)(1).

<sup>188</sup> U.S. Const., art. I, § 8.

<sup>189</sup> *Id.* (citations omitted).

<sup>190</sup> *Id.* at 146–47.

<sup>191</sup> *Id.*

candid discussions of hazardous locations, better informed decision-making, and, ultimately, greater safety on our Nation's roads.<sup>192</sup>

That same analysis would apply to a regulation protecting railroad safety risk information from discovery or admission into evidence in civil litigation.

## **2. Congress May Preempt State Law under the Supremacy Clause**

Under the Supremacy Clause,<sup>193</sup> Congress may exercise its Commerce Clause power to preempt State laws and procedures that conflict with Federal statutes and regulations. In that regard, the Supreme Court has held that Federal law preempts State laws where the State laws “stand as obstacles to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>194</sup> Accordingly, Congress may preempt State discovery rules or sunshine laws with respect to railroad safety risk reduction programs in order to further the objective of improving public safety.<sup>195</sup> Further, the Supreme Court has held that “Federal regulations have no less

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<sup>192</sup> *Id.* at 147.

<sup>193</sup> U.S. Const., art. IV, cl. 2.

<sup>194</sup> *Edgar v. Mite Corp.*, 457 U.S. 624, 635 (1982).

<sup>195</sup> One commenter suggests, however, that a regulation restricting information from discovery or admission into evidence in civil litigation in State courts would violate *Erie Railroad Company v. Tompkins*. See AAJ, *supra* note 165, at 2 (citing 304 U.S. 64, 78 (1938)). In *Erie*, the Supreme Court held that Federal courts did not have the power to create Federal common law in cases involving State law claims under diversity jurisdiction. 304 U.S. at 78. That holding has no bearing on whether Congress may by statute, or the FRA through rulemaking, preempt State discovery rules or sunshine laws in the furtherance of the objective of improving public safety through railroad safety risk reduction programs. AAJ also cites two other Supreme Court cases, *Howlett v. Rose*, 496 U.S. 356, 369–72 (1990) and *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 57–58 (1912), for the similar proposition that Federal law cannot preempt State procedural rules. However, in both *Howlett* and *Mondou*, the Court held only that State courts could not refuse to entertain Federal claims in State court. Both cases are concerned with questions of State court jurisdiction and do not address the interaction between State procedural rules and conflicting Federal law.

preemptive effect than Federal statutes,”<sup>196</sup> so long as the agency adopting the regulation is “acting within the scope of its congressionally delegated authority.”<sup>197</sup> In this case, Congress has enacted an express preemption provision that applies to railroad safety regulations issued by the Secretary through FRA.<sup>198</sup>

### **3. Congress May Delegate Regulatory Power to FRA**

Finally, Congress has the constitutional authority to grant rulemaking powers to an administrative agency, so long as Congress provides the agency with an intelligible principle to guide the rulemaking.<sup>199</sup> Congress has specifically authorized the Secretary of Transportation (through the FRA) to “prescribe regulations . . . for every area of railroad safety. . . .”<sup>200</sup> In this particular case, Congress set forth a detailed standard guiding both FRA’s study and any subsequent regulations. Specifically, Congress directed FRA to study–

[w]hether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under this chapter including a railroad carrier’s analysis of

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<sup>196</sup> *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

<sup>197</sup> *City of New York v. FCC*, 486 U.S. 57, 63 (1988) (quotation marks omitted).

<sup>198</sup> *See* 49 U.S.C. § 20106 (“Section 20106”).

<sup>199</sup> *E.g.*, *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928) (“So long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’”).

<sup>200</sup> *See generally id.* § 20103(a) (“The Secretary of Transportation, as necessary, shall prescribe regulations and issue orders for every area of railroad safety supplementing laws and regulations in effect on October 16, 1970.”).

its safety risks and its statement of the mitigation measures with which it will address those risks.<sup>201</sup>

Congress also specifically authorized FRA to “prescribe a rule subject to notice and comment to address the results of the study.”<sup>202</sup> Thus, Congress has lawfully authorized FRA to adopt a regulation governing the discovery or admission into evidence of railroad safety risk reduction program information.

## **B. The Public Interest Considerations**

To determine whether it would be in the public interest for FRA to promulgate a regulation protecting railroad safety risk information from discovery or admission into evidence in civil litigation involving claims for personal injuries or wrongful death, it is necessary to identify and balance the competing considerations that affect the public interest. In general, balancing those considerations involves weighing the broad public interest in promoting railroad safety and preventing accidents against the interests of individual accident victims in litigation.

### **1. *Considerations in Support of a Rule Limiting Discovery and Admissibility***

#### **a. *Considerations Relating to the Promotion of Effective Railroad Safety Risk Reduction Programs***

In support of a rule limiting the discovery and admissibility of railroad safety risk reduction program information, a number of commenters asserted that, absent such a rule, the public interest in effective railroad safety risk reduction programs would likely be impaired.<sup>203</sup>

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<sup>201</sup> 49 U.S.C. § 20119(a) (emphasis added).

<sup>202</sup> *Id.* § 20119(b).

<sup>203</sup> Some commenters also argued that FRA would be justified in adopting such a regulation to keep sensitive safety documents hidden from terrorists. However, to the extent that a railroad safety risk document implicates security concerns, (1) other administrative programs already exist to shield sensitive transportation security information in government custody from disclosure, including the Sensitive Security Information designation under 49 C.F.R. Pts. 15 and

Under the RSIA, FRA has a statutory duty to maximize railroad safety through the creation of effective railroad safety risk reduction programs. The RSIA recognized the important public safety interest that would be served by identifying and remedying safety risks. Railroad safety risk reduction programs may potentially benefit millions of Americans who ride, work with, or live near railroads.

According to some commenters, however, such safety programs cannot be successful if railroads do not provide a detailed, comprehensive, and honest assessment of their safety risks and their proposed remedial measures. Without including full and complete safety risk information, the railroads' safety plans may, for example, inaccurately identify safety priorities or fail to consider and address specific safety risks. As a result, the public has a strong interest in ensuring that railroads collect and include in their risk reduction programs the appropriate quality and quantity of safety risk information.

Litigation concerns may substantially discourage railroads from creating and submitting thorough, candid, and detailed railroad safety risk reduction programs. Because civil litigation can result in large awards of damages, the evidence admissible or discoverable in civil litigation can have a serious adverse financial effect on railroads, therefore giving railroads an incentive to avoid creating business documents that are likely to be used as evidence by accident victims. When railroads create railroad safety risk reduction programs under the regulations mandated by 49 U.S.C. § 20156, in which they detail their safety risks and plans to address those risks, those documents might be introduced as evidence in civil litigation regarding railroad accidents. The possibility of civil litigation would give railroads financial incentives to include as little safety information as possible, which would frustrate the intent of Congress in mandating railroad

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1520; and (2) judicial protective orders could be used to prohibit or restrict the disclosure or use of sensitive security information in litigation.

safety risk reduction programs in the RSIA. If risk reduction program information were protected from discovery or use in litigation, the disincentive for railroads to disclose safety information fully and candidly would be removed, thereby promoting the development of effective risk reduction programs.

Those factors support a conclusion that the broad public interest would be served by protecting railroad safety risk information from discovery or admission into evidence in civil litigation involving claims for personal injuries or wrongful death. As discussed above in Part IV, the history of Section 409 and Federal Highway Administration's Hazard Elimination Program shows that implementing a safety risk reduction program, while allowing the use of related documents in civil litigation, could prevent the program from obtaining the safety data it needs to be successful.<sup>204</sup> In the same way, Section 409's history supports the conclusion that a regulation prohibiting the discovery and admissibility of safety information would remove the main disincentive to compile, consider and submit complete safety information to FRA.

**b. Considerations Relating to Accident Victims' Discovery Rights**

The issue of the public interest in promoting railroad safety risk reduction programs extends to the discovery of railroad safety risk reduction program documents in litigation, as well as their admissibility into evidence. Courts generally permit broad discovery because discovery enables litigants to identify and obtain admissible evidence. Arguably, however, allowing the discovery of inadmissible information may not substantially contribute to the public interest, but could create uncertainty that would limit the creation of documents relating to safety information.

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<sup>204</sup> See *Pierce County v. Guillen*, 537 U.S. 129, 133 (2003); see also 23 U.S.C. § 152(a)(1).

Some commenters assert that prohibiting the discovery and admissibility of information created or compiled for the purpose of an FRA safety risk reduction program would not affect the admissibility or discovery of other safety-related documents. Information that is currently discoverable or admissible would remain available, which would leave plaintiffs with the same rights they would have had if Congress had not required railroad safety risk reduction programs. The need to discover safety risk information is reduced when that information is itself inadmissible and when other potentially relevant evidence remains available. In addition, a regulation that does not explicitly prohibit both the discovery and admissibility of safety-related information would likely be subject to repeated and costly litigation over its proper interpretation. Those arguments support the idea that, to achieve the full benefits resulting from railroad safety risk reduction programs, and to promote the public interest in clarity and certainty in regulatory requirements with the force of law, it would be in the public interest to prohibit discovery, as well as admissibility, of railroad safety documents compiled in connection with railroad safety risk reduction programs.

## ***2. Considerations Opposing a Rule Limiting Discoverability and Admissibility***

As described above, FRA received a number of comments opposing a regulation limiting discovery or admissibility of safety-related information. Having carefully reviewed all such comments, this subsection reviews the public interest considerations opposing a regulation.

### **a. Considerations Relating to Victims' Compensation**

Some commenters argued that accident victims would be disadvantaged by a regulation prohibiting the discovery and admissibility of railroad safety documents because the victims

would be unable to recover full damages for their injuries.<sup>205</sup> These commenters point out that the burden of showing that a railroad has violated a standard of care falls on the plaintiff, and that safety information can help establish whether the railroad met that standard.<sup>206</sup> The commenters note that affected accident victims may include both railroad employees, who may be less likely to prevail in a suit under FELA, as well as passengers and bystanders, whose claims of negligence under State law may be more difficult to prove.

According to other commenters, however, a regulation restricting the use of information compiled in connection with a future railroad safety risk reduction program would not take away any existing rights to information, and to the contrary, would continue to allow litigants to have access to all information that is currently available.<sup>207</sup> Previously available railroad safety documents would remain subject to discovery and admission into evidence in court. Accordingly, it appears unlikely that “the quantum of evidence currently available to litigants” would be “reduced by any RSIA changes” so that plaintiffs are “worse off than they would have been had the Federal program never existed.”<sup>208</sup> Further, the need for access to additional

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<sup>205</sup> AAJ, *supra* note 165, at 3; *see also* Hofmann & Schweitzer, *supra* note 165; Rail Labor Orgs., *supra* note 165, at 12; UTU, *supra* note 165, at 3; Rail Labor Orgs., *supra* note 165, at 9-10.

<sup>206</sup> *See, e.g., id.*

<sup>207</sup> *See* AAR, *supra* note 149, at 13; Amtrak, *supra* note 147, at 5–6; ASLRRRA, *supra* note 152, at 7–8; IAISRR, *supra* note 149, at 3–4; LACMTA, *supra* note 147; Metrolink, *supra* note 147, at 1.

<sup>208</sup> Rail Labor Orgs., *supra* note 165, at 12. One commenter also contends that the kind of regulation described in the statute would make it “almost impossible” for railroad workers “to prove negligence in a FELA case.” AAJ, *supra* note 165, at 3. However, as the Supreme Court recently noted in *CSX Transportation, Inc. v. McBride*, “in comparison to tort litigation at common law, ‘a relaxed standard of causation applies under FELA.’” 131 S. Ct. 2630, 2636 (2011) (quoting *Consol. Rail Corp. v. Gottshall* 512 U.S. 532, 542–43 (1994)). Therefore, it appears that a regulation limiting the use of railroad safety information would have no greater effect on railroad employees than on other litigants.

documents relating to FRA’s railroad safety risk reduction programs for use in individual litigation is counterbalanced by the concern that a limitation on the use of such documents is necessary to promote the broader public interest in candid railroad safety risk assessments. The comments of those in support of such a limitation indicate that the broad public interest benefits of successful railroad safety risk reduction programs would be concrete and immediate, while the potential need for individual litigants to use materials relating to railroad safety risk reduction programs to prove damage claims appears to be more speculative.

**b. Considerations Relating to the Necessity of a Regulation**

Some commenters believe that a regulation is unnecessary because the RSIA requires railroads to participate in FRA safety risk reduction programs, even without protections against the disclosure of program documents in litigation.<sup>209</sup> For example, some commenters point out that courts have frequently declined to adopt an analogous self-critical analysis privilege, and have rejected the idea that “unless internal agency investigations are protected from public disclosure, those investigations will not be honest.”<sup>210</sup> Likewise, some commenters argued that a broad regulation would defeat the ability to use other laws, like FOIA and the Federal Rules of Evidence, to ensure that railroads comply with FRA requirements.<sup>211</sup>

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<sup>209</sup> Rail Labor Orgs., *supra* note 165, at 8.

<sup>210</sup> See Hofmann & Schweitzer, *supra* note 165 (citing *Boyd v. New York*, 1987 WL 6915 (S.D.N.Y. 1987)); see also Rail Labor Orgs., *supra* note 165, at 11 (noting that the self-critical analysis doctrine has not “achieved wide acceptance”).

<sup>211</sup> UTU, *supra* note 165, at 2; see also Rail Labor Orgs., *supra* note 165, at 8 (identifying Fed. R. Evid. 407 as drawing the proper balance between disclosure and exclusion because it maintains “the public’s interest” in “the free flow of information” by excluding only “evidence of the subsequent measures” taken by the railroad following a rail accident). The Rail Labor Organizations similarly argue that allowing disclosure of such documents under FOIA would promote compliance on the railroads’ behalf. Rail Labor Orgs., *supra* note 165, at 5.

However, other commenters argue that some courts have adopted the self-critical analysis privilege, concluding that such a privilege encourages companies to identify and remedy internal problems.<sup>212</sup> One commenter cites a decision declining to apply the self-critical analysis privilege to a public employer and rejecting the argument that “unless internal agency investigations are protected from public disclosure, those investigations will not be honest.”<sup>213</sup> However, other courts have upheld the privilege in cases where there is a strong public interest in preserving “[c]andid and conscientious evaluation,” such as when the evaluation affects public safety.<sup>214</sup>

Some commenters also argued that protection of information relating to risk reduction programs is unnecessary in this context based on the fact that certain new and proposed FAA safety risk programs have no such protections.<sup>215</sup> The FAA is in the process of requiring regulated aviation entities to adopt safety management systems (“SMSs”).<sup>216</sup> In 2010, the FAA required airports to adopt SMSs, and the FAA is currently developing rules to require air carriers

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<sup>212</sup> See AAR, *supra* note 149, at 11–12; ASLRRRA, *supra* note 152, at 9; UTA, *supra* note 147.

<sup>213</sup> See Hofmann & Schweitzer, *supra* note 165 (citing *Boyd v. New York*, 1987 WL 6915 (S.D.N.Y. 1987)).

<sup>214</sup> *E.g.*, *Bredice v. Doctors Hosp. Inc.*, 50 F.R.D. 249, 250-51 (D.D.C. 1970) (granting the privilege to documents assembled by hospital staff to improve care and treatment of patients); *see also Zoom Imaging, L.P. v. St. Luke’s Hosp. & Health Network*, 513 F. Supp. 2d 411, 415 (E.D. Pa. 2007) (declining to impose the privilege but noting that “[s]ince *Bredice*, courts have applied the self-critical analysis privilege to protect information from discovery where the public interest in compliance with the law outweighs the need for discovery.”)

<sup>215</sup> UTU, *supra* note 165, at 2.

<sup>216</sup> *E.g.*, FAA, Notice of Proposed Rulemaking (“NPRM”), Safety Management Systems for Part 121 Certificate Holders, 75 Fed. Reg. 68,224 (Nov. 5, 2010); *see also* FAA, ANPRM, Safety Management System, 74 Fed. Reg. 36,414, 36,415 (July 23, 2009) (RIN: 2120-AJ15; Docket No. FAA-2009-0671).

to adopt SMSs.<sup>217</sup> The FAA has also stated that it intends to conduct a rulemaking proceeding requiring other regulated aviation product or service providers to develop SMSs.<sup>218</sup> The FAA's order requiring airports to create SMSs does not provide any protections against disclosure in connection with airport SMSs.<sup>219</sup> Similarly, the public notices regarding future SMS regulations did not propose confidential safety treatment for future SMSs.<sup>220</sup>

It appears, however, that FAA SMS programs are an imperfect basis for comparison with railroad safety risk reduction programs. SMS programs differ from FRA railroad safety risk reduction programs structurally because they do not involve submitting safety information to the Federal government. The SMS regulations, as proposed, do not require a regulated entity to submit an SMS plan to the FAA for approval.<sup>221</sup> Rather, the entity must simply compile necessary safety information, create an SMS plan, and then make its SMS plan available for inspection.<sup>222</sup> The FAA's SMS initiative thus is not a direct reporting program like FRA railroad safety risk reduction programs. The SMS regulations moreover assume that previously existing programs under Section 40123, in which safety information is voluntarily submitted to the FAA,

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<sup>217</sup> U.S. DOT, FAA Order 5200.11: FAA Airports (ARP) Safety Management System (effective Aug. 30, 2010).

<sup>218</sup> See 75 Fed. Reg. at 68,232; 74 Fed. Reg. 36,414; see also FAA, ANPRM; Withdrawal, Safety Management System; 76 Fed. Reg. 14,592 (Mar. 17, 2011) (withdrawing the broader SMS project to focus on the air carrier SMS program); *FAA Withdraws Safety Management System ANPRM*, Aviation Daily, Mar. 25, 2011 (quoting the manager of FAA Flight Standards SMS Program Office as stating that rulemaking adding SMS requirements to Part 135 (operators), Part 145 (repair stations), and Part 21 (aircraft design and manufacturing organizations) has been withdrawn).

<sup>219</sup> Order 5200.11.

<sup>220</sup> 74 Fed. Reg. 36,414; 76 Fed. Reg. at 14,592.

<sup>221</sup> 75 Fed. Reg. at 68,233.

<sup>222</sup> *Id.*

would continue side-by-side with SMS programs, and that safety information submitted in connection with those programs would remain confidential.<sup>223</sup>

Further, as discussed above, the *Guillen* decision supports the assertions of some commenters that absence of protection from discovery and admissibility is likely to discourage railroads from submitting thorough and candid safety plans to the FRA. This same issue has been raised and considered in connection with the FHWA's Hazard Elimination Program, and in that context, it has been determined that the broader public interest is best served by limiting the discovery and admissibility of safety-related information.<sup>224</sup>

### **c. Considerations Relating to Promoting Railroad Safety**

Some commenters believe that a regulation would reduce safety by eliminating litigants' ability to identify and penalize railroads responsible for accidents.<sup>225</sup> These commenters argue that by using these documents in litigation, plaintiffs could force railroads to put new safety measures in place, thereby holding railroads financially accountable for damages resulting from accidents and failed safety measures.<sup>226</sup> They argue further that if a litigant may discover a safety plan and introduce it into evidence, then the railroad would be motivated to ensure

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<sup>223</sup> The statute forbids the Administrator of the FAA from disclosing "voluntarily-provided safety or security related information" where either "(1) the disclosure of the information would inhibit the voluntary provision of that type of information and that the receipt of that type of information aids in fulfilling the Administrator's safety and security responsibilities" and "(2) withholding such information from disclosure would be consistent with the Administrator's safety and security responsibilities." 49 U.S.C. § 40123; *see also* 14 C.F.R. Pt. 193 (implementing protections for voluntarily provided safety- or security-related information submitted according to Section 40123).

<sup>224</sup> *Pierce County v. Guillen*, 537 U.S. 129, 133 (2003); *see* 23 U.S.C. § 152(a)(1).

<sup>225</sup> Orion's Angels, *supra* note 165, at 1–2.

<sup>226</sup> Rail Labor Orgs., *supra* note 165, at 8; AAJ, *supra* note 165, at 3.

compliance with that plan in the future.<sup>227</sup> In general, those commenters believe that a restriction on the use of safety-related documents would be detrimental to public safety because it may limit or weaken the ability of private litigants in individual suits for damages to use the courts to promote safety.<sup>228</sup>

As a conceptual matter, the issue raised by the commenters is whether the broad public interest is best served by uniformly promoting and reporting safety improvements through federal regulation, rather than forcing railroads to improve safety through the efforts of private litigants in the courts. Because FRA has the statutory duty and responsibility to approve and monitor railroad safety plans, and by law is responsible for protecting the public interest in railroad safety, the argument that private litigation is necessary to improve railroad safety carries less weight. While all efforts to improve railroad safety are helpful, FRA's federal regulation of railroad safety matters can provide a more uniform way to protect the public interest than potentially inconsistent safety enforcement through litigation.<sup>229</sup>

That concept of uniformity is central to the Federal regulation of railroad safety. In the area of rail safety, Congress has recognized the need for a uniform body of law to avoid the prospect of railroads having to comply with fifty different statutory schemes. To that end, in 49 U.S.C. § 20106, Congress provided that “[l]aws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable.”<sup>230</sup> Thus, Congress has determined that the public interest in

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<sup>227</sup> TCU/IAM, *supra* note 165, at 2; *see also* Orion's Angels, *supra* note 165, at 2.

<sup>228</sup> Rail Labor Orgs., *supra* note 165, at 4, *et seq.*

<sup>229</sup> Moreover, a regulation limiting the uses of safety-related information would not preclude such litigation and its public safety benefits.

<sup>230</sup> 49 U.S.C. § 20106(a)(1).

predictability and certainty regarding railroad safety requirements is best served through uniform regulation by the FRA.<sup>231</sup>

**d. Considerations Relating to Promoting the Reporting of Railroad Accidents**

One commenter argued that litigants bring to light accidents that railroads fail to report to FRA or the public.<sup>232</sup> However, as noted above, efforts to improve safety through litigation of individual damage claims may induce railroads to minimize the information compiled for purposes of safety reports and analyses for fear of increased liability in litigation. While there may be a public interest benefit in the fact that litigation publicizes unreported accidents, a regulation limiting the use of safety-related information would not prevent victims of railroad accidents from filing claims in the event of an accident, and would not inhibit the ability to use such suits to publicize unreported accidents.<sup>233</sup> Accordingly, the public interest benefit in increasing public awareness of some accidents via litigation is counterbalanced by the fact that a rule limiting the use of railroad safety information in litigation would promote candid and complete reporting to FRA, thus possibly reducing the number of accidents.

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<sup>231</sup> Congress has enacted several other provisions that further the goal of uniformity in specific areas of rail safety regulation. First, Congress has specified that, where a railroad carrier has been ordered to install a signal system on one part of its line, “it may not be held negligent for not installing the system on any part of its line that was not included in the order,” and the lack of the signal system on other parts of the line “may not be considered in a civil action brought because of [an] accident or incident.” 49 U.S.C. § 20502(a)(2). Second, Congress has provided that, where the Secretary approves new warning technology for use at highway-rail grade crossings, the Secretary’s determination “preempts any State statute or regulation concerning the adequacy of the technology in providing warning at the crossing.” 49 U.S.C. § 20161(d).

<sup>232</sup> AAJ, *supra* note 165, at 4.

<sup>233</sup> FRA’s accident reporting regulations require all railroad accidents, incidents, and injuries to be reported. *See* 49 C.F.R. Pt. 225.19. Further, when accidents go unreported, FRA may pursue civil penalties.

**e. Considerations Relating to the Promotion of Open Government and Freedom of Information**

Some commenters argued that FRA should not adopt a regulation in this area because the public interest in justice and transparent government supports the broad admissibility and discoverability of evidence.<sup>234</sup> While it is generally true that a judicial examination of all relevant evidence best serves justice and the truth-seeking function of courts in individual cases, that general principle must be balanced against FRA's broader statutory responsibilities. FRA has the statutory duty and responsibility to protect and promote the public interest by regulating all matters relating to rail safety. Moreover, in 49 U.S.C. § 20118, Congress specifically exempted railroad safety analysis records from public disclosure under FOIA. Because risk reduction program information is already exempt from disclosure under FOIA, it appears that the type of regulation under consideration would not conflict with the goals of transparency in government.

**f. Considerations Relating to Which Kinds of Documents a Regulation Should Protect**

One commenter argued that should FRA conclude that protection from discovery or admissibility is warranted, any such protection should be narrowly drawn, such that “[a]ny shield should cover only information the disclosure of which would substantially detract from the effectiveness of the risk reduction program” because “[n]o other considerations justify protecting information from disclosure.”<sup>235</sup> However, such a broad standard could be very difficult to apply in actual cases because it could be difficult to determine what railroad safety risk reduction information would “substantially detract from” the program. In addition, as discussed above, the

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<sup>234</sup> UTU, *supra* note 165, at 2; *see also* AAJ, *supra* note 165, at 3; Orion's Angels, *supra* note 165, at 2; Hofmann & Schweitzer, *supra* note 165; Rail Labor Orgs., *supra* note 165, at 11.

<sup>235</sup> Public Citizen, *supra* note 165, at 2.

*Guillen* case indicates that the possibility of disclosure of safety information has impaired the success of past Federal safety programs. Further, creating a subjective standard would conflict with the regulatory goal of predictability and clarity.

Some commenters argued that a regulation should resemble Section 20903, asserting that that statute correctly balances the competing public interest considerations because it “generally allows disclosure of [documents relating to accident and investigation reports], but prohibits admission of the railroad’s required report or FRA’s conclusions and opinions, in evidence.”<sup>236</sup> Section 20903 governs monthly reports concerning “all accidents and incidents resulting in injury or death to an individual or damage to equipment or a roadbed arising from the carrier’s operations” and prohibits the use of any part of such reports “in a civil action for damages resulting from a matter mentioned in the report.”<sup>237</sup> Courts have divided significantly over the extent to which the reports, and the methods used to prepare them, are subject to disclosure during discovery,<sup>238</sup> and this has impaired the clarity and predictability of the prohibition on

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<sup>236</sup> Rail Labor Orgs., *supra* note 165, at 9.

<sup>237</sup> 49 U.S.C. § 20901(a); 49 U.S.C. § 20903; 49 C.F.R. §§ 1.49, 225.7(b). Under new regulations effective June 1, 2011, a railroad’s monthly report is deemed to include any attached or supplemental employee reports. 49 C.F.R. § 225.7(b).

<sup>238</sup> *See, e.g., Villa v. Burlington N. & Santa Fe Ry. Co.*, 397 F.3d 1041, 1047 (8th Cir. 2005) (holding that Section 20903 only applies to reports actually filed with FRA and noting that it is a “narrow statutory privilege”); *Belisle v. BNSF Ry. Co.*, No. 08-2087-JWL, 2008 WL 4198514, at \*1 (D. Kan. Sept. 12, 2008) (finding that the statute exempts some FRA forms and reports from discovery, but not others); *Scotto v. Long Island R.R.*, No. 05 Civ. 4757(PKL), 2007 WL 894332, at \*4–5 (S.D.N.Y. Mar. 20, 2007) (applying the provision and refusing to permit the introduction of any official FRA accident reports or investigation documents at trial); *Bennett v. CSX Transp., Inc.*, Civil Action No. 1:05-CV-839-JEC, 2006 WL 5249702, at \*12 (N.D. Ga. Sept. 19, 2006) (assuming that the parties agree that Section 20903 precludes discovering all incident reports prepared for or submitted to FRA); *Winslow v. Mont. Rail Link, Inc.*, No. CDV-1997-552, 2003 WL 25656787 (D. Ct. Mont. Apr. 11, 2003) (holding that “FRA report should have been produced because it indicated to MRL management that employees may be concerned about the policies and procedures” it uses to terminate injured employees, but not requiring the production of other FRA reports); *Yanich v. Pa. R.R. Co.*, 192 F. Supp. 373, 375–77 (E.D.N.Y. 1961)

admissibility. Moreover, reports under Section 20903 are subject to release under FOIA,<sup>239</sup> while in the RSIA, Congress has expressly exempted railroad safety risk reduction program data from disclosure under FOIA.<sup>240</sup>

**g. Considerations Relating to Administrative Procedure**

Finally, the Rail Labor Organizations proposed a series of recommendations to ensure both that FRA has properly considered the true quantity of data that any new discovery protection would affect and that the labor organizations are involved in helping to define the parameters of the ultimate rule.<sup>241</sup> FRA will ensure that the Rail Labor Organizations have a full opportunity to comment on any proposed regulation, as required by the RSIA and the Administrative Procedure Act.<sup>242</sup>

**C. Conclusion**

After thoroughly considering and balancing all of the factors identified by the commenters, there is substantial support for a conclusion that a rule protecting railroad safety risk information from use in civil litigation involving claims for personal injuries or wrongful death would serve the broader public interest. In the past, in connection with a variety of similar programs, Congress has found it in the public interest to place explicit statutory limitations on the disclosure and use of information compiled or collected for use by the Federal government.

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(holding that the prior inconsistent testimony of a witness made to the government, while it was investigating the accident in order to prepare an investigative report, may be used at trial to impeach that witness or to refresh the witness's recollection).

<sup>239</sup> See 49 C.F.R. § 225.25(h).

<sup>240</sup> See 49 U.S.C. § 20118(a).

<sup>241</sup> See *id.* at 14–16.

<sup>242</sup> 49 U.S.C. § 20119(b).

The RSIA's railroad safety risk reduction programs implicate public interest considerations similar to those Congress has protected through other statutory limitations on the use of information in civil litigation or discovery, and those provisions have been upheld by the courts. As discussed in many of the comments submitted to FRA, it is likely that limiting the use of information collected as part of a railroad safety risk reduction program in discovery or litigation would serve the broad public interest by encouraging and facilitating the timely and complete disclosure of safety-related information to FRA. Such a rule is likely to remove a significant obstacle that could prevent the development of candid and effective railroad safety plans. FRA's statutory duty is ultimately to protect the broader public interest in improving and ensuring rail safety through effective railroad safety risk reduction program plans, and that broad public interest outweighs the individual interests of future litigants who may assert damage claims against railroads.

Accordingly, after balancing all of the considerations that bear upon the public interest, this Study concludes that the balance weighs in favor of adopting rules prohibiting the admissibility or discovery of information compiled or collected for FRA railroad safety risk reduction programs in a civil action where a plaintiff seeks damages for personal injury or wrongful death.