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HEALTH AND SAFETY COMMISSION

THE RAILWAYS AND OTHER GUIDED TRANSPORT SYSTEMS (SAFETY) REGULATIONS (ROGTSS) AND FATIGUE ACoP

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Issue

1. To consider the proposed new rail safety regulations and Approved Code of Practice (ACoP) following public consultation.

Timing

2. Urgent. The Rail Delivery Programme, of which the new regulations are a key part, needs to finish as planned at the end of March 2005.

Recommendation

3. The Commission is invited to agree:
- The draft regulations (Annex 5) and ACoP on management of risk from fatigue in safety critical workers (Annex 6)
 - The draft letter from the Chair to the Secretary of State and Memorandum (Annexes 2 and 3)

Background

4. HSC's Consultative Document, *Proposals for new safety regulations for railways and other guided transport systems*, was published on 6 September 2004. The proposed new regulations (ROGTSS) will replace three existing sets of rail safety regulations on safety cases, safety critical work and approval of works, plant and equipment with a single, coherent, proportionate set of regulations developed to implement the EU Railway Safety Directive, to reflect 'Better Regulation' considerations, and to implement outstanding Cullen recommendations.

5. The proposed new regulations:

- Transfer railway duty holders from the existing system of railway safety cases to the new EU system of safety certification and authorisation, enabling mainline train operators to operate services more easily on rail networks in other Member States
- Establish basic requirements for a safety management system and reduce the resource required by industry and HMRI to prepare and assess applications for a safety certificate or authorisation (the new equivalent of a safety case)
- Provide a flexible framework to ensure so far as is reasonably practicable those undertaking safety critical work are competent, fit and not so fatigued as to affect significantly the health and safety of persons on a transport system

- For metros, trams, heritage railways and other non-mainline sectors, replace the existing requirement for formal approval by the safety regulator of new or altered works, plant or equipment, with a risk-based duty to comply with safety requirements and obtain verification from a competent person.

6. Comments on the CD were requested by 27 November 2004. 82 responses were received from a wide range of stakeholders, revealing wide support for many, though not all, aspects of the proposals. In addition, some 20 responses were received to a supplementary consultation letter clarifying and amplifying the transitional provisions and proposing other minor changes. Annex 1 summarises the main points in the responses and how the proposed regulations (Annex 5) and ACoP (Annex 6) have been amended.

7. The Commission considered stakeholder views on key issues on 7 December 2004 (HSC/04/132). RIAC considered the proposed new Regulations and fatigue ACoP on 10 February 2005. Paragraphs 8 to 18 update the Commission.

Argument

Safety critical work and fatigue

8. HSC/04/132 noted the view of many rail operators that, notwithstanding the importance of safety critical work, there is no need for specific regulatory requirements in addition to the basic safety management system. At the 7 December 2004 meeting HSC reaffirmed the need to continue to have specific regulatory requirements relating to safety critical work on railways and other guided transport systems.

9. However, the Rail Safety and Standards Board, on behalf of the mainline industry, has recently returned to the issue, saying the proposed specific requirements on safety critical work are unnecessary because they are already mandated in Railway Group Standards, and so in company safety management systems. RSSB considers that if specific regulations are needed, they should apply to all workplaces, and any particular requirements for rail should be in guidance or an ACoP. RSSB also say that no direct parallel can be made between railways and other transport modes. Their letter does not contain new information, and these points were noted in HSC/04/132.

10. HSE considers that the legal framework for railways and other guided transport systems should include broadly framed requirements that safety critical workers are competent, fit and not so fatigued as to affect the safety of those on the transport system. We believe the public expectation is no less.

11. At a constructive meeting on 20 January 2005 stakeholders commented on a shorter, improved ACoP. The outcome is at Annex 6.

Role of the infrastructure manager

12. The Railway Safety Directive provides for rail operators to be responsible for the safe operation of the railway system as a whole. They are responsible for managing their risks, and working co-operatively together where necessary. The measures to manage risk day-to-day are drawn up by each operator in establishing and maintaining their safety management systems. The spirit of this has been clarified in the proposed Regulations, in particular in Regulation 19 (risk assessment) and in amendments to Regulations 22 (co-operation, which has been strengthened) and 5(4) (requirements for the infrastructure manager's safety management system).

13. In practice Network Rail will, as now, often take the lead in monitoring performance across the network, e.g. on signals passed at danger, sharing the data obtained and co-ordinating action. However these arrangements depend on cooperation and Network Rail has some concerns as to what happens if cooperation fails to achieve a solution. In such

14. circumstances, RSSB and/or HSE may have a role, which can be mentioned in the formal guidance to the new Regulations. However we do not think it necessary, and we consider there would be a risk of improperly implementing the Directive, if we were to insert additional provisions requiring Network Rail to ensure that train operators comply with their safety management systems and to report non-compliances to HSE. As now, it is open to any party to bring safety concerns to HSE's attention.

Safety verification

15. The tram and heritage sectors continue to be concerned that removal of HMRI approval will take away a means of providing reassurance for passengers, and financial comfort for funders and insurers, and will increase costs. There are no new issues here. In discussions HSE has pointed to wider developments driving revocation of the approval system, and urged these sectors to grasp the opportunities presented by the proposed flexible, risk-based, safety verification scheme, and develop it into a system in which others will have confidence, as is already the case in, for example, the regulatory regimes for pressure vessels and lifting plant.

16. In response to stakeholder requests, we propose to extend the final deadline for the approval system by an additional 6 months, so that applications can be "in the pipeline" for up to 2 years after ROGTSS comes into force. This would also align with the end of the transitional period for nearly all existing safety case holders.

Timing and interoperability

17. Although we have kept to our timetable and delivered new draft regulations to HSC in March, DfT's timetable to implement in parallel EU Directives on interoperability has slipped. When HSC issued its CD in September 2004, DfT's CD was to have followed soon afterwards, enabling both sets of regulations to be progressed together. However, DfT do not now expect to issue their CD until June 2005. Although it would be possible to make the safety regulations in advance of the interoperability regulations, many stakeholders consider that both sets of proposed regulations should be considered together. We agree that consistency between ROGTSS and DfT's regulations is important.

18. This has been reinforced by recent policy developments on interoperability. To limit industry costs, DfT is now seeking to implement the Interoperability Directives in ways that would restrict significantly both the projects in scope and what would be addressed in such projects. This means that in future HSE will not be able to rely on the interoperability regime to address safe design and construction on the mainline network. Moreover, it seems to us that it will also result in inconsistent treatment for non-mainline transport systems because the risk-based safety verification regime will apply to a greater range of projects. One solution would be to extend the safety verification regime to projects on the mainline that are not subject to interoperability requirements. However, this would be a significant change, on which we feel there should be public consultation. Subject to HSC and DfT agreement, this could be covered in DfT's consultation on interoperability, in which DfT would engage HSC/E. In the interim, DfT continue to develop their policy, and the draft safety Regulations provide for the approval system to continue to apply only to the mainline railway, and for safety verification to apply to other transport systems.

19. It seems unavoidable, therefore, that ROGTSS will be delayed by at least 6 months. This is disappointing. Unwanted consequences include delay in securing the benefits of the new, streamlined system, with cost implications for industry, HMRI and ORR; and potential disadvantage for existing British companies seeking to operate on other EU rail networks, as they will not have their Part A certificates from the safety authority by 30 April 2006. However DfT still hope their new regulations will be in force in the last quarter of

2005. It should therefore be possible for both sets to be made in the Autumn, and for ROGTSS to be in force by April 2006, with transitional arrangements until April 2008.

Consultation

20. The proposed new ROGTSS Regulations and ACoP have been developed in open and iterative engagement with many stakeholders over the past 3 years. Stakeholders have commented positively on the open nature of the process, which has included seven open meetings, workshops, a working group on safety critical work, meetings with individual stakeholders, a project steering group including representatives of industry, passengers and rail trade unions, as well as formal Discussion and Consultative Documents.

21. DfT, the Office of Rail Regulation (ORR) and the Strategic Rail Authority have been engaged throughout, and are members of the project Steering Group. No firm decision has yet been reached on transferring to DfT policy responsibility for the safety of guided bus systems, and any trolley vehicle systems operating on public roads (Para 4, Annex 1).

Presentation

22. Presentation is inevitably linked with transfer of responsibility for rail safety from HSC to ORR, which is expected at the end of 2005. Industry may seek to present HSC's proposals as a final attempt to impose its approach on the rail industry. In fact this was the line in a letter to The Railway Magazine from the Chairman of the Heritage Rail Association in the context of RAIB. We will challenge misleading information and explain that the Regulations are the outcome of a three-year project, which HSC/E has completed in line with commitments made to Ministers.

23. There is also a risk that DfT will feel exposed because they are not yet able to consult on interoperability, delaying the new safety regulations.

24. To promulgate ROGTSS we will build on the communication channels established in the rail legislative reform project, and on the many well-established fora in which HSE presently engages the rail and related industries.

Costs and Benefits

25. The full regulatory impact assessment is at [Annex 4](#). The proposed Regulations generally seek to maintain existing levels of safety. Estimated total costs are between £44m and £81m over the 10-year appraisal period, or £5m to £9.5m pa.

Financial/Resource Implications for HSE

26. The estimated cost of the three-year rail legislative reform project to date is £1.75m. In view of the further work arising from DfT's slippage on interoperability, we propose to ask DfT for additional funding to cover the extra work that will now be needed (paras 16 to 18) after March 2005. HMRI will continue to be able to charge duty holders for inspection and approval, at least until responsibility for rail safety transfers from HSC to ORR.

Environmental and other Implications

27. None

Action

28. The Commission is invited to comment on paragraphs 8 to 18 and, if appropriate, agree the recommendations in paragraph 3. The Commission is also invited to agree that, if significant changes to the draft Regulations or ACoP are needed following the meeting, they are cleared by the Chair and the Chair of RIAC.

Main comments from respondents and significant changes to the proposals

A) Safety management system and safety certification / authorisation

Interoperable railway

1 A number of respondents found the term “interoperable railway” misleading because it will be many years before much of the railway actually meets interoperability requirements following renewals and upgrades. We have therefore adopted respondents’ preferred term, “mainline railway” in the amended draft regulations. Mainline railway is defined in regulation 2 and covers the high speed and conventional railway to which interoperability requirements will eventually extend. In effect, it covers all railways except those that are “functionally isolated” from any other railway, and those reserved strictly for local use, for historical use or for tourism purposes. This definition remains subject to adjustment and to DfT’s agreement.

2 Some respondents expressed concern that the exact boundary of the interoperable/mainline railway is not yet clear, for example in relation to Community railways and some harbour railways affording access to terminals. We accept there is some uncertainty at the margins, but the position should become clearer as DfT develops its thinking. Wherever the boundary falls, it is clear in the regulations that all parts of the mainline railway will be subject to the requirements. In particular, all the exclusions from the definition of “transport system” are subject to a caveat that no part of the mainline railway is excluded from scope.

Application to other transport systems

3 The draft regulations use the term “transport system” to cover their entire scope including tramways and other guided transport. All of these terms are defined in regulation 2. Most respondents agreed in principle with extending the regulations beyond railways, but some had reservations about excluding guided bus systems and trolley vehicle systems.

4 Guided bus systems generally operate on a reserved portion of the highway for part of their route, and as normal buses on the remainder, though at least one proposed system in Cambridge will operate partly off the highway on what was a railway route. A new definition of guided bus system in the revised draft is intended to cover the various types. DfT agreed to our consulting on the basis that responsibility for the safety of guided bus systems may pass to DfT in future and the draft regulations therefore contained square-bracketed exclusions for guided bus systems and also trolley bus systems that operate on a public road, although none of the latter currently exist. Discussions with DfT continue on this issue, but no final decision has yet been reached and the draft regulations therefore still have these exclusions in square brackets. A number of trolley bus systems operate in museums and these are subject to the draft regulations, though not to certification because of their low speed.

5 The definition of transport system in the CD excluded systems where traction is provided wholly or partly by cables. Respondents pointed out that this exclusion might exclude some airport peplemovers, which was not intended. The exclusion has therefore been tightened and now refers primarily to cable cars, ski lifts and drag lifts.

6 Some respondents had questions about how the regulations will apply at the interface between different transport systems, for example:

- Where metro trains operate on the mainline railway.
- Conversely, where mainline trains operate on metro (eg London Underground) infrastructure.
- Where trams operate alongside mainline trains and may be subject to common signalling arrangements.
- At the interface between the mainline railway and depots, sidings and terminals.

7 We believe the draft regulations, supported by guidance, should provide clarity on these points. Where an operator operates vehicles on both the mainline railway and on another system such as London Underground, he will need to have two separate certificates because of the slightly different requirements that apply, but a single application can be made and HMRI's systems will be made as straightforward as possible in such cases. Parts of certain tramways (such as Croydon Tramlink) share permanent way with the mainline railway, but not actual rails, so the tramway and the mainline railway can be clearly distinguished.

8 There was broad agreement with the exclusion of transport systems operating at 40 kph or less from safety certification requirements (though they will be subject to general duties on safety management systems and risk assessment). Some found the 40 kph threshold somewhat arbitrary and one or two suggested it might inhibit future expansion of community railways if operators were tempted to remain within the 40 kph limit to avoid certification requirements. In the absence of an alternative practical trigger for certification requirements we do not propose any amendment on this point.

Terminology

9 Some respondents commented on the absence of definitions of "major change", "substantial change", "substantial alteration", and "equivalent operation". Differing views were expressed on the last of these, some preferring a broader and others a narrower definition. None of these terms are defined in the Directive, but they may be subject to future guidance from the European Commission. We propose to explain these terms in guidance, which could be amended if necessary following any guidance from the EC. In response to some respondents' comments we have amended "substantial alteration" in regulation 8(1) to "substantial change", in line with "substantial change" in regulation 11.

The role of the infrastructure manager

10 Whilst recognising that the position in the current safety case regulations may no longer be sustainable, Network Rail expressed concern that the draft regulations contain no provisions at all that are equivalent to the following duties on the infrastructure manager in the safety case regulations:

- To take reasonable steps to ensure that train operators comply with their safety case, to the extent necessary to enable it to comply with its own safety duties.
- To obtain from train operators an undertaking to comply with its reasonable safety requests.
- To report to HSE non-compliances likely to increase the risk of serious personal injury on the part of train operators.

11 Our general position on this issue is set out in paragraphs 12-13 of the main paper. To insert duties on the above lines would create a risk of improper implementation, as it would not reflect the responsibilities of transport undertakings and infrastructure managers as set out in the directive. Moreover we do not believe that it should be necessary to

regulate the relationships between different parties in this way. There is nothing to prevent, and we would encourage, the parties to maintain existing sensible arrangements where Network Rail take a lead role on issues where it is sensible to do so. Where cooperation breaks down or dispute arises in relation to a Railway Group Standard, the Railway Group Standards Code contains procedures for resolving such difficulties including referral to the Rail Regulator. In other matters there is also nothing to prevent the parties approaching HSE. HSE would not regard itself as a mediator or arbitrator in these situations, but it could play a useful role in considering the extent of each party's compliance with the conditions underlying its safety certificate or authorisation, with their duty to co-operate (see below), and with health and safety legislation generally.

Co-operation

12 To emphasise the importance of cooperation, the draft regulations have been amended to include an additional provision requiring a transport operator (transport undertaking or infrastructure manager) to cooperate insofar as is reasonable with another operator where that other operator is taking action to achieve safe operation of the transport system (draft regulation 22(3)).

Stations

13 The draft regulations apply to the whole of stations in principle. A number of respondents including Network Rail, ATOC and RSSB considered that the definition of "station" should be limited so as to exclude parts not directly related to the operation of the transport system, such as retail and general circulation areas. However it would be difficult to make such a limitation precise enough. Moreover, emergency evacuation arrangements need to take account of the station as a whole. The current wide definition of station follows that in the Safety Case Regulations, and guidance to those Regulations makes clear that safety cases are not expected to cover risks that are contained within separate premises in stations.

Operators in possessions

14 The exclusion of operators of vehicles within possessions was very widely welcomed in the earlier discussion document. A number of respondents in the supply industry have expressed some concern about how this change will be managed without increasing risks, and we are also aware of trade union concerns. We understand that Network Rail view this regulatory change as an opportunity to improve the management of engineering possessions. It is actively considering what additional controls are needed to its contractor assurance regime and its safety management system to achieve this purpose, and is starting to involve the trade unions in its discussions.

Involvement of "affected parties"

15 Under the proposals in the CD, applicants for a safety certificate or authorisation, or an amendment, were required to copy the documentation to other interfacing operators, and to any other parties HSE consider to be affected. Interfacing operators and affected parties may then make representations to HSE within 28 days. "Affected parties" may include recognised trade unions, the Rail Passenger Council, and possibly others. These wide provisions stem from Article 17.1, which require that the safety authority "*shall allow all parties to be heard*". They also implement a recommendation of Lord Cullen, though that recommendation was limited to interfacing operators.

16 A significant number of respondents considered these requirements unduly onerous. Network Rail, ATOC and London Underground amongst others questioned the usefulness of copying documentation to parties other than operators. However the trade unions supported the proposals. The Rail Passenger Council suggested that to reduce

bureaucracy operators should have the option of notifying parties that documentation is available if they wish to see it, and to make it available on the Internet.

17 Some amendments are proposed in response to these concerns. Instead of a potentially wide category of “affected parties”, operators are required to copy documents to (in addition to other operators) the trade unions recognised for collective bargaining purposes, and the Rail Passengers’ Council or London Transport Users’ Committee or the London Transport Users’ Group if they represent passengers’ interests on the transport system in question. In addition, as an alternative to copying documents (which can be electronic), operators can inform the parties that documentation is available and to make it available on the Internet.

Who holds the Part A certificate

18 A number of respondents asked whether Part A of a safety certificate can be held at group company level, pointing out that domestically the Part A certificate will only be transferable in practice if it can be issued at owner group level. This is because in Great Britain each franchise is operated by a separate legal entity (a subsidiary company), rather than by different divisions of one company. The draft regulations require both Parts A and B to be held by the actual operator, which the directive appears to provide for and is satisfactory from a safety point of view. This reduces the transferability of Part A certificates, so far as GB practice is concerned, although there is nothing to stop an operator from setting up a separate division of the same company to benefit from an existing Part A. However any changes would be complex, as they would have to take account of a range of possible company structures, and there would be some risks in small subsidiaries with limited resources being able to rely on a safety certificate held by any other company in the same group.

The Part B application

19 A number of respondents considered the draft requirements in Schedule 2 paragraph 2 to be bureaucratic and unnecessary in requiring mainline railway operators to include a list of the national safety rules, TSIs and other safety requirements relevant to their operation. Similar views were expressed in relation to paragraph 5 of the same Schedule, which requires non-mainline applications to include a list of relevant statutory provisions. These provisions have been amended as a result. The requirement is now to provide information on these matters and (as in the consultation draft) an explanation of how compliance with these requirements is ensured by the safety management system. New HMRI assessment criteria will provide guidance on what is required.

Revocation of safety certificates and authorisations

20 Few comments were received on the provisions on revoking safety certificates and authorisations. In accordance with the Directive, the draft regulations 15 and 16 place HSE under a duty (not a discretion) to revoke in certain circumstances. Before revoking the certificate or authorisation HSE must notify the holder that it is considering revocation and give them at least 28 days to make representations, including oral representations if the holder requests. If these are unsuccessful, the holder may then appeal to the Secretary of State, (regulation 35), and revocation is suspended again pending final determination of the appeal. In practice these provisions should generally give the holder sufficient time to remedy the breaches and avert revocation.

21 However we are concerned that HMRI would be put in the position of having to commence revocation proceedings in situations where more targeted enforcement action, such as an improvement notice, would ordinarily be contemplated and would be more appropriate. A range of affected parties would be informed of the contemplated revocation and would be entitled to have their representations taken into account. Such procedures

will consume time and effort and should be reserved for serious cases where safety is being put at risk, especially as without a certificate an operator cannot legally continue to operate. Regulations 15(1) and 16(1) have therefore been amended slightly so that the duty to revoke only applies where “there is a significant risk [to the safety of persons] arising as a result [of the failure].

Annual reports

22 The CD invited views on whether the requirement to prepare annual reports for HSE should be extended to non-mainline transport systems, and also proposed that annual reports should be made publicly available on request. Some respondents disagreed or expressed reservations on one or both counts, whilst others supported the proposition. We believe it is reasonable to extend the requirement beyond the mainline railway, but propose to limit it to those who hold a safety certificate or authorisation (not for example, tramways and most heritage railways). Regulation 20(1) also provides that non-mainline operators do not have to include certain data, including data on the costs of accidents.

Openness

23 A number of respondents pointed out a discrepancy between the main text of the CD and the draft regulations. The CD indicated that there would be no requirement for operators to make audit reports available for public inspection, but the draft regulations contradicted this. We confirm that it is not intended to require individual audit reports to be publicly available. Regulation 21(6) has been amended accordingly.

24 However, audit findings will be part of transport operators’ annual reports to the safety authority and the draft regulations require annual reports to be made publicly available (regulation 21(6)). In the context of an annual report it would be possible to summarise the findings to avoid repetition.

Approach to assessment

25 The proposals for simplifying current processes and for requiring rather less information about detailed operational procedures than under the existing safety case regime were widely welcomed. The objective of freeing up some additional resource for inspection activity was also widely supported.

Transitional provisions

26 Nearly all respondents supported the proposed transitional provisions, which were clarified and amplified in a further consultation letter. The Heritage Railway Association and Confederation of Passenger Transport suggested that exemption holders (such as heritage railways) and tramways should be given additional time to comply with the safety management system duties and other general duties in the regulations. In response the regulation have been amended so that formerly exempted or excluded operators will have an additional 6 months to comply.

27 All of the changes to the transitional provisions set out in the further consultation have now been included in Schedule 5. They are now quite complicated because of the many detailed differences between the safety case regulations and the new regime, and the importance of ensuring a smooth transition. Detailed guidance will be issued which will explain the provisions in as clear and simple a way as possible.

Regulatory impact assessment

28 Some respondents felt that the partial RIA under-estimated costs, but were unable to offer specific suggestions for more accurate figures. An earlier estimate from the

Heritage Railway Association of the cost of preparing a safety case (£20,000) was accepted in the RIA and used as the basis for cost estimates.

B) Safety critical work

29 Overall, most respondents questioned why specific safety critical work regulations are required. They expressed the view that existing legislation should be sufficient to ensure competence and fitness, and that competence and fitness can be managed as part of the Safety Management System (SMS) without the need for specific regulations.

30 Most respondents agreed that fatigue is an issue that needs to be addressed, but considered it should be addressed across all industries and not just the rail sector. Respondents were generally in favour of taking steps to manage fatigue but considered compliance with an ACoP too onerous, saying that fatigue is a complex issue that needs to be addressed with the flexibility provided by guidance.

31 HSC considered these views, the importance of safety critical work in the rail industry, comparison with other industries and transport modes, the European safety management system and public perception. HSC reaffirmed the need to have specific regulatory requirements on safety critical work, but considered that the fatigue ACOP should be streamlined in discussion with the rail industry.

Regulatory impact assessment

32 The majority of stakeholders considered the RIA inadequate, saying that it did not accurately identify for some duty holders the costs of the proposed Regulations and ACoP. Many considered that, as the proposals for safety critical work are not a requirement of the Safety Directive they were a burden on the UK that other Member States would not share. Little evidence or additional detail was provided to support the claims made. Many of the comments indicated that most sectors had interpreted the proposed scope of the regulations too widely. Suppliers and rolling stock operators were concerned that the proposed requirements appeared to apply to all levels of the supply chain, even when outside the UK. Others had not appreciated that tasks only become safety critical when they “could significantly affect the health and safety of persons on a transport system”. Heritage and tram operators were concerned that the RIA did not separately consider their sector; therefore they were unable to estimate the cost of the proposed changes.

33 Respondents suggested that the RIA should also have considered the impact on management time; potential industrial relation issues that may result from introducing the ACoP; the possibility of some heritage operators having to employ external assessors if they have insufficient competent people available; and that the removal of a requirement for ID cards should not have been considered as a cost saving as operators will still provide them to staff.

34 Passenger groups considered that the regulations should not add significant costs because operators should already be complying with the proposed requirements. They concluded that, if the industry was not already doing what was proposed, standards needed to be raised.

35 The RIA has been adjusted, as necessary, in the light of the information provided by stakeholders.

Definition of safety critical task

36 The train and freight operating companies agreed that the definition of safety critical task adequately captures all tasks critical to safety to a vehicle or transport system. There was no consensus of opinion from other respondents. Several thought that the selection of safety critical categories was counterproductive, and could lead to the view that other roles were not important.

37 Many were concerned that the definition of safety critical task was too broad and required redefining or clarifying, e.g. in relation to controlling street running trams. Some noted that freight control room staff should not be included as they merely log events and do not perform safety critical tasks. Some respondents, in particular the suppliers, were concerned that clarity was needed on how far down the supply chain the requirements extended, and even wondered whether they extended to suppliers from outside the UK. Several respondents considered there to be lack of clarity over whether overhaul of safety critical components was included and how the requirements applied to maintenance and installation of components (for example, whether it could capture conventional maintenance to trains, telecom systems and electrical supplies). Others were concerned that the requirements may be so onerous that those suppliers whose main business is not the rail industry may pull out of the supply market, or that it would be impossible to pass on the requirements to suppliers outside the UK.

38 Several respondents made additional suggestions on what the definition of safety critical task should cover, including assembly of components to capture items such as wheelsets; manufacture of new vehicles and safety critical components; and design of safety critical systems.

40 Several respondents asked for clarification on when work 'on or near the track' was safety critical, and similarly for planning, controlling, managing and supervision. Tram operators were unclear on who performed 'signaller' tasks for tramways. Rolling stock operators suggested that the definition should only apply when there is 'significant, real-time impact on the operational railway' and 'apply only to the last person to check before a system becomes operational', so as to exclude those further down the supply chain.

41 Several respondents were concerned that changing the definition of safety critical work from that in the current Railways (Safety Critical Work) Regulations 1994 may require a corresponding change to the provisions in Section 27 of the Transport and Works Act 1992 in relation to Alcohol and Drugs, otherwise there could be confusion.

42 The decision on whether a task is considered safety critical depends on whether it would have a 'significant effect on the health or safety or persons on a transport system'. Many of the stakeholder comments have not adequately taken this into account. For example, the task would not be safety critical if the work was subject to such supervision or checking that it was not likely for any error in that work to go unobserved or uncorrected. A similar definition is used in the existing regulations and has not caused significant problems to duty holders. The need for detailed guidance on who is, or is not considered safety critical was discussed recently at RIAC and they concluded that this was not necessary as the industry has a clear understanding of the issues. However, HSE will provide general guidance to accompany the regulations.

Scope

43 There were mixed views on whether the scope of 'safety critical task' should be extended to include checking underground stations, crowd control and responsibility for evacuations and emergencies. Those against extending the scope to include these tasks were mostly the same respondents that did not consider specific provisions for safety critical work to be necessary. Whilst most respondents considered such tasks important to safety, many did not consider the risks involved to be sufficient to class them as safety critical or to be a particular problem for the rail industry compared with other industries.

44 However, London Underground noted that they already consider these tasks safety critical and the majority of suppliers, trade unions and passenger groups considered that the scope should be extended to all three tasks.

45 Some stakeholders expressed concern that the regulations shouldn't constrain the arrangements for emergency response.

46 The existing RIAC guidance considers the operation of level crossing equipment and the checking the loading of vehicles to be safety critical activities, but this was not clear in the revised definition. The list of safety critical tasks has been amended to remove this ambiguity. As it is not the intention to prevent or adversely hinder an emergency situation, an exclusion has been added to disapply the regulations relating to safety critical work to the police, ambulance or fire service when they are carrying out their emergency functions on a transport system. Although considered important to safety, it is not proposed to include 'checking underground stations' 'crowd control' and 'responsibility for evacuations / emergencies' as safety critical tasks.

Volunteers

47 The majority of stakeholders were in favour of including volunteers in the definition of safety critical work. The Confederation of Passenger Transport (CPT) partly agreed that volunteers should be included, but were concerned that the fitness and competence assessments for volunteers should be less prescriptive than for those for employees on the national rail network. CPT favoured internal assessment of volunteers rather than the use of accredited assessors. The use of accredited assessors is not mandated by the proposed regulations.

48 Network Rail were the only respondents who thought the regulations should not include volunteers; they felt inclusion is not justified because heritage operations are lower in terms of risk when compared to the national rail network.

49 Volunteers are to remain in scope of the regulations and ACOP. The requirements are not considered too onerous or prescriptive as the level of risk should be taken into account when determining what tasks would be safety critical and the action dutyholders are required to take.

Industry standards and attributes necessary for assessors

50 Responses fell into two categories:

- A list of the standards and attributes respondents felt were necessary for assessors, e.g. NVQs for competence and appropriate medical/occupational health qualifications, experience for fitness assessors, and membership of ARIOPS. These respondents also pointed out they did not see any value in having accreditation schemes in this area.
- The view that the standards and attributes of assessors should not be enshrined in regulations, but should be more industry driven with the industry setting competence criteria in consultation with relevant trade bodies and the CITB. Tram operators were in favour of RSSB setting medical and competence standards for the national rail network.

51 The majority of stakeholders saw standards and attributes as an area where it would not be possible for a set of standards to apply across all sectors. RSSB was seen as the organisation that should set standards for the national rail network (although RSSB did not confirm this view in their response). Other sectors, e.g. trams, would prefer standards to be developed and tailored to their sector.

52 This question had been included in the CD to seek the views of stakeholders before preparing guidance on the regulations. This will be reflected in the guidance in due course.

Frequency of updating records

53 Responses were split between those who considered that a risk-based approach was required rather than setting a global figure, and those who suggested that records should be updated at a frequency determined through railway group standards. Respondents suggested that records should be kept for two to three times the period of time between reassessments.

54 This question had been included in the CD to seek the views of stakeholders before preparing guidance on the regulations. This will be reflected in the guidance in due course.

Protecting the transport system

55 Responses fell broadly into two categories:

- The view that protecting the transport system was a matter for good supervision and local management processes
- Details of the action respondents would take to protect the transport system, e.g. remove staff from jobs, re-train, re-assess or take disciplinary action.

This question has been included in the CD to seek the views of stakeholders before preparing guidance on the regulations. This will be reflected in the guidance in due course.

ACoP on the management of fatigue

56 Respondents expressed strong views. A large number of operators felt that fatigue was a complex issue that needed to be managed, but they were not in favour of introducing an ACoP because:

- Fatigue is an issue that affects all parts of industry and cross-industry guidance would be more appropriate;
- The industry should be given time to develop its own management systems that address fatigue
- An ACoP was not necessary where there are 'Hidden limits' and the Working Time Regulations
- The ACoP was intrusive, and could affect industrial relations.
- The ACoP will impose substantial additional costs on some duty holders and possibly create a large record-keeping burden; and
- The ACoP is too complex for the largely volunteer run heritage sector.

57 The Trade Unions expressed strong support for the ACoP but wanted to see words such as 'monitor' and 'review' used more sparingly in the document as, in their experience, employers 'monitor' but then do not address issues such as fatigue when it is identified. The Trade Unions considered that there should be more on the action to be taken. They also requested that a reference be made in the ACoP to consultation with workers and safety representatives when changes to shift patterns are proposed.

58 The ACoP was also supported by the ROSCOs and by two FOCs.

59 HSC considered these views at a recent meeting and considered that the ACOP should be streamlined in discussion with the rail industry. Extensive redrafting of the ACOP has taken place, with assistance being given by a Stakeholder Working Group. Membership included RSSB, Network Rail, London Underground, RSSB, Association of Train Operating Companies, Heritage Rail Association, RMT and the Railway Industry Association.

Travel time and on-call duties

60 Some respondents felt that monitoring travel time was not something they should do as it intruded into the private lives of individuals. This is not considered to be the case, as the monitoring of travel time in the revised ACOP is subject to the provision of 'so far as is reasonably practicable'.

61 Most respondents commented that the arrangements in the ACoP concerning on-call and travel time were unclear, and they would welcome guidance in these areas. HSE intend to produce general guidance on these issues.

Transitional Provisions

62 There was little consensus on transitional provisions. Several respondents, including RSSB, considered that the proposals set out in the CD were sufficient. Some suggested that transitional arrangements were not necessary as the industry should already be compliant with most of the proposed requirements. Others suggested transitional arrangements extending over six years, though several suggested six to twelve months. Few robustly justified a particular timescale. Some noted that, as parts of the industry do not have appropriate national standards, sufficient time would be required to set up new systems and establish suitable arrangements, including the establishment of panels of assessors as necessary. Some were concerned by the perceived increased workload or a shortage of suitable advisors. Several suggested that current assessments and certifications should be allowed to run their course.

63 The heritage sector wanted sufficient time for change, but the majority of heritage operators themselves suggested that 12 months from the coming into force of the Regulations would be appropriate.

64 A transitional period of 12 months from coming into force of the regulations has been included in relation to volunteers. Other transitional provisions are not considered necessary as duty holders already have similar duties under the existing regulations and ACOP. Streamlining of the ACOP has reduced many of the additional requirements in relation to the change in focus from hours of work to fatigue. The time between the regulations being signed and coming into force should give additional time for duty holders to take the necessary action.

C) Safety verification

Timing of appointment of competent persons

65 A number of situations have been identified where it may not be possible to meet the requirement of regulation 32 to appoint a competent person before completion or selection of the design:

- 1) Where an operator proposed to introduce either "off the shelf" rolling stock or second-hand stock vehicles. In such cases a competent person may be unable to

fully verify that the design or construction meets the approved safety requirements or good engineering practice as required by regulation 30.

- 2) Where the design of infrastructure or vehicles has been completed or selected before the new regulations come into force, but there is insufficient time for HSE to issue an approval before the deadline of October 2007 in regulation 37. The purpose of this deadline is to draw a line under ROTS and prevent a situation where ROTS continues to be used, in relation to a major project, for perhaps several years after their revocation.

66 Amendments have therefore been made so that, where the infrastructure or vehicle in question conforms to a prototype for which a manufacturer has obtained approval under ROTS, or has already been used in another operation -

- the competent person must be appointed at such time as will enable any safety issues he raises to be taken into account (regulation 32(2)(b)); and
- the competent person may verify compliance with safety requirements and good safety engineering practice to the extent possible where the prototype or design was already selected or completed at the date of his appointment (regulation 30(2)(b)).

67 HMRI has been working in consultation with external stakeholders to develop the safety requirements in Schedule 4 into a set of HSC Approved Safety Requirements, as envisaged in regulation 31. This work has gone well and we hope to be in a position to consult more widely in the Spring with a view to enabling the HSC to issue Approved Safety Requirements and guidance at the same time as the regulations are made in the last quarter of 2005.

Regulatory impact assessment

68 Many respondents who operate non-mainline transport systems, or represent those who do, were critical of the partial RIA. It was argued that the RIA does not take account of commercial costs that respondents believe will result from the switch from HSE approval to a regime of verification by competent persons arising for example from insurance costs incurred by competent persons which will have to be passed onto the client, and the need for operators to undertake considerable work to develop the standards that competent persons will need in order to undertake their task. Respondents also pointed out that exemption holders are not currently charged by HSE for approval work.



