or disrupt any lawful BLM meeting, procession, or gathering; or significantly obstruct or interfere with said meeting, procession, or gathering by physical action, verbal utterance, or any other means.

3. You must not willfully deny any member of the public, public official, BLM employee, volunteer, invitee, or agent thereof, their lawful rights to gain access to, enter, use, or leave a BLM facility.

4. You must not willfully impede any public official, BLM employee, or volunteer in the lawful performance of duties or activities through the use of restraint, abduction, coercion, or intimidation, or by force and violence or threat thereof.

5. You must not willfully refuse or fail to leave a BLM facility upon being requested to do so by a Federal Officer, Field Office Manager, Acting Manager, or privately contracted security officer assigned to the facility if you have willfully committed, are committing, threaten to commit, or are inciting others to commit any act which did, or would, if completed, disrupt, impair, interfere with, or obstruct the lawful missions, processes, procedures, or functions being carried on in the BLM facility.

6. You must not willfully impede, disrupt, or hinder the normal proceedings of any BLM meeting or session conducted by any public official, BLM employee, volunteer, invitee, or agent thereof by any act of intrusion into the chamber or other areas designated for use of the body or official conducting the meeting or session or by any act designed to intimidate, coerce, or hinder any public official, BLM employee, volunteer, invitee, or agent thereof.

7. You must not conduct, participate in, or engage in demonstrations outside of designated demonstration areas when BLM has established such areas. BLM will establish designated demonstration areas only where it finds, in writing, that demonstrations would: (i) Cause injury or damage to public lands or BLM facilities in Colorado; (ii) unreasonably impair the atmosphere of peace and tranquility maintained in wilderness, natural, or historic areas; (iii) unreasonably interfere with interpretive, visitor service, or other program activities, or with the administrative activities of BLM; (iv) substantially impair the operation of public use facilities or services; (v) present a clear and present danger to the public health and safety; or (vi) be incompatible with the nature and traditional use of the particular area of public land or BLM facility involved.

8. You must not remain or camp at any BLM facility past the normal business hours posted on the facility, unless otherwise authorized.

9. You must not incite or urge a group of five or more persons to engage in a current or impending riot or give commands, instructions, or signals to a group of five or more persons in furtherance of a riot.

10. You must not engage in a riot.

11. You must not engage in public indecency or indecent exposure.

12. You must not possess, discharge, or use explosives, incendiary or chemical devices, or exploding targets without prior authorization.

13. You must not engage in rifle or pistol target shooting activities unless they are conducted towards and into a backstop of material that prevents further travel beyond the intended target and/or ricochet of the bullet or projectile.

14. You must not rifle or pistol target shoot at materials other than paper, plastic, or steel targets manufactured for shooting sports or biodegradable clay pigeons.

15. You must not leave targets, target debris (except pieces of biodegradable clay pigeons), cartridge ''brass,'' or shell casings at any shooting area.

16. You must not possess, discharge, or use flammable devices including, but not limited to, gasoline bombs commonly referred to as ''Sobe Bombs'' or flammable projectiles discharged from a launching tube or other device.

17. You must not drink an alcoholic beverage or possess an open alcoholic beverage container while in the passenger area of a motorized vehicle.

18. You must not tow or be in possession of a trailer requiring registration under Colorado Revised Statutes that is either unregistered or has expired registration.

19. You must not violate any Colorado Revised Statute regarding hunting, fishing, boating, or outfitters.

20. You must not operate a mechanized vehicle within a designated Wilderness Study Area except on travel routes identified for such use by a BLM sign or map.

21. You must not burn wood or wood pallets containing nails or staples.

Exemptions

The following persons are exempt from these supplementary rules: Any Federal, State, local, and/or military employees acting within the scope of their official duties; members of any organized rescue or fire fighting force performing an official duty; and persons who are expressly authorized or approved by the BLM.

Enforcement

Any person who violates any of these supplementary rules may be tried before a United States Magistrate and fined in accordance with 18 U.S.C. 3571, imprisoned for no more than 12 months under 43 U.S.C. 1733(a) and 43 CFR 8360.0–7, or both. In accordance with 43 CFR 8365.1–7, State or local officials may also impose penalties for violations of Colorado law.

Ruth Welch,

BLM Colorado State Director.

[FR Doc. 2016–21934 Filed 10–4–16; 8:45 am]

BILLING CODE 4310–JB–P

SURFACE TRANSPORTATION BOARD

49 CFR Part 1152

[Docket No. EP 729]

Offers of Financial Assistance

AGENCY: Surface Transportation Board.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Surface Transportation Board (Board) is proposing changes to its rules pertaining to Offers of Financial Assistance to improve the process and protect it against abuse.

DATES: Comments are due by December 5, 2016. Reply comments are due by January 3, 2017.

ADDRESSES: Comments and replies may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the ''E–FILING'' link on the Board's Web site, at ''*http://www.stb.gov.*'' Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: Docket No. EP 729, 395 E Street SW., Washington, DC 20423–0001. Copies of written comments and replies will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's Web site.

FOR FURTHER INFORMATION CONTACT: Jonathon Binet, (202) 245–0368. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877–8339.

SUPPLEMENTARY INFORMATION: In the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995) (ICCTA), Congress revised the process for filing Offers of Financial Assistance (OFAs) for continued rail service, codified at 49 U.S.C. 10904. Under the OFA process, as implemented in the Board's

regulations at 49 CFR 1152.27, financially responsible parties may offer to temporarily subsidize continued rail service over a line on which a carrier seeks to abandon or discontinue service, or offer to purchase a line and provide continued rail service on a line that a carrier seeks to abandon.

Upon request, the abandoning or discontinuing carrier must provide certain information required under 49 U.S.C. 10904(b) and 49 CFR 1152.27(a) to a party that is considering making an OFA. A party that decides to make an OFA (the offeror) must submit the OFA to the Board, including the information specified in 49 CFR 1152.27(c)(1)(ii). If the Board determines that the OFA is made by a ''financially responsible'' offeror, the abandonment or discontinuance authority is postponed to allow the parties to negotiate a sale or subsidy arrangement. 49 U.S.C. 10904(d)(2); 49 CFR 1152.27(e). If the parties cannot agree to the terms of a sale or subsidy, they may request that the Board set binding terms under 49 U.S.C. 10904(f)(1). After the Board has set the terms, the offeror can accept the terms or withdraw the OFA. When the operation of a line is subsidized to prevent abandonment or discontinuance of service, it may only be subsidized for up to one year, unless the parties mutually agree otherwise. 49 U.S.C. 10904(f)(4)(b). When a line is purchased pursuant to an OFA, the buyer must provide common carrier service over the line for a minimum of two years and may not resell the line (except to the carrier from which the line was purchased) for five years after the purchase. 49 U.S.C. 10904(f)(4)(A); 49 CFR 1152.27(i)(2).

On May 26, 2015, Norfolk Southern Railway Company (NSR) filed a petition to institute a rulemaking proceeding to address abuses of Board processes. In particular, NSR sought to have the Board establish new rules regarding the OFA process. NSR proposed that the Board establish new rules creating a pre-approval process for filings submitted by parties deemed abusive filers, financial responsibility presumptions, and additional financial responsibility certifications. In a decision served on September 23, 2015, the Board denied NSR's petition, stating that the Board would instead seek to address the concerns raised in the petition through increased enforcement of existing rules and by instituting an Advanced Notice of Proposed Rulemaking (ANPRM) to consider possible changes to the OFA process. *Pet. of Norfolk S. Ry. to Institute a Rulemaking Proceeding to Address Abuses of Board Processes* (*NSR Petition*), EP 727, slip op. at 4 (STB served Sept. 23, 2015).

The Board issued the ANPRM on December 14, 2015. In that ANPRM, the Board explained that its experiences have shown that there are areas where clarifications and revisions could enhance the OFA process and protect it against abuse. Accordingly, the Board requested public comments on whether and how to improve any aspect of the OFA process, including enhancing its transparency and ensuring that it is invoked only to further its statutory purpose of preserving lines for continued rail service. The Board also specifically requested comments on methods for ensuring offerors are financially responsible, addressing issues related to the continuation of rail service, and clarifying the identities of potential offerors.

The Board received comments on the ANPRM from 10 commenters: The Department of the Army Military Surface Deployment and Distribution Command (Army); NSR; CSX Transportation, Inc. (CSXT); the Association of American Railroads (AAR); the Rails-to-Trails Conservancy (Rails-to-Trails); Union Pacific Railroad Corporation (UP); Consolidated Rail Corporation (Conrail); the City of Jersey City (Jersey City); the American Short Line and Regional Railroad Association (ASLRRA); and Mr. James Riffin (Riffin). Based on the comments, the Board has a sufficient record on which to develop specific changes that could improve the OFA process. In Section I, the Board addresses the comments and how they have formed the basis of the rule proposed here. Even if not specifically discussed, the Board has carefully reviewed all comments on the ANPRM and taken each comment into account in developing the proposed rule. In Section II, the Board explains the newly proposed rule.

I. Comments in Response to the ANPRM

Financial Responsibility. The Board's regulations require that a potential offeror demonstrate that it is ''financially responsible,'' but those regulations do not fully define this concept or what facts or evidence a party must provide to demonstrate financial responsibility. Accordingly, in the ANPRM, the Board sought comments regarding how to modify its regulations so that the definition of financial responsibility is more transparent and understandable. In particular, the Board asked parties to comment on a number of methods of ensuring that an offeror is in fact financially responsible, which are discussed below.

a. Documentation

The Board sought comment on what documentation a potential offeror should be required to submit to show financial responsibility. AAR suggested generally that the Board clarify the documentation needed to show financial responsibility (AAR Comments 7–8), while the individual railroads and ASLRRA proposed specific evidence that should be required from offerors, including income statements, balance sheets, letters of credit, statements of financial resources, and evidence of adequate insurance or the ability to obtain such insurance. (*See* Conrail Comments 6–7, ASLRRA Comments 5, UP Comments 4, CSXT Comments 9.) Riffin commented that the Board's current financial responsibility requirements are too strict and should be broadened to allow offerors to provide evidence of non-liquid assets, ability to borrow money, including on credit cards, and demonstrations of cash. (Riffin Comments 17.)

The Board disagrees with Riffin that the financial responsibility requirements are currently too strict, and the Board does not believe that the types of evidence he suggests would show an offeror's financial ability to actually purchase and operate, or subsidize the operation of, a railroad, as is the purpose of an OFA. The Board agrees with the railroad commenters that clarification of the financial responsibility requirements is necessary, but finds that requiring specific documentation would likely place too heavy a burden on legitimate offerors. Instead, as discussed below, the Board proposes to provide clarifying examples of documentation the Board would accept as evidence of financial responsibility, including those documents suggested by the railroad and association commenters, and documentation the Board will not accept, including some of the types of evidence proposed by Riffin.

b. Notice of Intent To File an OFA

Another question posed by the Board in the ANPRM was whether it should require that potential offerors file notices of intent to file an OFA in abandonment and discontinuance proceedings by a date certain. Under the Board's current regulations, a notice of intent to file an OFA is required only when the carrier seeks abandonment or discontinuance authority through the Board's class exemption process, but not through a petition for exemption or application. 49 CFR 1152.27(c)(2)(i).

The railroad and association commenters expressed support for the idea that the Board require offerors to file notices of intent (NOIs) to file an OFA by a date certain in all cases. (*See* Conrail Comments 4, AAR Comments 5–6, NSR Comments 3, 5–6, CSXT Comments 5–6, ASLRRA Comments 5.) AAR and NSR specifically suggested that the Board require NOIs to be filed within 10 days of the publication of a notice of exemption or a petition, and within 45 days after the publication of notice of an application. (AAR Comments 5–6, NSR Comments 5–6.) Several commenters also proposed that the Board require these NOIs to contain specific financial and other certifications about the offeror. (*See* Conrail Comments 5, AAR Comments 6, CSXT Comments 5–6.) Jersey City and Riffin commented that NOIs should not be required. (Jersey City Comments 33–35, Riffin Comments 18.) Riffin argued that the purpose of NOIs in class exemption proceedings is to stay the proceeding to allow an offeror to obtain data from the carrier. Riffin also argued that potential offerors often do not know a line is going to be discontinued or abandoned until a Board decision is served or that potential offerors may decide after a petition, exemption, or application is filed that they want to file an OFA, making it difficult to file a NOI so early in the process. (Riffin Comments 19.)

As discussed further below, the Board proposes to require OFA NOIs in all abandonment or discontinuance proceedings, with the deadlines proposed by AAR and NSR. Congress expedited the abandonment process so that carriers could promptly relieve themselves of unprofitable assets, and the OFA process should move quickly so that carriers can know where things stand. The Board believes that the benefit of providing notice to the abandoning or discontinuing carrier that a party is considering an OFA will help expedite the process. Although Riffin argues that a party may not know so early in the process that it wants to file an OFA, the proposed filing deadlines for an NOI should still allow potential offerors sufficient time to consider their options. However, the Board believes the detailed certification and information requirements proposed by many of the commenters place too heavy a burden on legitimate potential OFA offerors at the NOI stage, and thus we propose to require only the information that is currently required as part of the class exemption process, as well as a minimal preliminary financial responsibility showing described further below.

c. Preliminary Financial Responsibility

In the ANPRM, the Board also sought comment on whether it should require potential offerors to make a financial responsibility showing before carriers are required to provide financial information to the offerors. ASLRRA, NSR, and AAR supported the idea, Jersey City and Riffin opposed it, and the Army commented that this should not be required for governmental entities. (ASLRRA Comments 5–6, NSR Comments 6–8, AAR Comments 6, Jersey City Comments 38–40, Riffin Comments 15–17, Army Comments 2.) ASLRRA proposed requiring prima facie evidence of the ability to purchase, operate, and maintain the line, along with a preliminary determination of financial responsibility from the Board. (ASLRRA Comments 5–6.) NSR proposed requiring financial information at the NOI stage, including statements on the potential offeror's financing abilities. (NSR Comments 7–8.) Jersey City commented that the statute requires carriers to provide valuation information before a showing of financial responsibility. (Jersey City Comments 38.) Riffin commented that no financial responsibility showing should be required at the NOI stage because a potential offeror at this stage will not have the information required to determine the net liquidation value (NLV) of the line, and he suggested as an alternative that a potential offeror should have 30 days after NLV is disclosed by a carrier to demonstrate financial responsibility. (Riffin Comments 15–17.)

The Board is convinced that it makes sense to require offerors to demonstrate some degree of financial responsibility before requiring the railroads to turn over their financial information to offerors. However, the Board also recognizes that a potential offeror cannot be expected to make a full financial responsibility showing based on the value of a rail line without financial information from the carrier. Accordingly, as discussed in more detail in Section II, the Board proposes requiring potential offerors to make a minimal, preliminary financial responsibility showing, but one that does not require any information from the carrier beyond that provided in the notice, petition, or application for abandonment or discontinuance.

With regard to Jersey City's comment that the current requirements for exchanging information is mandated by statute, the regulations proposed here would still require carriers to provide valuation information before a full financial responsibility showing is required. The Board simply proposes this preliminary minimal showing to ensure that potential offerors are legitimate and are not seeking to abuse the OFA process to cause delay in the abandonment or discontinuance process.

With regard to the Army's comment that no financial responsibility showing be required by governmental entities prior to obtaining financial information from the carrier, under 49 CFR 1152.27(c)(1)(ii)(B), governmental entities are presumed financially responsible and the Board does not propose to change that presumption in this rulemaking. Governmental entities, therefore, would not to be subject to this preliminary financial responsibility requirement, although this presumption of financial responsibility would still be rebuttable. *See Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind.,* AB 1065X, slip op. at 5 (STB served Apr. 8, 2011) (finding government entity was not financially responsible, dismissing its OFA, and stating that the presumption that government entities are financially responsible, ''although entitled to significant weight, is not conclusive'').

d. Definition of Financial Responsibility

The Board also sought comment on the definition of financial responsibility. Conrail, ASLRRA, and AAR supported the idea of amending the definition of financial responsibility to include the ability to purchase and operate for at least two years, or subsidize for one year, a line being abandoned or to subsidize for one year service being discontinued. (*See* Conrail Comments 4, ASLRRA Comments 6, AAR Comments 8.) Jersey City supported such a requirement for private offerors, but not for governmental entities, though the City states that it believes it may be difficult to administer a requirement for financial responsibility for two years of operation. (Jersey City Comments 43–46.) AAR commented that the Board should establish a rebuttable presumption that an offeror that has been previously found not to be financially responsible remains not financially responsible. (AAR Comments 8.) CSXT proposed a detailed definition of financial responsibility that would include an offeror having to show immediately available funds for a number of payments and purchases, including locomotives and cars, insurance, and 15 days of working capital. (CSXT Comments 9.) Riffin opposed including the ability to purchase and operate or to subsidize in

the definition of financial responsibility, arguing that it would be contrary to Congressional intent. Riffin also opposes AAR's proposal and CSXT's proposal. (Riffin Comments 11, 15, Riffin Reply Comments 5.)

The Board declines to create a rebuttable presumption of the sort proposed by AAR: That an offeror that has been previously found not to be financially responsible remains not financially responsible. Under the current rules, all offerors (except government entities) bear the burden of showing that they are financially responsible, regardless of whether they have or have not been found financially responsible in the past. As such, there would be little benefit, if any, from AAR's proposed presumption.

The Board, however, does propose to make clear in its rules that, consistent with current Board precedent, an offeror attempting to make the proposed preliminary financial responsibility showing must, at a minimum, demonstrate some ability to purchase and operate the line, or, if there is no active service, at least maintain the line. *See, e.g., Consol. Rail Corp.—Aban. Exemption—in Phila. Pa.,* AB 167 (Sub-No. 1191X) et al., slip op. at 2 (STB served Mar. 14, 2012) (rejecting OFA because offerors ''failed to include any evidence to demonstrate that they are financially responsible to acquire and operate the OFA Segment''); *Greenville Cty. Econ. Dev. Corp.—Aban. & Discontinuance Exemption—in Greenville Cty, S.C.,* AB 490 (Sub-No. 1X), slip op. at 1 (STB served Oct. 27, 2005) (finding offeror financially responsible where it had ''sufficient financial resources to acquire and operate'' the line); *CSX Transp. Inc.—Aban.—in Atkinson & Ware Ctys, Ga.,* AB 55 (Sub-No. 640), slip op. at 1 (STB served Jan. 7, 2004) (finding offeror financially responsible because it had ''the financial resources to acquire and operate the line''). Accordingly, the Board proposes requiring as part of a NOI a minimal showing that this basic requirement can be met. The specifics of the proposed preliminary financial responsibility showing are discussed in Section II below.

e. Railroads' Duty To Provide Information

In the ANPRM, the Board also questioned whether it should alter the process for carriers to provide required financial information to potential offerors. CSXT commented that carriers should only be required to provide the information they are required to disclose by statute and should not be required to provide publicly available information. (CSXT Comments 6–8.) Jersey City argued that most of the delay in the OFA process arises because carriers do not timely provide valuation information, and that to avoid this delay, the Board should require that valuation information be provided with a carrier's initial filing, or create a rule that failure to provide such information promptly waives the carrier's ability to object to an offeror's valuation of a line. (Jersey City 21, 25.) Riffin also suggested that carriers could be required to provide valuation information with the carrier's initial abandonment or discontinuance filing, or within 30 days thereafter. (Riffin Comments 23.) AAR opposed this idea as unnecessary. (AAR Reply Comments 4.)

The Board agrees with AAR that requiring valuation information to be submitted with a carrier's initial filing would place an unnecessarily high burden on carriers at the abandonment or discontinuance filing stage because an OFA may never be filed. Indeed, in most abandonment and discontinuance proceedings, OFAs are not filed. We also reject CSXT's suggestion that the Board limit the carriers' disclosure to evidence required by statute and that is not publicly available. Under 49 U.S.C. 10904(b)(4), the Board has the authority to require carriers to provide potential OFA offerors with ''any other information that the Board considers necessary to allow a potential offeror to calculate an adequate subsidy or purchase offer,'' and the Board does not wish to foreclose this ability in the regulations.

f. Earnest Money/Escrow

The Board also requested comment on whether or not offerors should be required to make an earnest money payment or escrow payment, or to obtain a bond for some portion of their offer. ASLRRA supported an escrow or bond requirement, also suggesting that if the Board determines an OFA to be a sham or abuse of the OFA process, the escrow amount should be paid to the carrier to compensate it for delays and costs. (ASLRRA Comments 6.) UP also supported an earnest money payment, suggesting the payment should be in the amount of the OFA filing fee [1] and made to the carrier before the carrier is required to produce the financial information required under 49 CFR 1152.27(a). (UP Comments 5.) UP argued that the railroad should be allowed to keep the payment, either as part of the final purchase price of the rail line if a sale occurs or to compensate it for the time and expense involved in providing financial information to the offeror if a sale does not occur. (UP Comments 5–6.) Jersey City opposed the idea, arguing that initial payments or bonds should not be required for governmental entities and that the Board has not shown such a requirement is necessary. (Jersey City Comments 48–49.) Riffin also opposed the Board's proposal, arguing that bonds are not feasible within the OFA timeline, that earnest money would not be useful because settlement in an OFA proceeding usually happens quickly after abandonment or discontinuance authority is granted, and that escrow would take too much time and cost the offeror too much money. (Riffin Comments 18.)

As detailed in the proposed rule, the Board proposes to require an offeror to include with its OFA evidence proof that the offeror has placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility amount that would be calculated at the NOI stage under the proposed rule. The Board believes that the proposed escrow requirement would reduce illegitimate offers from parties that may later be found not to be financially responsible. Many significant financial transactions, like real estate transactions, involve escrow, and the Board sees no reason why the purchase or subsidization of a rail line is any different. If an offeror is legitimately interested in an OFA and legitimately capable of acquiring or subsidizing the subject line, this amount is unlikely to be burdensome, especially at the actual offer stage when an offeror should have financing in place. While the Board believes a payment of some kind by an offeror would be a useful tool for the offeror to show the legitimacy of its participation in the OFA process, we do not believe this payment should be made to either the Board or the carrier, nor should this payment go to the carrier other than as part of the purchase or subsidy price in the event of a successful OFA. For that reason, the Board believes escrow would be the best choice for the format of this payment.

Lastly, we note that although governmental entities are presumed to be financially responsible, as discussed below, the Board proposes that these entities also be subject to this escrow requirement.

[1] The filing fee for ''an offer of financial assistance under 49 U.S.C. 10904 relating to the purchase of or subsidy for a rail line proposed for abandonment'' is currently set at $1,700. *See Regulations Governing Fees for Servs. Performed in Connection with Licensing & Related Servs.—2016 Updated,* EP 542 (Sub-No. 24) (STB served Aug. 2, 2016).

g. Abusive Filers

In the ANPRM, the Board also requested comment as to whether to prohibit filings by individuals or entities that have abused the Board's processes in the past, and if so, what standards the Board should apply to such a determination. ASLRRA, NSR, and Conrail supported such a prohibition, with ASLRRA and NSR offering potential standards for such a finding. (ASLRRA Comments 7, NSR Comments 8–9, Conrail Comments 8.) ASLRRA proposed prohibiting parties from filing an OFA when they have repeatedly submitted filings without following through on those filings or have submitted false or misleading information. (ASLRRA Comments 7.) NSR proposed that the Board create a ''demonstrated unqualified offeror'' status for parties who have been found not financially responsible in their most recent prior OFA, have failed to consummate their most recent OFA, or are currently subject to an active bankruptcy proceeding. (NSR Comments 8–9.) NSR proposed that such parties be subject to pre-approval requirements before being allowed to participate in the OFA process. (*Id.*) Jersey City commented that the Board should not make any changes to its regulations, but instead enforce its existing rules to prevent abusive filings. (Jersey City Comments 52–56.) Riffin commented against a prohibition, arguing that a frequent litigant is not the same as an abusive filer. (Riffin 20–22.)

The Board continues to be concerned with inappropriate and vexatious filings and the burden they place on the Board's resources and the resources of the parties that come before the Board. But given that many parties file for bankruptcy and later reestablish themselves financially, prior bankruptcy should not be an absolute bar to using the Board's processes. Nor does the failure to follow through on one OFA necessarily indicate that a party would not follow through on the next one. Finally, even if a party files a vexatious pleading, as the Board has witnessed, we are not persuaded on this record that a special rule is warranted to protect the agency and the public in OFA and other cases.[2] Rather, at this time, we believe that the best way to handle inappropriate filings is to increase enforcement of the existing rules, including 49 CFR 1104.8.[3]

h. Other Issues

Parties also commented on other aspects of financial responsibility. Conrail commented that the Board should eliminate the presumption of financial responsibility for governmental entities, should require governmental entities to show they have taken the necessary steps to authorize the acquisition of the property subject to an OFA and the common carrier obligation, and should require governmental entities to show community support for continued rail operations. (Conrail Comments 7.) The Army and Riffin commented that the Board should keep the presumption of financial responsibility for governmental entities. (Army Comments 2, Riffin Comments 17.) The Board agrees. Conrail has not shown that any changes to the presumption of financial responsibility for governmental entities are necessary to prevent an abuse of the Board's processes, and the Board therefore does not propose to adopt these proposals.[4]

Riffin also suggested that, if a party acquiring a line via OFA fails to make a good faith effort to provide rail service, the line should be subject to reversion to the carrier or made available to other entities that may be able to provide service. (Riffin Reply Comments 8–9.) The Board rejects this proposal, as there are existing remedies before the Board if a carrier fails to meet its common carrier obligation, such as Feeder Line applications, unreasonable practice complaints, emergency service orders, or assistance through the Board's Rail Customer & Public Assistance program.

Continuation of Rail Service. Another area where the Board sought comment concerns whether a party seeking to subsidize or acquire a line through the OFA process is doing so based on a genuine interest in and ability to preserve the line for rail service. Specifically, the Board inquired whether offerors should be required to address whether there is a commercial need for rail service as demonstrated by support from shippers or receivers on the line or through other evidence of immediate and significant commercial need; whether there is community support for rail service; and whether rail service is operationally feasible.

The railroad commenters supported a requirement that offerors address whether there is a commercial need for rail service using the criteria laid out by the Board in *Los Angeles County Metropolitan Transportation Authority—Abandonment Exemption—in Los Angeles County, California* (*LACMTA*), AB 409 (Sub-No. 5X), slip op. at 3 (STB served June 16, 2008). (*See* Conrail Comments 9–10, UP Comments 6–8, ASLRRA Comments 7, AAR Comments 8–10, NSR Comments 9–10, CSXT Comments 5.) Some commenters further suggested that the Board require an offeror to present specific evidence that the OFA would enable continued rail service and that the offeror would be able to provide that service, as demonstrated by a business plan, traffic projections, service plans and contracts with shippers on the line. (AAR Comments 9, NSR Comments 9–10 (agreeing with AAR's proposal).) Several commenters also suggested that the burden on an offeror should be higher when a carrier has filed a notice of exemption to abandon or discontinue, given that in such cases, there has been no traffic on the line for at least two years, making the need for continued rail service more doubtful. Some commenters provide specific suggestions for what that burden should be. (Conrail Comments 10, CSXT Comments 11, AAR Comments 9, NSR Comments 10.) NSR argues that a higher burden should also apply when abandonment or discontinuance is sought through a petition for exemption. (NSR Comments 10.)

Jersey City argued against a detailed requirement for offerors to address commercial need, suggesting instead that offerors only be required to show support from one shipper, potential shipper, or interested governmental entity. (Jersey City Reply Comments 10–11.) Jersey City contended that requiring a more substantial showing that the line is needed for continued rail service conflicts with the agency's prior interpretations of ICCTA. (Jersey City Comments 59–61.) Finally, the Army argued there should be no requirement for governmental entities and shippers to address commercial need (Army Comments 2), but as Conrail points out in response, the Army's comments seem to contemplate a subsidy (not purchase) scenario, in which case ''neither the need for rail service nor its operational feasibility will likely be a serious issue.'' (Conrail Reply Comments 1.)

The Board agrees with the railroad commenters on the benefit of imposing a requirement that offerors demonstrate

[2] We are aware that one option could be to require a pro se party found to have abused the Board's processes in one proceeding to be represented by counsel in any future matters. The idea would be that a licensed attorney would exercise some control over the filings made by the pro se party. Although we will not propose that approach in this NPRM, if parties believe that it could improve our processes, they may wish to address the matter in their comments.

[3] In a recent case the Board rejected a vexatious filing. *See Norfolk S. Ry.—Acquis. & Operation—Certain Rail Lines of Del. & Hudson Ry.,* FD 35873 (STB served Mar. 24, 2016).

[4] Community support for continued rail operations—with respect to all offerors, not only governmental entities—is discussed further below.

a need for continuation of rail service, as it would ensure that the OFA is being sought for the reason Congress intended. Accordingly, as discussed below, the Board proposes to require offerors to address the continued need for rail service when submitting an OFA. However, instead of requiring an offeror to satisfy the specific *LACMTA* criteria or additional criteria, the Board proposes to list those criteria as examples of what the Board will accept as evidence of continued need. The Board also will not adopt a requirement that offerors must submit specific information to show continued need for rail service.

The Board disagrees with Jersey City's argument that requiring such a showing is contrary to the Board's prior ICCTA interpretation. Although the Board, when it adopted regulations implementing ICCTA, concluded that 10904 as revised did not require such a showing, the Board later concluded that an OFA nevertheless must be for continued rail service. *Roaring Fork R.R. Holding Auth.—Aban.—in Garfield, Engle, & Pitkin Ctys., Colo.,* AB 547X (STB served May 21, 1997). That determination has been judicially affirmed. *E.g., Kulmer* v. *STB,* 236 F.3d 1255, 1256–57 (10th Cir. 2001); *Redmond-Issaquah R.R. Preservation Ass'n* v. *STB,* 223 F.3d 1057, 1061–63 (9th Cir. 2000).

OFA Exemptions. The Board also sought comment on whether it should establish criteria and deadlines for carriers that seek exemptions from the OFA process. Some commenters generally supported the idea of establishing criteria and deadlines for carriers seeking exemptions from the OFA process, but they did not agree how stringent the criteria should be. (*See* ASLRRA Comments 8–9, Riffin Comments 28–29.) Other commenters suggested the Board should even establish a class exemption from the OFA process in certain scenarios, including: where the abandoning carrier has entered into an agreement to sell or donate the line for a public purpose (AAR Comments 10, UP Comments 9 (agreeing with AAR's proposal)), where there has been no local traffic for five years (UP Comments 10), or for all notice of exemption and petition for exemption proceedings (NSR Comments 4–5). In addition, Jersey City and Rails-to-Trails also commented that, when determining whether to grant an exemption from the OFA process, greenway or trail projects should be treated with equal importance to other public projects when balanced against the commercial need for continued rail service. (Jersey City 64–65, Rails-to-Trails Comments 3.) In other words, they argue an OFA exemption should be granted if the public importance of the greenway or trail project outweighs the commercial need for continued rail service.

Based on the comments, the Board is not convinced that establishing criteria or deadlines for exemptions from the OFA process is needed. The Board finds that reviewing requests for exemptions from the OFA process on a case-by-case basis allows it to consider the individual circumstances of each case, which the Board would not be able to do if it established specific criteria or created a class exemption. Accordingly, the Board will continue its existing practice of considering such exemptions on a case-by-case basis. We note that the proposal to require offerors to address the continued need for commercial service would ease the burden on carriers without the need for a class exemption. With regard to the comments from Jersey City and Rails-to-Trails, given the Board's conclusion that requests for exemptions from the OFA process should continue to be decided on a case-by-case basis, the Board will not generalize about how it would apply the OFA exemption test in the context of a public greenway or trail project. In addition, there are existing processes under the National Trails System Act, 16 U.S.C. 1247(d) (2014), and the public use provisions of 49 U.S.C. 10905, for seeking the use of rail corridors that would otherwise be abandoned for purposes such as trail and greenway projects.

Other Continuation of Rail Service Comments. UP suggested the Board should allow an abandoning carrier to withdraw its request for abandonment authorization if a need for continued rail service becomes apparent during an OFA proceeding. (UP Comments 11–12.) This is an action carriers may already take in such situations. *See, e.g., Reading Blue Mountain & N. R.R.—Aban. Exemption—in Schuylkill Cty, Pa.,* AB 996X (STB served Feb. 5, 2008); *Almono LP—Aban. Exemption—in Allegheny Cty., Pa.,* AB 842X (Served Jan. 28, 2004); *CSX Transp.—Aban. in Vermillion Cty., Ill.,* AB 55 (Sub-No. 193) (STB served Aug. 28, 1989). Therefore, we are not proposing to change the Board's rules.

Conrail suggested that the Board specify that an offeror successfully acquiring a line via OFA must actually provide service for a minimum of two years before the Board will allow abandonment or discontinuance. (Conrail Reply Comments 3.) In contrast, Riffin commented that operation in the first two years after acquisition should be of little concern to the Board because the purpose of the OFA process is to preserve rail corridors for future use. (Riffin Comments 15.) While the offeror must intend to operate the line for two years, Conrail's comment does not take into account the fact that the offeror may not receive requests allowing it to provide service throughout its first two years. However, Riffin's comment is also incorrect, as the purpose of the OFA statute is not to preserve an unused rail corridor for future rail service, but to fulfill the common carrier obligation under 49 U.S.C. 11101 by providing continued rail service *upon reasonable request* for at least two years.

Identity of the Offeror. In the ANPRM, the Board noted that there has been confusion in some OFA proceedings over the identity of the potential offeror and therefore sought comments regarding ideas on how to address this issue. With regard to the idea that the Board should require multiple parties submitting a joint OFA to form a single legal entity, commenters were split. As an alternative, AAR proposed the Board require joint OFA filers to clearly disclose which entity will be assuming the common carrier obligation, along with how the parties would allocate responsibility for financing the purchase or subsidy and operation of the line, if purchased. (AAR Comments 4.) As discussed below, the Board proposes to adopt AAR's alternative suggestion, as it would allow the Board to identify responsible parties without requiring parties to form a separate entity.

The Board also inquired whether an individual filing an OFA should be required to provide his or her personal address. Commenters generally found such a requirement would be reasonable (Jersey City Comments 77–78, Conrail Comments 11, ASLRRA Comments 8, AAR Comments 4), although Riffin commented that individuals might want to keep their personal addresses out of the public record. (Riffin Comments 9.) Based on the comments, the Board believes that requiring an individual offeror to provide contact information would assist carriers and the Board in identifying the parties involved in an OFA. This is true for all offerors, not only individuals. Any legitimate party that intends to undertake the responsibility for purchasing an operating a rail line, making it subject to various federal, state, and local laws, should be willing to disclose its address. Without an address, it could be difficult for parties to engage the offeror or pursue legal recourse. As discussed below, for this reason, the Board proposes to require an address, either

business or personal, and other contact information for an offeror or a representative of an offeror. This proposed requirement would apply to all offerors, including legal entities.

With regard to the identity of private legal entities filing an OFA, commenters generally agreed that the Board should require such an entity to provide its complete legal name and state of incorporation. (Conrail Comments 11, ASLRRA Comments 8–9, AAR Comments 3–4.) AAR also suggested requiring further details regarding the ownership of an entity, while Conrail also suggested requiring entities to document that they are in good standing in their state of organization. (AAR Comments 3–4, Conrail Comments 11–12.) Riffin pointed out that the location of an entity's principal place of business is not necessary in the OFA process (Riffin Comments 9–10.), and that ownership information is not relevant to whether or not the entity is interested in providing rail service. (Riffin Reply Comments 4.)

The Board proposes to require some information as to the ownership of a legal entity. This information, along with the other identifying information we propose to require, would assist the Board and carriers in identifying the parties involved in an OFA. Although Riffin argues that this information is currently not necessary under the OFA process, the Board is permitted to adopt regulations that will improve the process, so long as it is not contrary to statute, which this proposal is not. Contrary to Riffin's claim, we also believe that ownership information could shed light on whether the entity has a legitimate interest in providing rail service, or instead, is seeking to acquire the corridor for some other, non-rail related purpose. Moreover, ownership information could be helpful in assessing whether the entity has the means to finance the purchase or subsidization of the line.

CSXT commented that the Board should reduce the time for consummation of an OFA once terms and conditions have been set from 90 days to 30 days. (CSXT Comments 6.) CSXT argues that carriers are now familiar with the documentation required for OFAs and can have documents ready for finalization quickly. (*Id.*) However, CSXT does not provide any evidence that the 90-day time period has been problematic. The Board also notes that parties are free to consummate an OFA sooner than 90 days.

Jersey City proposed that governmental entities should be allowed to use OFAs to acquire rail lines for passenger rail service, as long as they also assume the freight common carrier obligation. (Jersey City Comments 28–29.) Jersey City argues OFAs may already be used for passenger rail service, citing *Chicago & North Western Transportation Company* v. *United States,* 678 F.2d 665 (7th Cir. 1982). As the Board has stated, ''nothing in section 10904 precludes a line from being acquired under the OFA procedures to provide combined passenger/freight service and indeed there are situations where . . . it is the inclusion of passenger operations that would seem to make it financially viable for an operator to offer continued (or restored) freight service.'' *Trinidad Ry.—Acquis. & Operation Exemption—in Las Animas Cty., Colo.,* AB 573X et al., slip op. at 8 (STB served Aug. 13, 2001). *See also Union Pac. R.R.—Aban. Exemption—in Rio Grande & Mineral Ctys., Colo.,* AB 33 (Sub-No. 132X), slip op. at 3 (STB served Apr. 22, 1999). Therefore, the Board does not believe the OFA regulations require further clarification on this point.

Jersey City also expressed its concern that ''illegal de facto abandonments'' are the biggest issue surrounding the OFA process. (*See, e.g.,* Jersey City Comments 2, 10–21, 31, 53–54.) This issue is outside the scope of this proceeding, which is focused on changes to the OFA process, not whether more abandonment filings ought to be made.

The Army described situations in which it would make an OFA, and argued that there should be a presumption that existing carriers will retain the common carrier obligation if an OFA is successful. (Army Comments 2.) The situation described by the Army is one of an OFA subsidy, rather than a purchase, in which an existing carrier would continue operation of a line subsidized by an OFA, and would retain the common carrier obligation. Thus, in the scenario that the Army raises, existing law already provides the outcome the Army seeks. If a special situation arose for the Army involving the OFA process, the Board would work with the Army to identify a workable solution.

II. The Proposed Rule

The proposed rule contains eight proposed changes to the Board's regulations at 49 CFR part 1152, which are set out below: Four changes relating to financial responsibility, one relating to the continuation of rail service, and three relating to the identity of offerors.[5] In proposing these changes, the Board has considered the suggestions from commenters on the ANPRM, incorporating them where appropriate and modifying them where necessary in order to propose changes to the regulations that the Board believes would best improve the OFA process and protect it from abuse.

Financial Responsibility. The proposed rule includes four changes intended to clarify the requirement that OFA offerors be financially responsible and to require offerors to provide additional evidence of financial responsibility to the Board.

1. *Examples of evidence of financial responsibility.* First, the Board proposes to further define financial responsibility in its regulations at 49 CFR 1152.27(c)(1)(ii)(B) by including examples of the kinds of evidence the Board would accept to demonstrate that offerors are financially responsible, as well as examples of the kinds of documentation the Board would not accept as evidence of financial responsibility. Examples of documentation the Board would accept include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. Examples of evidence the Board would not accept include the ability to borrow money on credit cards and evidence of non-liquid assets an offeror intends to use as collateral.

Including these examples in the regulations is intended to provide guidance to offerors as to what evidence demonstrates financial responsibility in the OFA process. This change to the regulations would not create new requirements, but would simply provide guidance as to what the regulations already require. The Board proposes to provide these as examples instead of strict requirements because we recognize that each OFA offeror's financial situation may be different, and thus offerors are likely to have access to different types of evidence. The Board believes that requiring the same evidence from all offerors could place an unnecessarily heavy burden on some offerors.

2. *Notice of Intent filing.* Second, the Board proposes to amend its regulations at 49 CFR 1152.27(c)(1) to require potential offerors to submit notices of intent (NOIs) to file an OFA in all

[5] The Surface Transportation Board Reauthorization Act of 2015, Public Law 114–110, 129 Stat. 2228 (2015) revised parts of the United States Code, including re-designating chapter 7 of title 49 of the Code as chapter 13. As a result, in this rulemaking the Board is also revising the authority citation for 49 CFR part 1152 as set out below.

abandonment and discontinuance proceedings. The Board proposes to require NOIs to be filed no later than 10 days after the **Federal Register** publication of notice that a petition for exemption has been filed, and no later than 45 days after the **Federal Register** publication of notice that an application to abandon or discontinue has been filed.

Under 49 CFR 1152.27(c)(2)(i), potential offerors are already required to file NOIs no later than 10 days after the publication of a notice of exemption in notice of exemption proceedings. This notice is a short document providing notification to the carrier and the Board that a party intends to make an OFA. Extending this requirement to petition and application proceedings would be a relatively low burden on potential offerors, as they would only be required to indicate their interest and to make a minimal financial responsibility showing, as discussed further below, at this stage. The Board also believes that setting the deadlines for NOIs at 10 days after the publication of notice that a petition has been filed and 45 days after the filing of an application would provide potential offerors adequate time to consider whether or not they want to participate in the OFA process in a particular proceeding and have the financial resources to do so. This small burden on potential offerors would also be balanced by the benefit NOIs would provide to the Board and to abandoning or discontinuing carriers by notifying them that a party is interested in an OFA and providing the identity of that party. Providing this notice to carriers would allow carriers to more timely assemble the financial information that, under 49 CFR 1125.27(a), they will be required to provide a potential offeror on request. Identifying potential offerors at an early stage may also provide an opportunity for carriers to work with those seeking to make an OFA and allow the parties to come to a mutually beneficial agreement outside of the OFA process.

3. *Preliminary showing of financial responsibility.* Third, the Board proposes to amend its regulations at 49 CFR 1152.27(c)(1) to require a preliminary showing of financial responsibility with the filing of an NOI, before the railroad is required to provide financial information to the potential offeror. The Board has identified an initial minimal financial responsibility showing as a useful tool to ensure offerors are legitimately interested in, and capable of, participating in the OFA process and are not seeking to abuse the Board's processes or cause delay in abandonment or discontinuance proceedings. The Board proposes calculating the amounts required for this showing using the following formulas.

For a potential OFA to subsidize service, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as a minimum maintenance cost for the line per mile for the one-year mandatory subsidy period. To determine this amount, the Board proposes multiplying the standard per-mile per-year maintenance cost for rail lines by the length of the line in miles. As discussed below, the Board proposes setting the standard per-mile per-year maintenance cost at $4,000. The potential offeror would then provide the Board with evidence of its preliminary financial responsibility at that level.

In the past, the Board has accepted base maintenance costs for rail line of between $4,000 and $11,000 per mile per year. *See Wis. Cent. Ltd.—Aban.—in Ozaukee, Sheboygan, & Manitowoc Ctys., Wis.,* AB 303 (Sub-No. 27), slip op. at 6 (STB served Oct. 18, 2004) (accepting forecast year maintenance-of-way and structures cost of approximately $4,300 per mile in granting petition for abandonment exemption); *Union Pac. R.R.—Aban.—in Harris, Fort Bend, Austin, Wharton, & Colo. Ctys., Tex.,* AB 33 (Sub-No. 156), slip op. at app. (STB served Nov. 8, 2000) (accepting total forecast year costs for maintenance-of-way and structures of $529,833 in granting application for abandonment exemption for 49.42-mile rail line, for a maintenance cost of just under $11,000 per mile per year); *SWKR Operating Co.—Aban. Exemption—in Cochise Cty., Ariz.,* AB 441 (Sub-No. 2X), slip op. at 6 (STB served Feb. 14, 1997) (accepting rail line maintenance costs of just over $6,000 per-mile per-year in granting petition for abandonment exemption and stating that ''[w]e know from extensive experience that $6,000 per mile/per year is a reasonable figure for maintenance by a Class III railroad.''). We believe that it is appropriate to use the lowest end of this range so as not to unintentionally discourage parties that have a legitimate interest in pursuing an OFA too early in the process. In addition, while the maintenance cost per mile will naturally vary for each rail line subject to an OFA, the purpose here is to set a standard cost that can be applied easily in each case. We believe that requiring potential offerors to specifically identify that value and provide the Board with evidence to support it would create additional complexity that is contrary to the purpose of the preliminary financial responsibility showing. We therefore propose to set the per-mile per-year maintenance cost to be used in the preliminary financial responsibility calculation at a standard $4,000.

For a potential OFA to purchase a line, the Board proposes that the preliminary financial responsibility showing at the NOI stage be calculated as the sum of (a) the current rail steel scrap price per ton, multiplied by 132 tons per track mile as the estimated weight of the track, multiplied by the total track length in miles, plus (b) the $4,000 minimum maintenance cost per mile described above, multiplied by the total track length in miles, multiplied by two (because an OFA purchaser is responsible for operating the acquired line for at least two years).[6] As noted previously, although the Board is declining to propose rebuttable presumptions or specific requirements for a showing of financial responsibility, these elements would be consistent with the Board precedent that an offeror must at least demonstrate some ability to purchase and operate the line, or, if there is no active service, at least maintain the line.

The current rail steel scrap price is available at no charge from Web sites that track steel prices. The Board proposes requiring the potential offeror to use one of these publicly available sources to determine the price of steel and then submit to the Board documentation showing the source the offeror uses, with a requirement that this source price be dated within 30 days of the submission of the NOI. We propose to set the estimated weight of the steel per mile of track at 132 tons per mile of track.[7] The Board believes that this amount, which is at or near the low end of the weight range for track materials generally associated with the OFA process, would be a reasonable standard weight to be used in this calculation at the NOI stage. The Board proposes to set a standard weight to be used in this calculation in order to simplify the preliminary financial responsibility calculation and avoid requiring offerors to determine actual weights of rail. The length of the track would be taken from the carrier's filing.

[6] OFAs to purchase rail lines normally include the value of the land. Because the value of land varies widely across the country and is not easily identified at this stage, the Board does not propose to include land value in the preliminary financial responsibility calculation.

[7] Seventy-five pounds per yard of rail equals 25 pounds per foot. Twenty-five pounds per foot multiplied by 5,280 feet per mile equals 132,000 pounds per mile. One hundred thirty-two thousand pounds per mile multiplied by two (the number of rails per track) equals 264,000 pounds, or 132 tons, of rail per mile of track.

The potential offeror would calculate the total cost as described above and provide evidence of its financial responsibility at that level.

Upon receipt of the potential offeror's NOI with the preliminary financial responsibility evidence, the Board would review the information submitted. If the Board finds the information is inadequate to determine the potential offeror's preliminary financial responsibility, it would issue a decision within 10 days of the receipt of the information, either requesting further information from the potential offeror or rejecting the potential offeror's NOI. If after 10 days the Board has not issued a decision on the NOI, the potential offeror would be presumed to be preliminarily financially responsible for the minimum subsidy or purchase cost of the line, and the carrier would be required to provide the potential offeror with the information required under 49 CFR 1152.27(a) upon request. Being preliminarily financially responsible under this process would not create any presumption that the party will be found financially responsible under 49 CFR 1152.27(c)(1)(iv) if an OFA is submitted later.

The Board believes this calculation would result in an amount that is a reasonable measure of interest and capability. We acknowledge that the result of this calculation would be an amount somewhat below (in some cases substantially below) the actual subsidy or purchase price of the line, but the purpose is merely to discourage abusive OFAs. Additionally, the Board believes doing this calculation at the NOI stage, while representing an extra step, would not be a significant burden on potential offerors. This calculation could be done without the need for any additional information from the carrier or the Board beyond what is in the carrier's filing.

As noted above in the discussion of comments on this proposal, governmental entities would continue to be presumptively financially responsible under 49 CFR 1152.27(c)(1)(ii)(B), although this presumption is rebuttable at the OFA stage. Governmental entities would therefore not be subject to this proposed requirement, but they would still be required to file the NOI described above.

4. *Escrow requirement.* Fourth, the Board proposes to require offerors to demonstrate in their OFA that they have placed in escrow with a reputable financial institution 10% of the preliminary financial responsibility amount calculated at the NOI stage. The deposit into escrow would allow the offeror to show the abandoning or discontinuing carrier and the Board that its offer and interest in the line are legitimate. The Board has identified escrow as the best option for this financial demonstration because, similar to the use of escrow in other significant financial transactions, it would require the offeror to make a concrete showing of its finances and interest in the OFA without giving funds over to the Board or to the involved carrier. The Board would not administer this process, and the funds would never go to either the Board or the abandoning or discontinuing carrier as a penalty. If at any time before consummation of the transaction the offeror were to decide to end its involvement in the OFA process, it would be entitled to return of the escrowed funds. The escrowed funds would be given over to the carrier involved in the OFA transaction only as part of the purchase or subsidy price of the line if and when the OFA is successfully completed.

The Board believes that 10% of the preliminary financial responsibility amount calculated at the NOI stage would be the appropriate amount for an escrow deposit for several reasons. Although, as noted, the proposed preliminary financial responsibility amount will be lower than the eventual amount of the subsidy or purchase price, it is an amount that is easily identified by the offeror without the need to assess the overall value of the rail line. It is also an amount based on the length of the rail line. Ten percent of the preliminary financial responsibility amount would therefore also bear some relation to the size of the overall financial transaction. However, 10% of this amount would not likely be so burdensome as to discourage an otherwise qualified offeror from submitting an OFA. At the offer stage when this escrow deposit would be required, a qualified offeror should already have financing in place. For this reason, the Board proposes requiring governmental entities to comply with this escrow requirement. Although governmental entities are presumed financially responsible, since they too should have financing in place, the Board does believe it would be unreasonable or burdensome to require them to also meet this requirement.

Continuation of Rail Service. The Board proposes to amend 49 CFR 1152.27 to require offerors to demonstrate in their OFA that continued rail service on the line the offeror seeks to subsidize or purchase would be needed and feasible. Examples of evidence to be provided would include: (1) Evidence of a demonstrable commercial need for service, as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need; (2) evidence of community support for continued rail service; (3) evidence that acquisition of freight operating rights would not interfere with any current and planned transit services; and (4) evidence that continued service is operationally feasible.

The requirement for an OFA to show evidence of a continued need for service is already laid out in Board precedent. *See LACMTA,* AB 409 (Sub-No. 5X), slip op. at 3. By explicitly placing this requirement in our regulations, the Board would be able to ensure that this requirement is addressed in all OFAs and that there is a genuine need to preserve the line for rail service in all OFA cases. Additionally, by including examples of how an offeror may demonstrate the need for continued service, the amended regulations would provide guidance to offerors to assist them in meeting this requirement in their OFAs. The Board notes that, in cases of two year out-of-service notices of exemption, the burden on the offeror to show the continued need for rail service would remain the same as in other proceedings. However, because of the nature of the exemption process, where there has been no service for at least two years, an offeror would need to present concrete evidence of a continued need for rail service.

Identity of Offerors. The Board proposes three amendments to 49 CFR 1152.27 to clarify the identity of offerors in their OFAs.

1. *Mailing address.* First, the Board proposes to require offerors to provide a mailing address, either business or personal, and other contact information, including a phone number and email address, for the offeror or a representative. The Board notes that a Post Office Box would be an acceptable mailing address for an offeror to provide.

2. *Disclosure of identity.* Second, the Board proposes to require offerors that are legal entities to include in their offer the entity's full legal name, state of organization or incorporation, and a description of the ownership of the entity.

3. *Identify entity to hold common carrier responsibility.* Third, the Board proposes to require multiple parties filing a single OFA to clearly identify which entity or individual would be assuming the common carrier obligation and to clearly identify how the parties would allocate responsibility for

financing the purchase or subsidy and, if purchased, the operation of the line.

As noted in the ANPRM, in the past the Board has encountered confusion in the OFA process over the identity of offerors. *See CSX Transp. Inc.—Aban. Exemption—in Allegany Cty., Md.,* AB 55 (Sub-No. 659X), slip op. at 1 n.2 (STB served Apr. 24, 2008) (describing confusion over proper name and existence of entity that filed OFA in 2005 but may not have been a legal entity until 2007 or the correct legal entity to receive deed for rail line). This additional information the Board proposes to require in OFAs would allow the Board and the carrier receiving an OFA to identify the individuals or entities submitting the offer. It is essential for the Board to be able to identify the parties involved in an OFA in order to assess the ability of the party or parties to carry out an OFA, including assessing the financial responsibility of the offeror(s). It is also important for a carrier receiving an OFA to be able to identify the party or parties involved in an offer so that the carrier can effectively negotiate with them. Furthermore, the benefit of this information in clarifying the identity of an offeror would far outweigh the relatively small additional burden requiring this information places on an offeror.

The Board seeks comments from all interested persons on the proposed rule. Importantly, the Board encourages interested persons to propose and discuss potential modifications or alternatives to the proposed rule. The Board will carefully consider all recommended proposals in an effort to establish the most useful changes to the OFA regulations.

Regulatory Flexibility Act. The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, generally requires a description and analysis of new rules that would have a significant economic impact on a substantial number of small entities. In drafting a rule, an agency is required to: (1) Assess the effect that its regulation will have on small entities; (2) analyze effective alternatives that may minimize a regulation's impact; and (3) make the analysis available for public comment. 601–604. In its notice of proposed rulemaking, the agency must either include an initial regulatory flexibility analysis, 603(a), or certify that the proposed rule would not have a ''significant impact on a substantial number of small entities.'' 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the proposed rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

It is possible that the rule proposed here could have a significant economic impact on certain small entities.[8] Parties may comment on any information relevant to the burden, if any, the proposed rule will have on small entities as defined by the RFA.

Description of the reasons why the action by the agency is being considered.

On May 26, 2015, NSR filed a petition to institute a rulemaking proceeding to address abuses of Board processes. In a decision served on September 23, 2015, the Board denied NSR's petition but stated it would institute a separate rulemaking proceeding to examine the OFA process. On December 14, 2015 the Board instituted this proceeding, issuing an ANPRM requesting comments from the public and stating that, based on NSR's petition and on the Board's experiences since ICCTA was enacted in 1995, there are areas where clarifications and revisions to the Board's OFA process could enhance the process and protect it against abuse.

Succinct statement of the objectives of, and legal basis for, the proposed rule.

The objectives of this proposed rule are to update the Board's regulations regarding the OFA process and identify changes that can be made to improve the OFA process and protect it from abuse. The Board believes the changes proposed in this NPRM would achieve this by ensuring that parties that participate in the OFA process are legitimate and are doing so for the purpose intended by Congress, which is to preserve rail service. The legal basis for the proposed rule is 49 U.S.C. 1321.

Description of, and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

The proposed rule would apply to all entities making offers of financial assistance to subsidize or purchase rail lines subject to abandonment or discontinuance under the Board's regulations. In the past 20 years since ICCTA was enacted, the Board has received approximately 100 OFAs, or an average of five per year. Of those, the Board estimates that about 80, or 80%, were filed by small entities. Over the last six years, the Board has received six OFAs, or an average of one per year. Of those, the Board estimates that about four, or 66%, were filed by small entities. The majority of these small entities have been small businesses, including shippers and Class III railroads, but this has also included small governmental jurisdictions and small nonprofits. We therefore estimate that this rule will affect up to four small entities per year.

Description of the projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities that will be subject to the requirement and the types of professional skills necessary for preparation of the report or record.

The proposed rule would require additional information from entities interested in or submitting OFAs at two stages. First, an entity would have to file a notice of intent (NOI) soon after the railroad files for abandonment or discontinuance authority (the NOI stage). Second, entities would have to provide new information when the actual offer is submitted (the offer stage), which occurs soon after the railroad has obtained abandonment or discontinuance authority from the Board. The Board is seeking approval from the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act (PRA) for these requirements through a revision to a broader, existing OMB-approved collection, as described in the Appendix.

At the NOI stage, potential offerors would be required to submit an NOI in all notice of exemption, petition for exemption, and application proceedings, rather than only in notice of exemption proceedings as is now required. This NOI would be a simple notice to the Board and the carrier involved in the proceeding that a party is interested in making an OFA to subsidize or purchase the rail line. Potential offerors would also be required to calculate a preliminary financial responsibility amount for the line using information contained in the carrier's filing and other publicly available information, and provide to the Board evidence of their financial responsibility at that level. This calculation would require research on the part of the potential offeror to determine the current scrap price of steel, which is publicly available at no

[8] Effective June 30, 2016, for the purpose of RFA analysis, the Board defines a ''small business'' as only including those rail carriers classified as Class III rail carriers under 49 CFR 1201.1–1. *See Small Entity Size Standards Under the Regulatory Flexibility Act,* EP 719 (STB served June 30, 2016) (with Board Member Begeman dissenting). Class III carriers have annual operating revenues of $20 million or less in 1991 dollars, or $38,060,383 or less when adjusted for inflation using 2014 data. Class II rail carriers have annual operating revenues of up to $250 million in 1991 dollars or up to $475,754,802 when adjusted for inflation using 2014 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its Web site. 49 CFR 1201.1–1.

cost. This calculation would not require professional expertise, however, as it is intended to be relatively simple.

At the offer stage, offerors would be required to provide additional relevant identifying information depending on whether the offeror is an individual, a legal entity, or multiple parties seeking to submit a joint OFA. Offerors would also be required to address the continued need for rail service in their offer, to place 10% of the minimum subsidy or purchase price of the line (taken from the calculation done at the NOI stage) in an escrow account, and to provide evidence with their offer that they have completed the escrow requirement.

All small entities participating in the OFA process would be subject to these requirements. As discussed above, in the past these small entities have included small businesses, Class III railroads, small nonprofits, and small governmental entities. Many, but not all, entities participating in the OFA process are represented by legal counsel, though such representation is not required. These new requirements may take additional time, as detailed in the Paperwork Reduction Act analysis below, but the Board does not believe they would require additional professional expertise beyond that already required by the OFA process.

The Board estimates these new requirements would add a total annual hour burden of 42 hours and no total annual ''non-hour burden'' cost under the Paperwork Reduction Act, as detailed below and in the Appendix. The Board seeks comment on these estimates and on the actual time, costs, or expenditures of compliance with the proposed rule.

Identification, to the extent practicable, of all relevant federal rules that may duplicate, overlap, or conflict with the proposed rule.

The Board is unaware of any duplicative, overlapping, or conflicting federal rules. The Board seeks comments and information about any such rules.

Description of any significant alternatives to the proposed rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the proposed rule on small entities, including alternatives considered, such as: (1) Establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) use of performance rather than design standards; (4) any exemption from coverage of the rule, or any part thereof, for such small entities.

Under the proposed rule, offerors and potential offerors participating in the OFA process would be required to submit additional information as described above at the NOI stage and at the offer stage of the process. One alternative to the NOI requirements in the proposed rule would be to exempt small entities from the preliminary financial responsibility showing. An alternative to the escrow requirement would be to require small entities to place a smaller percentage of the of the minimum subsidy or purchase price of the line in escrow, or to exempt small entities from the escrow requirement altogether. But because many of the problems with OFAs have involved parties that could be classified as small entities, applying these alternatives could defeat the purpose of the proposed rule.

An alternative to the proposed rule as a whole would be to exempt small entities from compliance with the rule. This would significantly weaken the effect of the rule because, as discussed above, approximately 66% to 80% of OFAs, depending on sample size, are filed by small entities. The Board could also take no action to revise the OFA regulations, though this would not allow the Board to meet its objectives of improving the OFA process and protecting it from abuse. Commenters should, if they advance any of these or any other alternatives in their comments, address how such alternatives would be consistent or inconsistent with the goals envisioned by the proposed rules.

Paperwork Reduction Act. Pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and Office of Management and Budget (OMB) regulations at 5 CFR 1320.8(d)(3), the Board seeks comments about each of the proposed collections regarding: (1) Whether the collection of information, as modified in the proposed rule and further described below, is necessary for the proper performance of the functions of the Board, including whether the collection has practical utility; (2) the accuracy of the Board's burden estimates; (3) ways to enhance the quality, utility, and clarity of the information collected; and (4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology, when appropriate. Information pertinent to these issues is included in the Appendix. This proposed rule will be submitted to OMB for review as required under 44 U.S.C. 3507(d) and 5 CFR 1320.11(b). Comments received by the Board regarding the information collection will also be forwarded to OMB for its review when the final rule is published.

List of Subjects in 49 CFR Part 1152

Administrative practice and procedure, Railroads, Reporting and recordkeeping requirements, Uniform System of Accounts.

It is ordered:

1. Comments are due by December 5, 2016. Reply comments are due by January 3, 2017.

2. A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration.

3. Notice of this decision will be published in the **Federal Register**.

4. This decision is effective on its service date.

Decided: September 28, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Marline Simeon,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board proposes to amend title 49, chapter X, subchapter B, part 1152 of the Code of Federal Regulations as follows:

PART 1152—ABANDONMENT AND DISCONTINUANCE OF RAIL LINES AND RAIL TRANSPORTATION UNDER 49 U.S.C. 10903

■ 1. The authority citation for part 1152 is revised to read as follows:

Authority: 11 U.S.C. 1170; 16 U.S.C. 1247(d) and 1248; 45 U.S.C. 744; and 49 U.S.C. 1301, 1321(a), 10502, 10903–10905, and 11161.

■ 2. Amend § 1152.27 as follows:

■ a. In paragraph (a) introductory text, add the words ''who has proven itself preliminarily financially responsible under paragraph (c)(1)(ii) of this section'' after the word ''service''.

■ b. Redesignate paragraphs (c)(1)(i) and (ii) as paragraphs (c)(1)(iii) and (iv), respectively, and add new paragraphs (c)(1)(i) and (ii).

■ c. Revise newly redesignated paragraph (c)(1)(iv)(B) and add paragraphs (c)(1)(iv)(D), (E), (F), (G), and (H).

■ d. In paragraph (c)(2)(i), add the words ''and demonstrating that they are preliminarily financially responsible as described in paragraph (c)(1)(ii) of this

section'' after the words ''(*i.e.,* subsidy or purchase)''.

■ e. In paragraph (c)(2)(iii), remove ''(c)(1)(ii)'' and add in its place ''(c)(1)(iv)''.

■ f. In paragraph (d), remove ''or a formal expression of intent under paragraph (c)(2)(i) of this section indicating an intent to offer financial assistance'' and add in its place '', or satisfaction of the preliminary financial responsibility requirement under paragraph (c)(1)(ii) of this section''.

■ g. In paragraph (e)(1), remove ''(c)(1)(i)(C)'' and add in its place ''(c)(1)(iii)(C)''.

■ h. In paragraph (e)(2), remove ''(c)(1)(i)(C)'' and add in its place ''(c)(1)(iii)(C)''.

The revisions and additions read as follows:

§ 1152.27 Financial assistance procedures.

* * * * *

(c) * * *

(1) * * *

(i) *Expression of intent to file offer.* Persons with a potential interest in providing financial assistance must, no later than 45 days after the **Federal Register** publication described in paragraph (b)(1) of this section or no later than 10 days after the **Federal Register** publication described in paragraph (b)(2)(i) of this section, submit to the carrier and the Board a formal expression of their intent to file an offer of financial assistance, indicating the type of financial assistance they wish to provide (*i.e.,* subsidy or purchase) and demonstrating that they are preliminarily financially responsible as described in paragraph (c)(1)(ii) of this section. Such submissions are subject to the filing requirements of § 1152.25(d)(1) through (3).

(ii) *Preliminary financial responsibility.* Persons submitting an expression of intent to file an offer of financial assistance as described in paragraph (c)(1)(i) or paragraph (c)(2)(i) of this section must demonstrate that they are financially responsible, under the definition set forth in paragraph (c)(1)(iv)(B) of this section, for the calculated preliminary financial responsibility amount of the rail line they seek to subsidize or purchase. If they seek to subsidize, the preliminary financial responsibility amount shall be $4,000 (representing a standard annual per-mile maintenance cost) times the number of miles of track. If they seek to purchase, the preliminary financial responsibility amount shall be the sum of: the rail steel scrap price per ton (dated within 30 days of the submission of the expression of intent), times 132 tons per track mile, times the total track length in miles; plus $4,000 times the number of miles of track times two. Persons submitting an expression of intent must provide evidentiary support for their calculations. If the Board does not issue a decision regarding the preliminary financial responsibility demonstration within ten days of receipt of the expression of intent, the party submitting the expression of intent will be presumed to be preliminarily financially responsible and, upon request, the applicant must provide the information required under paragraph (a) of this section. This presumption does not create a presumption that the party will be financially responsible for an offer submitted under paragraph (c)(1)(iv) of this section.

* * * * *

(iv) * * *

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations. Examples of documentation the Board will accept as evidence of financial responsibility include income statements, balance sheets, letters of credit, profit and loss statements, account statements, financing commitments, and evidence of adequate insurance or ability to obtain adequate insurance. Examples of documentation the Board will not accept as evidence of financial responsibility include the ability to borrow money on credit cards and evidence of non-liquid assets an offeror intends to use as collateral. Governmental entities will be presumed to be financially responsible;

* * * * *

(D) Demonstrate that the offeror has placed in escrow with a reputable financial institution funds equaling 10% of the preliminary financial responsibility amount calculated pursuant to paragraph (c)(1)(ii) of this section;

(E) Demonstrate that there is a continued need for rail service on the line, or portion of the line, in question. Examples of evidence to be provided include: evidence of a demonstrable commercial need for service (as reflected by support from shippers or receivers on the line or other evidence of an immediate and significant commercial need); evidence of community support for continued rail service; evidence that acquisition of freight operating rights would not interfere with current and planned transit services; and evidence that continued service is operationally feasible;

(F) Identify the offeror and provide a mailing address, either business or personal, and other contact information including phone number and email address as available, for the offeror or a representative;

(G) If the offeror is a legal entity, include the entity's full name, state of organization or incorporation, and a description of the ownership of the entity; and

(H) If multiple parties seek to make a single offer of financial assistance, clearly identify which entity or individual will assume the common carrier obligation if the offer is successful, and clearly describe how the parties will allocate responsibility for financing the subsidy or purchase of the line and, if purchased, the operation of the line.

* * * * *

Note: The following appendix will not appear in the Code of Federal Regulations.

Appendix

Information Collection

Title: Preservation of Rail Service (including Offers of Financial Assistance (OFAs) and Notices of Intent to File an OFA).

OMB Control Number: 2140–0022.

Form Number: None.

Type of Review: Revision of a currently approved collection.

Summary: As part of its continuing effort to reduce paperwork burdens, and as required by the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521 (PRA), the Surface Transportation Board (Board) gives notice that it is requesting from the Office of Management and Budget (OMB) approval for the revision of the currently approved information collection, Preservation of Rail Service, OMB Control No. 2140–0022, as further described below. The requested revision to the currently approved collection is necessitated by this NPRM, which amends certain information collected by the Board in OFAs and notices of intent to file an OFA. *See* 49 CFR 1152.27. All other information collected by the Board in the currently approved collection is without change from its approval (currently expiring on January 31, 2019).

Respondents: Affected shippers, communities, or other interested persons seeking to preserve rail service over rail lines that are proposed or identified for abandonment, and railroads that are required to provide information to the offeror or applicant.

Number of Respondents: 40.

Frequency of Response: On occasion.

TABLE—NUMBER OF YEARLY RESPONSES

Type of filing	Number of filings
Offer of Financial Assistance	1
Notice of Intent to File an OFA	4
OFA—Railroad Reply to Request for Information	2
OFA—Request to Set Terms and Conditions	1
Request for Public Use Condition	1
Feeder Line Application	1
Trail-Use Request	27
Trail-Use Request Extension	24

Total Burden Hours (annually including all respondents): 400 hours (sum total of estimated hours per response × number of responses for each type of filing).

TABLE—ESTIMATED HOURS PER RESPONSE

Type of filing	Number of hours per response
Offer of Financial Assistance	50
Notice of Intent to File an OFA	6
OFA—Railroad Reply to Request for Information	10
OFA—Request to Set Terms and Conditions	40
Request for Public Use Condition	2
Feeder Line Application	70
Trail-Use Request	4
Trail-Use Request Extension	4

Total Annual ''Non-Hour Burden'' Cost: None identified. Filings are submitted electronically to the Board.

Needs and Uses: Under the Interstate Commerce Act, as amended by the ICC Termination Act of 1995, Public Law 104–88, 109 Stat. 803 (1995), and Section 8(d) of the National Trails System Act, 16 U.S.C. 1247(d) (Trails Act), persons seeking to preserve rail service may file pleadings before the Board to acquire or subsidize a rail line for continued service, or to impose a trail use or public use condition. Under 49 U.S.C. 10904, the filing of a notice of intent to file an OFA alerts the Board and the public that the filing of an OFA may be imminent. The filing of an OFA then starts a process of negotiations to define the financial assistance needed to purchase or subsidize the rail line sought for abandonment. In this rulemaking, the Board is proposing to seek additional information in its collection of both (a) notices of intent to file and OFA and (b) OFAs. During the OFA process, the offeror may request additional information from the railroad, which the railroad must provide. If the parties cannot agree to the sale or subsidy, either party also may file a request for the Board to set the terms and conditions of the financial assistance. Under 10905, a public use request allows the Board to impose a 180-day public use condition on the abandonment of a rail line, permitting the parties to negotiate a public use for the rail line. Under 10907, a feeder line application provides the basis for authorizing an involuntary sale of a rail line. Finally, under 16 U.S.C. 1247(d), a trail-use request, if agreed upon by the abandoning carrier, requires the Board to condition the abandonment by issuing a Notice of Interim Trail Use or Certificate of Interim Trail Use, permitting the parties to negotiate an interim trail use/rail banking agreement for the rail line.

The collection by the Board of these offers, requests, and applications, and the railroad's replies (when required), enables the Board to meet its statutory duty to regulate the referenced rail transactions.

[FR Doc. 2016–24056 Filed 10–4–16; 8:45 am]

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