■ 2. Section 180.1195 is revised to read as follows:

§ 180.1195 Titanium dioxide.

(a) Titanium dioxide (CAS Reg. No. 13463–67–7) is exempted from the requirement of a tolerance for residues in or on growing crops, when used as an inert ingredient (UV protectant) in microencapsulated formulations of the insecticide lambda cyhalothrin at no more than 3.0% by weight of the formulation and as an inert ingredient (UV stabilizer) at no more than 5% in pesticide formulations containing the active ingredient napropamide.

(b) Residues of titanium dioxide (CAS Reg. No. 13463–67–7) in honey are exempted from the requirement of a tolerance, when used as an inert ingredient (colorant) in pesticide formulations intended for varroa mite control around bee hives at no more than 0.1% by weight in the pesticide formulation.

[FR Doc. 2017–14099 Filed 7–3–17; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 441

[EPA–HQ–OW–2014–0693; FRL–9957–10–OW]

RIN 2040–AF26

Effluent Limitations Guidelines and Standards for the Dental Category

Correction

In rule document C1–2017–12338, beginning on page 28777, in the issue of Monday, June 26, 2017 make the following corrections:

§ 441.30 Pretreatment standards for existing sources (PSES) [Corrected]

1. On page 28777, in the second column, ''§ 441.20 General definitions [Corrected]'' should read ''§ 441.30 Pretreatment standards for existing sources (PSES) [Corrected]''.

2. On page 28777, in the second column, ''the 18th line of paragraph (iii)'' should read ''in the 9th line of paragraph (iii)''.

[FR Doc. C2–2017–12338 Filed 7–3–17; 8:45 am]

BILLING CODE 1301–00–D

SURFACE TRANSPORTATION BOARD

49 CFR Part 1152

[Docket No. EP 729]

Offers of Financial Assistance

AGENCY: Surface Transportation Board.

ACTION: Final rule.

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

DATES: This rule is effective on July 29, 2017.

ADDRESSES: Information or questions regarding this final rule should reference Docket No. EP 729 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street SW., Washington, DC 20423–0001.

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'' person, 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 Advance 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 an 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: Ensuring offerors are financially responsible; addressing issues related to the continuation of rail service; and clarifying the identities of potential offerors.

On September 30, 2016, the Board issued a Notice of Proposed Rulemaking (NPRM), addressing the comments on the ANPRM and proposing specific amendments to its regulations at 49 CFR 1152.27 based on those comments. The Board proposed four amendments 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; one amendment intended to require that potential offerors demonstrate the continued need for rail service over the

line sought to be acquired; and three amendments intended to clarify the identity of offerors in OFAs.

The Board sought comments on the proposed regulations by December 5, 2016, and replies by January 3, 2017. The Board received comments from six parties: The Association of American Railroads (AAR); the Army's Military Surface Deployment and Distribution Command (Army); the City of Jersey City, New Jersey (Jersey City); 212 Marin Boulevard, LLC, 247 Manila Avenue, LLC, 280 Erie Street, LLC, 317 Jersey Avenue, LLC, 354 Cole Street, LLC, 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (filing collectively as the LLCs); NSR; and Mr. James Riffin (Riffin). AAR, the LLCs, and Jersey City also filed reply comments.

Below the Board addresses the comments and suggestions submitted by parties in response to the NPRM, including discussion of clarifications and modifications being adopted in the final rule based on the comments. Even if not specifically discussed here, the Board has carefully reviewed all comments on the NPRM and has taken each comment into account in developing the final rule. The text of the final rule is below.

Most parties commenting on the NPRM were supportive of the Board's proposals, suggesting certain modifications to and clarifications of the Board's proposals. (*See* Army NPRM Comments 1; Riffin NPRM Comments 1; NSR NPRM Comments 9; AAR NPRM Comments 12; LLCs NPRM Comments 2.) One commenter suggested the changes proposed in the NPRM were insufficient to deter abuse of the OFA process and were ''misfocused.'' (*See* Jersey City NPRM Comments 2, 7–9.)

Financial Responsibility. As noted, the Board made four proposals in the NPRM 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. First, the Board proposed to further define financial responsibility in its regulations by including examples of the kinds of evidence the Board would and would not accept to demonstrate financial responsibility. Second, the Board proposed to require notices of intent to file an OFA (NOIs) in all abandonment or discontinuance proceedings. Third, the Board proposed to require a showing of preliminary financial responsibility with the filing of an NOI, based on a calculation using the information contained in the carrier's filing and other publicly-available information. And fourth, the Board proposed to require an offeror to demonstrate in its OFA that the offeror has placed in escrow 10% of the preliminary financial responsibility amount calculated at the NOI stage.

Examples of evidence of financial responsibility. In the NPRM, the Board proposed as examples of documentation that it would accept as evidence of financial responsibility at 49 CFR 1152.27(c)(1)(iv)(B) to 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. *Offers of Financial Assistance* (*NPRM*), EP 729, slip op. at 14 (STB served Sept. 30, 2016). In response, Riffin commented that the Board should clarify that ''account statements'' means ''financial institution account statements,'' and that the Board should revise the proposed regulations to allow as evidence of financial responsibility lines of credit that provide ''access to cash upon demand,'' verified statements of the dollar value of cash, stocks and bonds, and ''substantial quantities of precious metals.'' (Riffin NPRM Comments 1–2.)

The Board finds Riffin's suggested clarification of ''financial institution account statements'' is overly restrictive, as it is possible that potential offerors, particularly governmental offerors, may have funds in accounts other than financial institution accounts. Additionally, as stated in response to Riffin's comments on the ANPRM, the Board does not believe that some of the examples of the types of assets Riffin proposes to include in the regulations would sufficiently show an offeror's financial ability to purchase and operate, or subsidize, a railroad, which is the purpose of an OFA. *See NPRM,* EP 729, slip op. at 3. Specifically, non-liquid assets (such as precious metals) and lines of credit that provide ''access to cash upon demand'' like credit cards are problematic as evidence of an offeror's continuing financial ability to actually operate or subsidize a rail line as the OFA process requires. Credit card lines of credit tend to be temporary and are for relatively limited amounts, while non-liquid assets are not easily accessible by an offeror and may fluctuate in value. By contrast, the examples of assets the Board is including in the regulations, such as income statements and letters of credit,[1] do not suffer from these problems and provide evidence of an offeror's long-term and ongoing ability to finance the actual operation or subsidy of a rail line. The Board therefore declines to adopt Riffin's proposed changes.

As for stocks and bonds, which are relatively liquid assets, we find that these may be presented by an offeror in conjunction with other evidence of financial responsibility, and will be considered by the Board on a case-by-case basis, as will evidence of cash on hand. Because these will be considered on a case-by-case basis the Board does not find it necessary to include these examples in the regulations.

Notice of Intent filing. The Board proposed to require NOIs as a preliminary step in all OFA cases, with potential offerors being presumed preliminarily financially responsible if the Board does not issue a decision within 10 days of receiving an NOI. In response, AAR commented that the Board should require that a decision be issued on all NOIs, not just when the Board is rejecting an NOI or seeking more information. (AAR NPRM Comments 5.) AAR proposes that the Board could delegate the authority for issuing this decision to the Director of the Office of Proceedings and argues that a decision should be issued in all cases because ''the proposed rule would inappropriately create legal obligations on railroads [to provide valuation information] as a result of government inaction.'' (AAR NPRM Comments 5.) The LLCs commented in support of AAR's proposal. (LLCs NPRM Reply Comments 2.)

The Board disagrees with AAR's characterization of this proposal as creating legal obligations on railroads because of government inaction. In fact, no additional obligation is created for carriers by this proposed change. Under 49 CFR 1152.27(a), carriers are currently required to provide certain valuation information ''promptly upon request'' to any party considering filing an OFA. The only requirement potential offerors must currently meet to obtain this information is to request it. The changes proposed in the NPRM that would apply to potential offerors would give the Board a basis on which to relieve railroads of their legal obligations to provide valuation information to potential offerors in certain cases. But the failure of the Board to issue a decision on the filing of an NOI would not impose on a railroad any burden it would not already have under the rules as they currently exist.

The Board proposed those changes, which would require a potential offeror to make an initial showing of

[1] A letter of credit from a bank functions more like a guarantee of payment for a specific purchasing transaction, while a line of credit (such as a credit card or home equity line) is a borrowing limit from a financial institution.

preliminary financial responsibility before the carrier's obligation to turn over the valuation information outlined in section 1152.27(a) upon request is triggered, because the current approach requiring carriers to provide this information to any interested party upon request, is vulnerable to abuse and has led to significant delay in the past. Carriers receiving requests they do not believe to be legitimate have refused to respond, or only belatedly responded, to interested parties with the required information, delaying the OFA process. Those interested parties have then at times had to ask the Board to issue a decision requiring the carrier to provide the information, which requires the Board to adjudicate disputes about the legitimacy of a party's interest in an OFA at an early stage of the process. The new proposal should make this process more efficient and effective by requiring some initial information from potential offerors before carriers must provide them with valuation information, which in turn will encourage carriers to respond more promptly to requests for that information. Setting a defined time period after the filing of an NOI when the potential offeror is considered preliminarily financially responsible, rather than requiring the Board to issue a decision to that effect, is part of that efficiency. The Board does not agree that it is necessary for a decision to be issued in these instances, even if that authority were delegated, and therefore declines to impose such a requirement.

Regarding the Board's proposed changes to the NOI process, Riffin suggested that the failure to file an NOI should not bar a timely OFA, arguing that restricting OFAs to entities that have filed timely NOIs would contravene the language of 49 U.S.C. 10904. Instead, Riffin suggested that NOIs should be optional in all cases, though he suggests that if a NOI is late-filed, the OFA filing deadline not be tolled. (Riffin NPRM Comments 2–3.) In response to this suggestion, AAR commented that Riffin's proposal would ignore the stated intent of the rulemaking and that the Board has authority to issue regulations consistent with the rail transportation policy (RTP) at 49 U.S.C. 10101. (AAR NPRM Reply Comments 2–3.) Similarly, the LLCs commented that Riffin's approach would ''run directly counter to the purpose of avoiding abuse.'' (LLCs NPRM Reply Comments 7.)

The Board does not believe Riffin's proposed changes to the NOI process are necessary, but instead agrees with AAR and the LLCs that adopting Riffin's proposed changes would be contrary to the purpose of this rulemaking. As discussed in the NPRM, the purpose of requiring NOIs in all cases is to make the OFA process more efficient by providing carriers with earlier notice that parties may be interested in purchasing or subsidizing service over rail lines that may otherwise be abandoned or discontinued and providing identifying information about those parties. *See NPRM,* EP 729, slip op at 15. Additionally, as AAR states, these new requirements would not contravene the language of 49 U.S.C. 10904—nothing in that provision *bars* NOIs. In fact, the new requirements are consistent with the RTP. *See, e.g.,* 49 U.S.C. 10101(2) (minimizing the need for federal regulatory control over the rail transportation system); 10101(3) (promoting a safe and efficient rail transportation system); 10101(4) (ensuring the development and continuation of a sound rail transportation system); 10101(9) (encouraging honest and efficient management of railroads).

Preliminary showing of financial responsibility. In the NPRM, the Board proposed that a potential offeror be required to make a preliminary financial responsibility showing as part of the NOI, based on a calculation using information contained in the carrier's filing and publicly-available information. For a potential OFA to subsidize service, the Board proposed this calculation be a standard per-mile per-year maintenance cost, set by the Board at $4,000, multiplied by the length of the rail line in miles. For a potential OFA to purchase a line, the Board proposed this calculation be the sum of (a) the current rail steel scrap price per ton, multiplied by an assumed track weight of 132 tons-per-track-mile, 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. Commenters generally supported the proposal to require this preliminary showing, while also suggesting some changes to the proposed calculations.

Criticisms of, and suggested changes to, the formula. Riffin suggested several minor clarifications to the calculations. He suggested that the Board specify whether the Board intended long tons, short tons, or metric tons be used in the regulations. (Riffin NPRM Comments 3.) The calculation in the NPRM used a 2,000 pound per ton weight to convert 264,000 pounds to 132 tons, and thus the Board intended short tons to be used in the calculation. *NPRM,* EP 729, slip op at 17 n.8. However, the Board will clarify the regulations by modifying the language in 49 CFR 1152.27(c)(1)(ii), as shown below, to include a weight of rail in both short tons and long tons. This will allow a potential offeror to use either measurement in its calculation, depending on whether the scrap rail cost it uses, discussed further below, is in short tons or long tons.

Riffin also commented that the final rule should address situations where there is no track left on a line subject to an OFA, suggesting that in such cases potential offerors should either calculate the track value at zero or show themselves financially responsible for 132 tons of track (*i.e.,* that offerors show themselves financially responsible to acquire one mile of track). (Riffin NPRM Comments 3–4.) Riffin suggested the Board adopt the latter option, as he argues this would at least show that a potential offeror has sufficient funds to re-install some of the track infrastructure. (Riffin NPRM Comments 4.) Jersey City commented that, because the Board's formula assumes track exists, it is ''wholly arbitrary'' in cases where railroads ''have engaged in illegal de facto abandonments.'' (Jersey City NPRM Comments 12.)

The Board will clarify 49 CFR 1152.27(c)(1)(ii) to provide that the length of the line listed in the carrier's abandonment or discontinuance filing (or the length the potential offeror seeks to purchase, as discussed further below) should be used in the calculation in place of the actual length of track. This language is reflected in below. Because this preliminary calculation is intended to identify an estimated theoretical base cost to the potential offeror to subsidize or purchase and operate a rail line, using the length of the line is an appropriate and non-arbitrary way to address situations even where there is no track left on the line, because the purpose of an OFA is to enable the provision of rail service. A party that cannot make the preliminary financial responsibility showing discussed here would not be able to replace the missing track needed to provide rail service, thus defeating the purpose of an OFA. Moreover, the preliminary financial responsibility calculation is intended to be a conservative estimate of what financial resources may be necessary for an OFA, not a valuation of the line.

Riffin further commented that the rule should address when a potential offeror does not want to subsidize or acquire the entire line. He suggests that, in such cases, offerors should calculate the track length that they wish to subsidize or acquire. (Riffin NPRM Comments 4.)

This is already allowed under the Board's regulations, and the changes to 49 CFR 1152.27(c)(1)(ii) proposed in the NPRM included a requirement that potential offerors demonstrate that they are financially responsible ''for the calculated preliminary financial responsibility amount of the rail line they seek to subsidize or purchase.'' However, as noted, the Board will further clarify here that when a potential offeror seeks to subsidize or acquire only a portion of the line (which the Board's regulations already permit), the offeror should use the length of line it seeks to acquire or subsidize in its preliminary financial responsibility calculation, rather than the length of the entire line subject to the proceeding. To further clarify this in the regulations, the Board will remove the word ''total'' from the description of the calculation contained in 49 CFR 1152.27(c)(1)(ii).

Riffin also suggested that more clarity is needed regarding the steel prices to be used in the preliminary financial responsibility calculation, suggesting that the Board identify the specific Web sites the Board has in mind as sources of scrap steel prices, and that the Board indicate specifically the type of steel being priced, as there are multiple categories of scrap steel. (Riffin NPRM Comments 4.) Jersey City commented that its counsel is ''unaware of any reliable generally available sites on the web to price rail steel,'' and that, if the Board is going to adopt a requirement related to rail steel prices, it should publish its own steel price for purposes of this calculation, or identify acceptable Web sites and receive public comment on those Web sites. (Jersey City NPRM Comments 11.)

The Board declines to publish its own steel price for purposes of this calculation, as this step is not necessary. A quote from a scrap dealer or a verified statement of a quote received telephonically, dated within 30 days of the submission of the notice of intent as required by this rule, would be acceptable sources for a scrap steel price for purposes of the preliminary calculation. If submitted as a verified statement, the potential offeror should describe the source of the quote, the price quoted, and the date of the conversation. In addition, though the Board does not endorse any specific Web site or source for scrap prices, there are both paid subscription services and free internet services that may also provide such prices.

Regarding the type of steel being priced, the Board declines to more specifically identify the category of scrap steel that a potential offeror should use in its calculation beyond what is already in the regulations: Rail steel scrap. While there are multiple categories of scrap steel, different scrap dealers may use different classifications of the sub-categories of rail scrap steel. The Board declines to be more specific in order to allow a potential offeror to use the available sub-category of rail scrap steel it finds most appropriate. As noted, the Board has not devised the formula to be a precise calculation of the value of the track assets. Accordingly, it is not essential that the category of steel that is used in the calculation be any one specific sub-category.

NSR and AAR both commented suggesting that the Board revise its proposed maintenance cost per mile and weight of rail in the preliminary calculation, respectively. NSR suggested that the Board should either evaluate current maintenance costs across the national rail system to determine a system-wide average, or use at least $5,000 per mile, rather than the $4,000 proposed in the NPRM. (NSR NPRM Comments 3–4. *See also* AAR NPRM Comments 8 n.4 (suggesting that the Board's $4,000 proposed maintenance cost is below averages the Board has relied on in past proceedings).) NSR argues this is necessary ''so as not to unintentionally encourage parties that clearly lack the financial capabilities to consummate an OFA.'' NSR also commented that the Board should update the maintenance cost number annually for inflation. (NSR NPRM Comments 3–4.) AAR similarly suggested that the Board should modify the weight of the rail used in the calculation to 115 pounds per yard (or 202.4 tons), which ''reflect[s] the predominant weight of rail currently in the national rail network and likely to be subject to the OFA process in the future.'' (AAR NPRM Comments 8–9.)

The Board declines to adopt these suggestions. Using a system-wide average for either or both of the per-mile per-year maintenance cost or the weight of the rail in the preliminary calculations could result in an overstated preliminary financial responsibility amount in some cases. This is particularly likely for rail lines subject to discontinuance or abandonment, which often have not been regularly used or highly maintained due to low traffic volumes, and may be composed of older rail materials. As the Board stated in the NPRM, the purpose of this calculation is not to attempt to estimate the eventual offer price of the line, but to discourage abuse of the OFA process by requiring a reasonable initial showing of financial capacity and interest. *See NPRM,* EP 729, slip op. at 18. For similar reasons, the Board finds it unnecessary to update the maintenance cost number annually for inflation. This number is intended to be a simple number for potential offerors to input into the overall calculation to arrive at an intentionally low-end estimate of the financial resources needed to subsidize or acquire the line. Thus, indexing this number for inflation would needlessly complicate this early step of the OFA process. Rather than updating it annually for inflation, the Board will issue a decision updating this number as needed in the future to prevent abuse of this process.

Jersey City asserted that the Board's formula for the preliminary financial responsibility calculation is ''totally arbitrary,'' arguing that there are many additional factors upon which salvage value depends, like transportation costs and the costs to remove bridges, that the Board has not considered in its proposed calculation, and that these factors also vary widely across the country. (Jersey City NPRM Comments 10.) Jersey City also argues that the proposed formula will ''vastly overstate salvage value for any line that has substantial bridges,'' as bridges can be costlier to salvage than the value of the steel they contain. (Jersey City NPRM Comments 12.) The LLCs also suggested modifications to the formula, suggesting that the formula should be modified to include the estimated cost of replacing any rail or infrastructure that has been removed from the line, and that would be reasonably required to carry freight on the line. (LLCs NPRM Comments 3–4.)

The Board declines to adopt these suggestions. As stated above, this calculation is not intended to result in an approximation of what an eventual offer will be, and it is not intended to consider every factor that may affect the cost of subsidizing or purchasing a line. Nor is it intended to identify the salvage cost of the line. The purpose of this calculation is to identify a conservative, low-end base number from which to determine a potential offeror's preliminary level of financial responsibility. As such, the Board believes this calculation properly balances the need to consider multiple factors with the need for a calculation simple enough that any potential offeror can participate in this process.

Certification and retroactivity. The LLCs also suggested that the submitted cost calculation should be certified by a licensed professional engineer experienced in railroad construction and that the Board should include language in the regulations requiring the preliminary financial responsibility

showing to be made for all OFAs filed after the adoption of the rule, even if an NOI was filed prior to the adoption of the rule. (LLCs NPRM Comments 3, 5, 10–11.) The Board will not adopt either of these suggestions. The purpose of laying out a clear formula in the regulations and requiring a potential offeror to submit evidence supporting its calculation is to enable any potential offeror to use the formula to participate in the OFA process, and to allow the Board to easily assess the resulting calculation. Requiring a potential offeror to have its calculation certified by a licensed professional engineer experienced in railroad construction would unnecessarily complicate the preliminary financial responsibility process, with little benefit to the integrity of the process. Additionally, requiring the preliminary financial responsibility showing to be made for offers filed after the adoption of the rule, even where a NOI was filed before the adoption of the rule, would be inappropriate. The preliminary financial responsibility calculation is a change to the NOI stage of the OFA process, and the Board will not retroactively impose this new requirement on NOIs filed before the effective date of this rule.

Escrow requirement. As noted, the Board proposed to require an offeror to demonstrate in its OFA that the offeror has placed in escrow 10% of the preliminary financial responsibility amount calculated at the NOI stage. The Army commented that federal government entities should be exempt from this proposed requirement. (Army NPRM Comments 1.) The Army argued that this requirement would be inordinately burdensome on government entities due to the appropriations process, and therefore suggests that section 1152.27(c)(iv)(D) apply only to an offeror that is a ''non-government entity.'' (Army NPRM Comments 3.) The LLCs, in response, argue that only federal government entities and state transportation agencies, not all governmental entities, should be exempt from the escrow requirement, because they are ''clearly responsible.'' (LLCs NPRM Reply Comments 6.) Jersey City also commented that ''it is difficult to understand what purpose [the escrow requirement] serves'' because it does not apply at the NOI stage, it is unlikely to deter abuse of the OFA process, and the Board's filing fees for OFAs are a more effective deterrent. (Jersey City NPRM Comments 12–13). Jersey City also argued that state and local governments frequently have hearing and budgeting requirements that would prevent them from being able to comply with the escrow requirement within the required time frame. For these reasons, it argued that the escrow requirement should not apply to these entities. (Jersey City NPRM Comments 12–13. *See also* Jersey City NPRM Reply Comments 18.) In response, AAR argued that Jersey City's comments mischaracterize the proposed escrow requirement and that the requirement should apply to state and local government entities because many of them obtain waivers of the Board's filing fees, and thus those fees are not acting as deterrents for those entities. (AAR NPRM Reply Comments 4.)

Upon review of the comments on the NPRM, the Board will exempt all governmental entities from the proposed escrow requirement, as reflected in the changes to 49 CFR 1152.27(c)(1)(iv)(D) in below. The Board agrees with the Army that this requirement is likely to be burdensome on the federal government because of the appropriations process, and the similar argument made by Jersey City that the hearing and budgeting requirements of state and local governments may cause this requirement to be unnecessarily burdensome on those entities as well. Additionally, the Board believes there is a low likelihood that this exclusion for governmental entities will lead to abuse because, as discussed in the NPRM, the presumption that governmental entities are financially responsible remains rebuttable, acting as a check on those entities. *See NPRM,* EP 729, slip op. at 5, 18. *See also Ind. Sw. Ry.—Aban. Exemption—in Posey & Vanderburgh Ctys., Ind.* (*Ind. Sw. Ry. Apr. 2011*), 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''). Accordingly, governmental entities will be required under this final rule to submit NOIs, but will not be required to complete the preliminary financial responsibility calculation or make the preliminary financial responsibility showing with an NOI, *see NPRM,* EP 729, slip op. at 5, 18, or submit evidence with their offer that they have placed 10% of that calculated preliminary financial responsibility amount in escrow.

Additionally, the Board disagrees with Jersey City's statements that the escrow requirement is unlikely to deter abuse of the OFA process overall, and as discussed in the NPRM, the Board believes that this requirement allows an offeror to make a concrete showing that its offer and interest in a line are legitimate. *See NPRM,* EP 729, slip op. at 18.

In addition to its other comments related to the escrow requirement, Jersey City also asserted that this requirement amounts to an effort to re-impose an arbitrary version of the ''bona fide'' requirement, a showing that used to be statutorily required but was removed by the passage of ICCTA. (Jersey City NPRM Reply Comments 18.) Under the bona fide requirement, the Board was required to find that an OFA was reasonable in relation to the likely value of the line, in addition to finding the offeror financially responsible. Contrary to Jersey City's assertion, the Board's escrow account proposal is not a re-imposition of that requirement. The Board is simply requiring an offeror to make a minimal showing of financial responsibility before initiating the OFA process. The Board clearly has authority under 49 U.S.C. 1321(a) to issue regulations to administer the OFA process under 49 U.S.C. 10904, including the requirement that an offeror be a ''financially responsible person.'' As noted, the preliminary financial responsibility amount is likely to be less than the eventual offer. A party that cannot place even 10% of this already conservative amount in escrow at the OFA stage is, in the Board's view, not likely to be found a ''financially responsible person.'' Accordingly, the escrow requirement, along with the other requirements that will be implemented under this final rule, will ensure that the Board carries out the OFA process effectively and efficiently.

Other Financial Responsibility Comments. In addition to responding to the specific proposals contained in the NPRM, commenters also suggested other changes to the Board's financial responsibility requirements. NSR proposed eliminating the presumption of financial responsibility that currently exists for state and municipal government entities. Instead, NSR proposes requiring those entities to satisfy the preliminary financial responsibility showing. (NSR NPRM Comments 2.) NSR argues that this would be appropriate because many municipalities have filed for bankruptcy since 2010, and that this would be a reasonable burden given that governmental entities would already be required to file NOIs and comply with the escrow requirement under this rule. (NSR NPRM Comments 5.) The LLCs also suggested the elimination of the presumption of financial responsibility for all government entities other than the federal government, state transportation agencies, and other government agencies ''specifically

created for the purpose of conducting rail freight operations.'' (LLCs NPRM Comments 6–7.) The LLCs suggest that these entities, along with providing evidence of financial responsibility, should be required to submit evidence of ''legal authorization to acquire the line, assume common carrier obligations, and available public financing for the specific operation and maintenance of any line'' sought to be acquired to ''weed out OFA abuse motivated by local political considerations and other improper motives.'' (LLCs NPRM Comments 7, 9.)

The Board declines to eliminate the presumption of financial responsibility for governmental entities. As discussed above, carriers already have recourse in situations where governmental entities are not financially responsible in that the governmental entities' presumption is rebuttable. *See Ind. Sw. Ry. Apr. 2011,* AB 1065X, slip op. at 5 (finding government entity was not financially responsible and dismissing its OFA). Moreover, situations such as the one that NSR and the LLCs are concerned about, in which the governmental entity turns out to not be financially responsible, are rare.[2] Accordingly, it is appropriate to continue to address governmental entities that may not be financially responsible on a case-by-case basis. This final rule effectively balances the need for information about an offeror with the unique appropriations issues governmental entities may face in the OFA process.

The Board also declines to require governmental entities to provide evidence of the additional authorizations suggested by the LLCs. To the extent a governmental entity's legal authorization to submit an OFA is disputed, a party is free to raise that during the OFA process, at which point the Board would take that into consideration. However, the Board has not been presented on a regular basis with situations where governmental entities have filed OFAs yet lacked the proper authority to do so. The Board therefore does not find it necessary to have regulations specifically requiring these showings from governmental entities.

The LLCs also proposed several changes to the offer stage of the process, including requiring offerors to identify all real property and other assets to be acquired from the carrier and any additional property or assets required to reinstitute rail service on the line. (LLCs NPRM Comments 11.) They also suggested that the Board include in the regulations a statement that the Board ''will not approve an offer that is contingent, or dependent for its implementation on the acquisition of property or other assets from anyone other than the applicant for abandonment without a clear showing that all steps necessary to provide rail service as a common carrier can be accomplished within a reasonable time.'' (LLCs NPRM Comments 11.) The LLCs argue that these additions are necessary ''to address the full scope of the [offeror's] proposal to provide rail service,'' and to make clear to offerors that OFA procedures are limited to the property and assets of the applicant for discontinuance or abandonment, and cannot be used ''to give an offeror more than can be obtained from the railroad seeking abandonment.'' (LLCs NPRM Comments 12.) The LLCs also suggest requiring an offeror (or in the case of a legal entity, an officer of the offeror with authority to bind the entity) to include in its offer a certification under penalty of perjury that the offer is made in good faith for the purpose of operating rail service on the line; that it is not made for any non-rail purpose; that the person certifying the offer is authorized to do so; and that the contents of the offer are true and correct. (LLCs NPRM Comments 12–13.)

The Board does not find it necessary to adopt the LLCs' proposed changes to the offer process. With regard to requiring offerors to identify real property and other assets to be acquired from the applicant for discontinuance or abandonment, or to reinstitute rail service, any acquisition of assets other than the line itself is outside of the OFA purchase process, and thus would not properly be included in the Board's regulations. Additionally, the Board already has the authority to reject an OFA when an offeror fails to demonstrate its ability to provide rail service as part of the Board's determination of financial responsibility at the offer stage.[3] Accordingly, the Board finds it unnecessary to include a requirement in these regulations that an offeror make a clear showing of its ability to complete all steps necessary to provide service, as the LLCs have suggested. The LLCs' suggested certifications to be included with an offer are also unnecessary. The Board's existing Rules of Practice direct ''*all persons* appearing in proceedings before it to conform, as nearly as possible, to the standards of ethical conduct required of practice before the courts of the United States.'' 49 CFR 1103.11 (emphasis added). By presenting a pleading, written motion, or other paper to a federal court, and by extension, to the Board, ''an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,'' the document ''is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,'' and that the factual contentions contained therein ''have evidentiary support.'' *See* Fed. R. Civ. P. 11(b)(1), (3). The Board does not believe that requiring a separate certification as proposed by the LLCs would act as any more effective a deterrent for abuse of the OFA process than these existing requirements.

In reply comments to the NPRM, AAR requested that the Board clarify that the preliminary financial responsibility requirement at the NOI stage is separate and distinct from the already existing financial responsibility determination at the offer stage. (AAR NPRM Reply Comments 3.) AAR made this request in response to a statement apparently made by Riffin in a court proceeding not involving the Board that

> the STB, in its EP 729 Decision, *did not* make it more difficult to prosecute an OFA in the 1189X proceeding [*Consol. Rail Corp.—Aban. Exemption—in Hudson Cty., N.J.,* Docket No. AB 167 (1189X) et al.]. The STB actually *made it easier.* (By eliminating its prior precedent requiring 'operation' of a line for two years.) Now one only has to demonstrate the financial ability to *maintain* a line for two years, at the minimal cost of $4,000 a year per mile of line.[4]

(Jersey City NPRM Comments 3–4.)

Based on this alleged quote from a court filing by Riffin, he appears to be conflating the preliminary financial responsibility requirement with the existing requirement in 49 U.S.C. 10904(d) and 49 CFR 1152.27(c)(1)(ii)(B) that an offeror be financially responsible for the full amount of its offer when it files an OFA. The Board clarifies here that the addition of the *preliminary* financial responsibility requirement to the Board's regulations does not eliminate or change the existing requirement at the OFA stage that an

[2] In addition, NSR's argument that requiring governmental entities to demonstrate that they are financial responsible is not burdensome because they must also comply with the Board's escrow account requirement is moot, given that the Board is also finding that governmental entities should be exempted from the escrow account requirement.

[3] *Consol. Rail Corp.—Aban. Exemption—in Phila., Pa.,* AB 167 (Sub-No. 1191X) et al., slip op. at 8 (STB served Oct. 26, 2012) (affirming Director's decision to reject an OFA because offeror did not have funds to both acquire the line and to rehabilitate the line and install safety equipment).

[4] Jersey City provided this quotation but did not submit a copy of the court pleading it quotes from with its comments. Riffin did not respond to Jersey City's comments.

offeror show themselves to be financially responsible for the full amount of its offer, and this final rule does not alter existing Board precedent regarding what constitutes financial responsibility or how the Board will evaluate an OFA after one is submitted.

Continuation of Rail Service. In the NPRM, the Board proposed to codify prior precedent requiring all offerors to demonstrate the need for and feasibility of continued rail service on the line and proposed to list in the regulations the following four examples of how an offeror may demonstrate that need: (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 current and planned transit services; and (4) evidence that continued service is operationally feasible. These criteria were 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).

In response to the Board's proposal, commenters expressed differing opinions about whether the Board should require all four elements of the *LACMTA* criteria to be met for offerors to make the showing of a continued need for rail service, or whether offerors should only be required to meet one element of the criteria. Riffin commented that the offerors should only be required to meet one of the four criteria, suggesting that the Board add language to the regulations ''to indicate that no one criteri[on] is dominant'' and that ''the STB will 'balance' the four criteria.'' (Riffin NPRM Comments 5.) In response, the LLCs commented that ''satisfying only one criterion is a meaningless exercise.'' (LLCs NPRM Reply Comments 8.) Similarly, NSR commented that the Board should ''require offerors to satisfy the *LACMTA* criteria in full in order to demonstrate a continued need for rail service,'' arguing that the criteria ''are not meant to operate in a piecemeal fashion,'' and that ''it is only the sum of the *LACMTA* criteria that allows the STB to make a reasoned decision as to whether there is a continued need for rail service.'' (NSR NPRM Comments 6.) NSR, with the LLCs' support, also argues that ''the *LACMTA* criteria themselves are broadly worded to provide offerors with some degree of flexibility in what is required to demonstrate a continued need for rail service.'' (NSR NPRM Comments 6; LLCs NPRM Reply Comments 5.)

Consistent with prior precedent, the Board's final rule will require that all offerors will be required to show a continued need for rail service. The criteria the Board laid out in *LACMTA,* AB 409 (Sub-No. 5X), are included in the regulations as examples of the types of evidence that offerors should present to the Board to illustrate a continued need for rail service, not requirements. Offerors will not be strictly required to meet any one of (or all) the criteria to show a continued need for rail service. The *LACMTA* criteria are intended to provide guidance to offerors as to the types of evidence the Board will examine when considering this element of an OFA. Although the Board agrees with NSR and the LLCs that an OFA proponent must make a strong showing of need, in conducting this evaluation, the Board will look at the totality of the circumstances to determine whether there is a continued need for rail service on the line. Because the regulations the Board proposed in the NPRM already state that the *LACMTA* criteria are included as examples, *NPRM,* EP 729, slip op. at 26, additional changes to the regulations are not necessary.

In the NPRM's discussion of this proposed requirement, the Board stated that ''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.'' *NPRM,* EP 729, slip op. at 19. AAR states that it understands this language to mean that there will be ''heightened scrutiny on claims that there is continued need for rail service in out-of-service exemption proceedings, not that particular and specific evidence would not be required in other proceedings,'' and suggests that the Board clarify that all offerors are required to show specific evidence of a continued need for rail service, not only offerors in two year out-of-service notice of exemption cases. (AAR NPRM Comments 6.) NSR also argued that the Board should clarify this statement by explicitly incorporating a heightened burden in the regulations for two-year out-of-service exemption proceedings. (NSR NPRM Comments 7.) The LLCs commented in support of NSR's proposal. (LLCs NPRM Reply Comments 5.)

The Board declines to adopt NSR's suggestion of a higher standard for notice of exemption proceedings and clarifies that it will not apply a heightened scrutiny standard to the continuation of service element of OFAs in those proceedings. In making the statement that ''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,'' the Board did not intend to imply a higher burden for notice of exemption proceedings or a lower burden for other proceedings. *See NPRM,* EP 729, slip op. at 19 (stating that ''the burden on the offeror to show the continued need for rail service would remain the same as in other proceedings.''). Rather, the Board simply intended to point out that an offeror is likely to have a more difficult time showing a continued need for service over a line where there has not been service in at least two years. All offerors in all OFA proceedings will be required to show specific and concrete evidence of a continued need for rail service to make the showing required by this rule, and in all proceedings the Board will consider the totality of circumstances in evaluating the evidence submitted by offerors.

As with the escrow account requirement, Jersey City opposes the proposed requirement that offerors demonstrate a continued need for rail service generally, on the ground that this showing amounts to a requirement that OFAs be bona fide, which conflicts with Congress' intent in removing such a requirement in ICCTA. (Jersey City NPRM Comments 14.) AAR argues that Jersey City is confusing ''the requirement that an offer be for continued rail service'' with ''the requirement, omitted in [ICCTA] that the Board find an OFA to be bona fide before proceeding.'' (AAR NPRM Reply Comments 3.) The LLCs commented that Jersey City is incorrect in its assertion that the Board's proposal to require a showing of a continued need for rail service amounts to a bona fide requirement. (LLCs NPRM Reply Comments 12–13.) The LLCs argue that in fact this proposal is consistent with current law and Board precedent. (LLCs NPRM Reply Comments 13–15.)

As discussed above, existing Board precedent requires that an OFA be for continued rail service. *See, e.g., LACMTA,* AB 409 (Sub-No. 5X), slip op. at 3. The proposal in the NPRM did not create an additional requirement, but simply proposed to formally codify the existing continued-rail-service requirement in the Board's regulations, so that the Board can ensure that it is addressed in all OFAs. *See NPRM,* EP 729, slip op. at 19. Additionally, although the Board, when it adopted regulations implementing ICCTA, indicated the statute as revised removed the requirement that an offer be ''bona fide,'' *Aban. & Discontinuance of Rail Lines & Rail Transp. Under 49 U.S.C.*

10903, EP 537, slip op. at 15 (STB served Dec. 24, 1996), the continued-rail-service requirement is consistent with the statute. Section 10904(b)(1) and (3) of title 49 require a carrier applying for abandonment or discontinuance authority to provide financial information to a potential offeror related to the continued operation of the line, and 49 U.S.C. 10904(d) requires an offeror to prove itself financially responsible for the amount of its offer, which under 49 U.S.C. 10904(c) shall be based on the financial information provided by the carrier or shall explain the basis of any disparity between the offer and the information provided by the carrier. Indeed, after adopting its post-ICCTA regulations, the Board later concluded that an OFA nevertheless must be for continued rail service. *Roaring Fork R.R. Holding Auth.—Aban.—in Garfield, Eagle, & Pitkin Ctys., Colo.,* AB 547X, slip op. at 4 (STB served May 21, 1999) (finding that ''[t]he OFA process is designed for the purpose of continuing to provide freight rail service,'' and that ''an offeror must be able to demonstrate that its OFA is for continued rail freight service.''). That determination has been judicially affirmed. *See, e.g., Kulmer* v. *STB,* 236 F.3d 1255, 1256–57 (10th Cir. 2001); *Redmond-Issaquah R.R. Pres. Ass'n* v. *STB,* 223 F.3d 1057, 1061–63 (9th Cir. 2000). The Board therefore disagrees with Jersey City's assertion that this continued-rail-service requirement contravenes Congressional intent under ICCTA.

Jersey City further commented that the requirement to show a continued need for rail service should not apply to OFAs filed by governmental entities. In particular, Jersey City argues that governmental entities should not be required to show non-interference with transit projects or community support, because ''[w]hen a government files an OFA, the OFA embodies the public project.'' (Jersey City NPRM Comments 14.) It also notes that the Board did not specifically identify any instances in which governmental entities have abused the OFA process. (*Id.*) Jersey City further argues that to apply the *LACMTA* criteria to governmental entities would also be a departure from previous Board precedent, because applying these criteria to governmental OFAs would ''amount to substituting the STB's planning judgments for those of local and state governments,'' even though the Board's predecessor, the Interstate Commerce Commission, stated in a 1991 decision that it is not a planning agency. (Jersey City NPRM Comments 15–16.) Jersey City does, however, support ''requiring private parties invoking the OFA process to show an overriding freight rail need when their OFA will interfere with a public project of any sort.'' (Jersey City NPRM Comments 9.) AAR commented in response that Jersey City's statements that the NPRM amounts to substituting the Board's planning judgments for those of state and local governments are incorrect. (AAR NPRM Reply Comments 4.) Instead, AAR argues, ''the NPRM reflects the limited jurisdiction of the STB to impose restrictions on the use of private property by railroads.'' (AAR NPRM Reply Comments 4.) The LLCs also commented in response to Jersey City that governmental entities should be required to make the showing of a continued need for service, and that the Board's proposal does not ''usurp the function of local governments' control over land use matters.'' (LLCs NPRM Reply Comments 17.)

The Board disagrees with Jersey City's suggestion that governmental entities should not be required to show a continued need for rail service because an OFA by a governmental entity ''embodies the public project.'' Congress did not give the Board unfettered authority in administering abandonments to force the sale of a rail line for any public purpose.[5] The purpose of the OFA process is not to preserve rail corridors for any public use or to assist with non-rail public projects, but rather, as explained above, to ensure continued rail service.

Nor is the Board persuaded by Jersey City's argument that to consider the *LACMTA* criteria when governmental entities file OFAs would be to substitute the Board's planning judgments for those of local governmental entities. The *LACMTA* criteria are not general planning criteria—they are all rail-oriented. As noted, the requirement that the OFA be for continued rail service already exists and has been judicially affirmed, and the *LACMTA* criteria are merely a means for the Board to determine if that standard has been met. Moreover, a determination by the Board regarding whether there is a need for continued rail service does not necessarily create a conflict with a local entity's planning; applying the *LACMTA* criteria when government entities file OFAs leaves the planning authority of state and local governmental entities intact but properly subject to Congress's terms for a forced sale under 49 U.S.C. 10904.

The Board has authority under 49 U.S.C. 1321(a) to issue these regulations to carry out the OFA process. While Jersey City points out that the Board has not identified any instances in which governmental entities have abused the OFA process, it is not necessary for the Board to have done so to make these changes to our regulations. The purpose of this proceeding is not only to protect the OFA process from abuse, but, after 20 years of experience, to identify ways in which the Board can improve the OFA process. The Board believes the continued-rail-service requirement, along with the other changes contained in this final rule, will improve the OFA process overall, including when the potential offeror is a governmental entity.

Finally, Jersey City also commented that ''the showings that the agency proposes as a precondition for rail use appear all to deal solely with freight,'' which it argues is problematic because the proposed language does not acknowledge that the OFA process may be used for passenger rail purposes. (Jersey City NPRM Comments 17–18.) But as the Board discussed in the NPRM, '' '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.' '' *NPRM,* EP 729, slip op. at 13, quoting *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). Thus, as explained in these prior Board decisions, even if the OFA process is used primarily for passenger rail purposes, the carrier acquiring the line must still be willing to provide freight rail service over the line for two years. Moreover, as discussed above, the *LACMTA* criteria are included as examples of the types of evidence the Board will look for when considering the totality of the circumstances surrounding the continued need for rail service, not specific requirements; offerors will not be strictly required to meet any one of (or all) the criteria to show a continued need for rail service.

Identity of the Offeror. The Board proposed to require an offeror or an

[5] Indeed, even the Board's public use provision at 49 U.S.C. 10905 does not provide for the forced sale of a rail line for non-rail public purposes. Instead, that section contains a process by which an abandoning carrier can be required to postpone for 180 days disposal of the properties it seeks to abandon so that parties may *negotiate* with the carrier for the possible disposition of the property for some other public purpose.

offeror's representative to provide a mailing address and other contact information, and to require an offeror that is a legal entity to provide its full legal name, state of organization or incorporation, and a description of the ownership of the entity. In addition, for multiple parties filing one OFA, the Board proposed requiring that the parties provide clear identification of which entity or individual would assume the common carrier obligation and clear identification of how the parties would allocate financing and, if purchased, the operation of the line.

NSR expressed support for the Board's proposals to require this identifying information, saying that it is important for the Board and carriers receiving OFAs to be able to identify the party or parties involved. (NSR NPRM Comments 7.) The LLCs commented that, in addition to the information proposed in the NPRM, the Board should also require a legal entity to provide a certificate of good standing from its state of incorporation and, where necessary, a certification that it is authorized to do business in the state or states where the rail line subject to an OFA is located. (LLCs NPRM Reply Comments 2–3.) The Board's purpose for requiring the additional information proposed is to assist the Board and carriers in identifying the parties involved in an OFA. However, the Board believes that requiring certifications of good standing or authorizations to do business from an offeror would go beyond that purpose, and thus the Board will not adopt the LLCs' proposal here. To the extent that the LLCs are concerned about potential offerors being in good standing, these concerns should be addressed by the fact that the Board will now require potential offerors to demonstrate preliminary financial responsibility and a continued need for rail service.

Other Comments. Parties also commented on other ways to prevent abuse of the OFA process, and on the OFA process and this proceeding generally. NSR commented that it continues to strongly support increased enforcement of 49 CFR 1104.8, which allows the Board to strike irrelevant or immaterial pleadings. (NSR NPRM Comments 1.) AAR similarly suggested that in addition to adopting the changes proposed in this proceeding the Board ''should also vigilantly enforce its existing rules to protect against abuse of the OFA process.'' (AAR NPRM Comments 12.) In denying NSR's 2015 petition to institute a rulemaking proceeding to address abuses of Board processes, the Board stated that, in addition to instituting this OFA rulemaking proceeding, it would increase enforcement of 49 CFR 1104.8. *NSR Petition,* EP 727, slip op. at 4. The Board has done so. *See, e.g., Riffin—Pet. for Declaratory Order,* FD 36078, slip op. 5 (STB served Apr. 27, 2017); *Norfolk S. Ry. Co.—Acquis. & Operation—Certain Rail Lines of the Del. & Hudson Ry.,* FD 35873, slip op. at 5–6 (STB served Oct. 18, 2016); *R. J. Corman R.R./Allentown Lines, Inc.—Aban. Exemption—in Lehigh Cty., Pa.,* AB 550 (Sub-No. 3X), slip op. at 1–2 (STB served Nov. 25, 2015). The Board restated this commitment in the NPRM. *NPRM,* EP 729, slip op. at 9. In this decision, the Board again reiterates its commitment to increasing enforcement of 49 CFR 1104.8 to prevent abuse of the OFA process and the Board's processes generally.

Jersey City commented that it believes the chief abuses of the OFA process are delay and the use of OFAs to prevent public projects. (Jersey City NPRM Reply Comments 8, 11.) With regard to delays in the OFA process, Jersey City argues that the proper remedy is ''for the agency to adhere to the statutory and regulatory deadlines.'' (Jersey City NPRM Comments 8. *See also* Jersey City NPRM Reply Comments 9.) Where delay is caused by railroads not making financial information promptly available to potential offerors, Jersey City suggests the Board should consider sanctioning such carriers, ''including barring the carrier from relying on information it does not promptly provide, or dismissing the proceeding in appropriate cases.'' (Jersey City NPRM Reply Comments 11.)

In addition, Jersey City suggests that the Board's focus in addressing abuse of the OFA process should be protecting public projects, even when those public projects are not rail projects. (Jersey City NPRM Comments 9.) Jersey City argues that ''the only real 'abuse' of the OFA statute that merits examination for possible new regulations is situations in which this Board's OFA remedy is invoked to prevent or to inhibit a public project.'' (Jersey City NPRM Reply Comments 15.) Instead of the Board's proposed rule, Jersey City proposes that any offeror filing an OFA ''aimed at thwarting public projects'' should be required to show ''an overriding public need for rail service.'' (Jersey City NPRM Reply Comments 19. *See also* Jersey City NPRM Comments 14, 19.) In response to Jersey City's comments, AAR argues that ''states and municipalities have no right to railroad rights of way for public projects, absent a desire and ability to obtain the line for continued rail service.'' (AAR NPRM Reply Comments 4.)

The Board is aware that the OFA process has been inefficient in some past cases. The proposals adopted in this final rule and discussed above, however, are geared to address delays associated with the OFA process. For example, requiring all offerors to file NOIs and make a preliminary financial responsibility showing should prompt rail carriers to assemble and provide the required valuation information more quickly for OFAs. The Board notes, however, that the OFA process is intended to promote continued rail service. *See Roaring Fork R.R. Holding Auth.,* AB 547X, slip op. at 4. *See also Kulmer,* 236 F.3d at 1256–57; *Redmond-Issaquah R.R. Preservation Ass'n,* 223 F.3d at 1061–63. The Board, therefore, rejects Jersey City's repeated suggestion that the OFA process may be invoked for public projects unrelated to the continuation of rail service.

To the extent that Jersey City is concerned that public projects may be thwarted by abuse of the OFA process, the regulations proposed here should help in that regard, as they will ensure that OFAs are being sought for a legitimate need for continued rail service and by parties that possess the means to acquire the line. However, to the extent Jersey City is arguing that even OFAs that do not abuse the process (*i.e.,* OFAs intended for continued rail service) should not be able to thwart public projects, the Board rejects that argument. The aim of the OFA statute is to preserve rail service where possible, *see Redmond-Issaquah R.R. Preservation Ass'n,* 223 F.3d at 1061, and as a result, the Board will grant exemptions from the OFA provisions for a valid public purpose only when there is no overriding public need for continued freight rail service. *See, e.g., Kessler* v. *STB,* 635 F.3d 1, 5 (D.C. Cir. 2011).[6]

In addition to its comments discussed above regarding the escrow requirement and the requirement to show a continued need for rail service, Jersey City also generally states throughout its comments that it believes the Board's proposals are ''difficult to square with past precedent,'' referring to ICCTA's removal of the requirement that an OFA be ''bona fide'' from 49 U.S.C. 10904. (Jersey City NPRM Comments 5. *See also* Jersey City NPRM Reply Comments 4–7 (''Some of the proposals . . . appear to be outside the Board's power given Congressional omission of the bona fide

[6] Accordingly, carriers that believe that an OFA would needlessly interfere with a public project can seek an OFA exemption, and, as the Board explained in the NPRM, it will address these requests on a case-by-case basis. *See NPRM,* EP 729, slip op. at 11.

requirement.'').) Jersey City argues that ''the law has not changed to permit the agency as a general matter to apply new requirements to potential offerants wholesale.'' (Jersey City NPRM Comments 6.) As noted elsewhere in this final rule, contrary to Jersey City's assertion, the Board's proposals are not a re-imposition of the bona fide requirement, nor are they in conflict with Congressional intent under ICCTA. The Board has authority under 49 U.S.C. 1321(a) to issue regulations to carry out its statutory obligations, including its obligations to carry out the OFA process under 49 U.S.C. 10904. The requirements under this final rule will ensure that the Board can meet those obligations effectively and efficiently, and will ensure that OFAs are initiated for continued rail service—which is the statutory objective embodied in 49 U.S.C. 10904. Moreover, as discussed throughout this proceeding, the Board does not believe these changes to the regulations will be unnecessarily burdensome on potential participants in the OFA process. Rather, the Board believes that these requirements will benefit participants in the OFA process by improving the efficiency, transparency, and reliability of the OFA process.

The final rule is set forth in full below. This action is categorically excluded from environmental review under 49 CFR 1105.6(c).

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. Sections 601–604. In its final rule, the agency must either include a final regulatory flexibility analysis, section 603(a), or certify that the final rule would not have a ''significant impact on a substantial number of small entities.'' section 605(b). The impact must be a direct impact on small entities ''whose conduct is circumscribed or mandated'' by the rule. *White Eagle Coop.* v. *Conner,* 553 F.3d 467, 480 (7th Cir. 2009).

In the NPRM, the Board stated that it was possible that the proposed rule could have a significant economic impact on certain small entities,[7] and issued an initial regulatory flexibility analysis (IRFA) and request for comments in order to explore further the impact, if any, of the proposed rule on small rail carriers. The Board did not receive any comments regarding the IRFA. The Board now publishes this final regulatory flexibility analysis.

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 with OFAs under 49 U.S.C. 10904 (as revised by ICCTA in 1995), there are areas where clarifications and revisions to the Board's OFA process could enhance the process and protect it against abuse. On September 30, 2016, the Board issued an NPRM proposing specific changes to the OFA process. Those changes proposed in the NPRM, with the modifications discussed above, are adopted in this final rule.

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

The objectives of this rule are to revise the Board's outdated regulations regarding the OFA process and make changes to streamline the OFA process and protect it from abuse. The Board believes the changes detailed in this final rule achieve this by ensuring that parties that seek to acquire lines through the OFA process satisfy the requirement that they be ''financially responsible persons'' and that OFA sales promote the statutory purpose of preserving rail service. The legal basis for the final rule is 49 U.S.C. 1321.

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

The rule will apply to all entities making OFAs 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. The Board therefore estimates that this rule may affect up to four small entities per year.[8]

Description of the projected reporting, recordkeeping, and other compliance requirements of the final 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 final rule will require additional information from entities interested in or submitting OFAs at two stages. First, an entity will have to file a notice of intent (NOI) soon after the railroad files for abandonment or discontinuance authority (the NOI stage). Second, entities will 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.

At the NOI stage, a potential offeror will 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 was previously required. This NOI will be a 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. A potential offeror will 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

[7] 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 $35,809,698 or less when adjusted for inflation using 2016 data. Class II rail carriers have annual operating revenues of less than $250 million in 1991 dollars or less than $447,621,226 when adjusted for inflation using 2016 data. The Board calculates the revenue deflator factor annually and publishes the railroad revenue thresholds on its Web site. 49 CFR 1201.1–1.

[8] The Board does not mean to suggest that four small entities per year by itself constitutes a ''substantial number'' under the RFA. However, because a high percentage of OFAs are filed by small entities, and out of an abundance of caution, the Board provides this RFA analysis.

information, and provide to the Board evidence of its financial responsibility at that level. This calculation will require research on the part of the potential offeror to determine the current scrap price of steel, which is publicly-available at no cost: Under the final rule potential offerors may obtain a quote from a scrap dealer or a recent scrap price from a free internet source, as explained above in the discussion of comments on the Board's proposed formula for determining preliminary financial responsibility. This calculation will not require professional expertise, however, as it is intended to be relatively simple.

At the offer stage, an offeror will 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. An offeror will also be required to address the continued need for rail service in its 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 its offer that it has completed the escrow requirement.

All small entities participating in the OFA process will be subject to these requirements, other than small governmental entities, which are exempt from some financial responsibility requirements.[9] As discussed above, in the past these small entities have included small businesses, Class III railroads, and small nonprofits. 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 in the NPRM, but the Board does not believe they will require additional professional expertise beyond that already required by the OFA process.

The Board estimates these new requirements will add a total annual hour burden of 42 hours and no total annual ''non-hour burden'' cost under the Paperwork Reduction Act, as detailed in the NPRM.

[9] In response to comments regarding the ability of government entities to comply with the escrow requirement, as discussed above this final rule exempts all government entities from placing 10% of the preliminary financial responsibility amount in escrow, as otherwise required by the final rule. This exemption includes any government entities that may qualify as small entities under the RFA. Governmental entities, including those that are small entities, are also exempt from conducting the preliminary financial responsibility calculation and providing evidence of their financial responsibility at the NOI stage.

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

The Board is unaware of any duplicative, overlapping, or conflicting federal rules.

Description of any significant alternatives to the final rule that accomplish the stated objectives of applicable statutes and that minimize any significant economic impact of the 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 final rule, offerors and potential offerors participating in the OFA process will be required to submit additional information as described above at the NOI stage and at the offer stage of the process. The Board considered alternatives to several of the requirements proposed in the NPRM. One alternative to the NOI requirements that was considered was to exempt small entities from the preliminary financial responsibility showing. An alternative to the escrow requirement that was considered was 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, selecting these alternatives would have defeated the purpose of the rule.

Indeed, exempting small entities from compliance with the rule would have significantly weakened 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 also considered taking no action to revise the OFA regulations, but this would not have allowed the Board to meet its objectives of improving the OFA process and protecting it from abuse.

A copy of this decision will be served upon the Chief Counsel for Advocacy, Office of Advocacy, U.S. Small Business Administration, Washington, DC 20416.

Paperwork Reduction Act. In this proceeding, the Board is modifying an existing collection of information that is currently approved by the Office of Management and Budget (OMB) through January 31, 2019, under OMB Control No. 2140–0022. In the NPRM, the Board sought comments pursuant to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501–3521, and OMB regulations at 5 CFR 1320.11 regarding: (1) Whether the collection of information associated with the proposed changes to the OFA regulations 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. No comments were received pertaining to the collection of this information under the PRA.

This modification to an existing collection will be submitted to OMB for review as required under the PRA, 44 U.S.C. 3507(d), and 5 CFR 1320.11.

It is ordered:

1. The Board adopts the final rule as set forth in this decision. Notice of the adopted rule will be published in the **Federal Register.**

2. This decision is effective 30 days after the day of service.

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

List of Subjects in 49 CFR Part 1152

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

Decided: June 28, 2017.

By the Board, Board Member Begeman, Elliott, and Miller.

Kenyatta Clay,

Clearance Clerk.

For the reasons set forth in the preamble, the Surface Transportation Board amends 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 ''that 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) and add new paragraphs (c)(1)(i) and (ii).
■ c. Revise newly redesignated paragraph (c)(1)(iv)(B), and add new 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 (d)(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 short tons per track mile or 117.857 long tons per track mile, times the length of the line 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 10 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. Governmental entities are exempt from this requirement;

(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.

* * * * *

[FR Doc. 2017–14044 Filed 7–3–17; 8:45 am]

BILLING CODE 4915–01–P