



Surface Transportation Board
Washington, D.C. 20423-0001

Small Entity Compliance Guide

Docket No. EP 729

Offers of Financial Assistance

May 17, 2018

This guide is prepared in accordance with the requirements of Section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the new rules adopted in the above-referenced Surface Transportation Board rulemaking. This guide is not intended to replace the rules and, therefore, final authority rests solely with the rules. Although this guide attempts to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This guide may not apply in a particular situation based upon the circumstances, and the Board retains the discretion to adopt approaches on a case-by-case basis that may differ from this guide, where appropriate. The Board may decide to revise this guide without public notice to reflect changes in the Board's approach to implementing a rule or to clarify or update the text of the guide. For further assistance, please contact the Board's Office of Public Assistance, Governmental Affairs, and Compliance at (202) 245-0238 or rcpa@stb.gov. Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at (800) 877-8339.

Purpose of this Guide

This guide was created to inform small entities, including small rail carriers, about the Board regulations adopted in Offers of Financial Assistance, Docket No. EP 729, which were effective July 29, 2017.

Introduction

Under the offer of financial assistance (OFA) process, as codified at 49 U.S.C. § 10904 and implemented in the Board's regulations at 49 C.F.R. § 1152.27, financially responsible parties may offer to temporarily subsidize continued rail service over a line on which a rail carrier seeks to abandon or discontinue service or may offer to purchase and provide continued rail service on a line that a carrier seeks to abandon.

Upon request, an abandoning or discontinuing carrier must provide certain information required under 49 U.S.C. § 10904(b) and 49 C.F.R. § 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 C.F.R. § 1152.27(c)(1)(iv). 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 C.F.R. § 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 C.F.R. § 1152.27(i)(2).

On September 30, 2016, the Board issued an NPRM proposing specific changes to the OFA process. The Board issued a final rule adopting changes proposed in the NPRM, along with certain modifications, on June 29, 2017.

Objectives of the Rulemaking

The objectives of the final rule were to revise the Board's outdated regulations regarding the OFA process and to streamline the OFA process and protect it from abuse. The final rule ensures that parties that seek to acquire rail 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.

Rules Approved by the Board

The Board's final rules amended 49 C.F.R. § 1152.27 to update the OFA process. The Board adopted four modifications 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 a continued need for rail service over the line sought to be acquired; and three amendments intended to clarify the identity of offerors in OFAs.

With regard to financial responsibility, first, the final rules further define financial responsibility in the regulations by including examples of the kinds of evidence the Board would and would not accept to demonstrate financial responsibility. Second, the final rules require notices of intent (NOIs) to file an OFA from potential offerors in all abandonment or discontinuance proceedings. Third, the final rules 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 final rules 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.

In addition, the final rules codify prior precedent requiring all offerors to demonstrate the need for and feasibility of continued rail service on the line, providing four examples of how an offeror may demonstrate that need: (1) evidence of a demonstrable commercial need for rail 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.

The final rules also require an offeror or an offeror's representative to provide a mailing address and other contact information and 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. For multiple parties filing one OFA, the final rules require 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.

Impact on Small Entities

The final rule requires additional information from all entities, including small entities, interested in or submitting OFAs at two stages. First, an entity must file a notice of intent soon after the railroad files for abandonment or discontinuance authority (the NOI stage). Second, entities must 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.

At the NOI stage, a potential offeror is 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 is 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 is also 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 to provide to the Board evidence of its financial responsibility at that level. This calculation requires 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. This calculation does not require professional expertise, as it is intended to be relatively simple.

At the offer stage, an offeror is 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 must also address the continued need for rail service in its offer, 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 provide evidence with its offer that it has completed the escrow requirement.

All small entities participating in the OFA process are subject to these requirements, except that small governmental jurisdictions are exempt from some financial responsibility requirements. Specifically, the final rule exempts all government entities, including those that qualify as small governmental entities, from placing 10% of the preliminary financial responsibility amount in escrow, from conducting the preliminary financial responsibility calculation, and from providing evidence of their financial responsibility at the NOI stage.

Additional Information

For additional information, please see the Board's decision adopting the final rules in Offers of Financial Assistance, Docket No. EP 729, issued on June 29, 2017. The decision is available on the Board's website at www.stb.gov.