



## **DEPARTMENT OF TRANSPORTATION**

### **Federal Railroad Administration**

#### **49 CFR Part 269**

**[Docket No. FRA-2016-0023; Notice No. 1]**

**RIN 2130-AC60**

#### **Competitive Passenger Rail Service Pilot Program**

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

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**SUMMARY:** FRA proposes regulations to implement a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes operated by Amtrak. The proposed rule would develop this pilot program as required by a statutory mandate.

**DATES:** *Written Comments:* Written comments on the proposed rule must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. FRA will consider comments received after that date if practicable.

*Hearing Request:* FRA anticipates resolving this rulemaking without a public, oral hearing. However, if FRA receives a specific request for a public, oral hearing prior to [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER], then FRA will schedule such a hearing and FRA will publish a supplemental notice in the Federal Register to inform interested parties of the date, time, and location of any such hearing.

**ADDRESSES:** Comments: Comments related to Docket Number FRA-2016-0023 may be submitted by any of the following methods:

- Online: Comments should be filed at the Federal eRulemaking Portal, <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Mail: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Ave. SE, W12-140, Washington, DC 20590.
- Hand Delivery: Room W12-140 on the Ground level of the West Building, 1200 New Jersey Ave. SE, Washington, DC between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.
- Fax: 202-493-2251.

Instructions: All submissions must include the agency name, docket name and docket number or Regulatory Identification Number (RIN) for this rulemaking (RIN 2130-AC60). Note that FRA will post all comments received without change to <http://www.regulations.gov>, including any personal information provided. Please see the Privacy Act heading in the “Supplemental Information” section of this document for Privacy Act information related to any submitted petitions or materials.

Docket: For access to the docket to read background documents or comments received, go to <http://www.regulations.gov> at any time, or to the U.S. Department of Transportation, Docket Operations, M-30, West Building, Ground Floor, room W12-140, 1200 New Jersey Ave. SE, Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

**FOR FURTHER INFORMATION CONTACT:** Brandon White, Office of Railroad Policy and Development, FRA, 1200 New Jersey Ave. SE, Washington, DC 20590, (202) 493-1327, or Zeb Schorr, Office of Chief Counsel, FRA, 1200 New Jersey Ave. SE, Mail Stop 10, Washington, DC 20590, (202) 493-6072.

**SUPPLEMENTARY INFORMATION:**

**I. Notice of Proposed Rulemaking**

**A. Statutory Background**

The proposed rule is in response to a statutory mandate – specifically, section 11307 of the Fixing America’s Surface Transportation (FAST) Act, Public Law No. 114-94, sec. 11307, 129 Stat. 1312, 1660-1664 (2015). Section 11307 states that the Secretary of Transportation (Secretary) must promulgate a rule to implement a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes, as defined in 49 U.S.C. 24102 and operated by Amtrak on the date the Passenger Rail Reform and Investment Act of 2015 (title XI of the FAST Act) was enacted.

Section 11307 also provides for, among other things, the following:

- (1) Establishment of a petition, notification, and bid process through which the Secretary would evaluate bids to provide passenger rail service over particular long-distance routes by interested eligible petitioners and Amtrak;
- (2) The Secretary’s selection of a winning bidder;
- (3) The Secretary’s execution of a contract with the winning bidder awarding the right and obligation to provide intercity passenger rail service over the route, along with an operating subsidy, subject to such performance standards as the Secretary may require;

- (4) Amtrak must provide access to the Amtrak-owned reservation system, stations, and facilities to a winning bidder;
- (5) Employees used in the operation of a route under the pilot program would be considered an employee of that eligible petitioner and would be subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak;
- (6) The winning bidder must provide hiring preference to displaced qualified Amtrak employees;
- (7) The winning bidder would be subject to 49 U.S.C. 24405 grant conditions; and
- (8) If a winning bidder ceases to operate the service, or to otherwise fulfill their obligations, the Secretary, in collaboration with the Surface Transportation Board, would take any necessary action consistent with the FAST Act to enforce the contract and to ensure the continued provision of service.

**B. Timeline Established by the Proposed Rule**

The proposed rule would establish deadlines for filing petitions, filing bids, and FRA's execution of contract(s) with any winning bidders. As to the filing of petitions, § 269.7(b) of the proposed rule would require a petition to be filed with FRA no later than 60 days after publication of the final rule implementing the pilot program. Section 269.9(a) would then require the FRA to publish in the Federal Register a notice of receipt of a petition not later than 30 days after the date of receipt.

As to the filing of bids, proposed § 269.9(b) would require both the petitioner and Amtrak, if Amtrak chose to do so, to submit complete bids to provide intercity passenger rail transportation over the applicable route with FRA not later than 120 days after FRA

publishes a notice of receipt in the Federal Register under § 269.9(a). Proposed § 269.9(b) articulates the bid requirements.

Lastly, as to the award and execution of contracts with winning bidders (who are or do not include Amtrak), proposed § 269.13 would require FRA to execute a contract with a winning bidder not later than 270 days after the bid deadline established by proposed § 269.9.

### **C. Operating Subsidy**

Section 11307 of the FAST Act requires the Secretary to award an operating subsidy to a winning bidder that is not or does not include Amtrak. 49 U.S.C. 24711(b)(1)(E)(ii). Specifically, the operating subsidy, as determined by the Secretary, would be for the first year at a level that does not exceed 90 percent of the level in effect for that specific route during the fiscal year preceding the fiscal year the petition was received, adjusted for inflation, and any subsequent years under the same calculation, adjusted for inflation.

To determine the operating subsidy amount, FRA would take the fully-allocated costs of the route, as operated by Amtrak in the prior fiscal year, including direct route costs, shared route costs, and indirect costs, into consideration so that the operating subsidy award would not result in an increase in the Federal subsidy of intercity passenger rail. In addition, as section 11307 of the FAST Act requires, FRA would provide to Amtrak an appropriate portion of the applicable appropriations to cover any cost directly attributable to termination of Amtrak service on the route and any indirect costs to Amtrak imposed on other Amtrak routes as a result of losing service on the route operated by the winning bidder. Any amount FRA provides to Amtrak under the prior

sentence would not be deducted from, or have any effect on, the operating subsidy 49 U.S.C. 24711(b)(1)(E)(ii) requires.

The FAST Act also authorizes the Secretary to fund the operating subsidy by withholding such sums as are necessary from the amount appropriated to the Secretary for the use of Amtrak for activities associated with Amtrak's National Network. FAST Act, section 11101(e), 129 Stat. at 1623. However, if Congress does not appropriate funds that allow the Secretary to pay an operating subsidy, then the Secretary cannot award an operating subsidy to a winning bidder other than Amtrak as required by the FAST Act. Consequently, this pilot program proposes to make the award of any operating subsidy to a winning bidder that is not or does not include Amtrak, subject to the availability of funding. Accordingly, the Secretary's contract with a winning bidder that is not or does not include Amtrak would not award an operating subsidy unless the award is consistent with the FAST Act and the applicable appropriations act. In addition, the Secretary would award the operating subsidy to the winning bidder annually and, again, only consistent with the FAST Act and the applicable appropriations act (i.e., the Secretary would not award all four years of the operating subsidy at one time).

## **II. Section-by-Section Analysis**

### Section 269.1      Purpose.

This section provides that the proposed rule would carry out the statutory mandate in 49 U.S.C. 24711 requiring FRA, on behalf of the Secretary, to implement a pilot program to competitively select eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes, as defined in 49 U.S.C. 24102, and operated by Amtrak on the date of enactment of the FAST Act.

Section 269.3            Application.

Paragraph (a) of this section provides that the proposed pilot program would not be made available to more than three Amtrak long-distance routes, as defined in 49 U.S.C. 24102. This proposed paragraph is based on the FAST Act directive in 49 U.S.C. 24711(a).

Paragraph (b) of this section proposes that any eligible petitioner awarded a contract to provide passenger rail service under the pilot program could only provide such service for a period not to exceed four years from the date the winning bidder commenced service and, at FRA's discretion on behalf of the Secretary, FRA could renew such service for one additional operation period of four years. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(A).

Section 269.5            Definitions.

This section contains the definitions FRA proposes to use in this rule for the following terms: Act; Administrator; Amtrak; Eligible petitioner; File and Filed; Financial plan; FRA; Operating plan; and Long-distance route.

This section proposes to define "financial plan" to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: an annual projection of the revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds) attributable to the route; and a statement of the assumptions underlying the financial plan's contents.

In addition, this proposed section defines "operating plan" to mean a plan that contains, for each Federal fiscal year fully or partially covered by the bid: a complete

description of the service planned to be offered, including the train schedules, frequencies, equipment consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; and a statement of the assumptions underlying the operating plan's contents. The proposed rule would require bidders to include a financial plan and an operating plan – as those terms are defined here – in their bids. These proposed definitions would ensure that bids contain sufficient information to be evaluated.

This section also proposes to define “long-distance route” to mean those routes described in 49 U.S.C. 24102(5) and operated by Amtrak on the date the FAST Act was enacted. This definition is based on the statutory directive in 49 U.S.C. 24711(a).

Section 269.7            Petitions.

Paragraph (a) of this section proposes that an eligible petitioner may petition FRA to provide intercity passenger rail transportation over a long-distance route in lieu of Amtrak for a period of time consistent with the time limitations described in § 269.3(c). This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(A).

Paragraph (b) of this section proposes that a petition submitted to FRA under this rule must: be filed with FRA no later than 60 days after FRA publishes the competitive passenger rail service pilot program final rule; describe the petition as a “Petition to Provide Passenger Rail Service under 49 CFR part 269”; and describe the long-distance route or routes over which the petitioner wants to provide intercity passenger rail

transportation and the Amtrak service the petitioner wants to replace. This proposed paragraph is intended to ensure a petition provides clear notice to FRA.

Section 269.9            Bid Process.

Paragraph (a) of this section proposes that FRA would notify the eligible petitioner and Amtrak of receipt of a petition filed with FRA by publishing a notice of receipt in the Federal Register not later than 30 days after FRA receives a petition. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(B)(i).

Paragraph (b) of this section describes the proposed bid requirements, including that a bid must be filed with FRA no later than 120 days after FRA publishes the notice of receipt in the Federal Register under § 269.9(a). Paragraph (b) further proposes the detailed information such bids must include. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(C).

Paragraph (c) of this section proposes that FRA could request supplemental information from a bidder and/or Amtrak if FRA determines it needs such information to adequately evaluate a bid. Such a request may seek information about the costs related to the service that Amtrak would still incur following the cessation of service, including the increased costs for other services. FRA would establish a deadline by which the bidder and/or Amtrak must submit the supplemental information to FRA.

Section 269.11            Evaluation.

Paragraph (a) of this section proposes that FRA would select a winning bidder by evaluating the bids based on the requirements of this proposed part.

Paragraph (b) of this section proposes that, upon selecting a winning bidder, FRA would publish a notice in the Federal Register identifying the winning bidder, the long-

distance route the bidder would operate, a detailed justification of the reasons why FRA selected the bid, and any other information the Secretary determines appropriate. FRA would request public comment for 30 days after the date on which FRA selects the bid. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(B)(iii).

Section 269.13      Award.

Paragraph (a) of this section proposes that FRA would execute a contract with a winning bidder that is not or does not include Amtrak, consistent with the requirements of proposed § 269.13, and as FRA may otherwise require, not later than 270 days after the bid deadline established by proposed paragraph 269.9(b). This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(E).

Paragraph (b) of this section proposes what the contract would include. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(E), (b)(4), and (c)(3).

Paragraph (c) of this section proposes that the winning bidder would make their bid available to the public after the bid award with any appropriate confidential or proprietary information redactions. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(b)(1)(C)(ii).

Section 269.15      Access to facilities; employees.

Paragraph (a) of this section proposes that, if an award under proposed § 269.13 is made to a bidder other than Amtrak, Amtrak must provide access to the Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded

route(s) to the bidder. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(c).

Paragraph (b) of this section proposes that the employees of any person, except as provided in a collective bargaining agreement, a bidder uses to operate a route under the proposed rule would be considered an employee of that bidder and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(c)(2).

Paragraph (c) of this section proposes that a winning bidder would provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan submitted by the winning bidder. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(c)(3).

Section 269.17      Cessation of service.

This section proposes under paragraph (a) that, if a bidder awarded a route under this rule ceases to operate the service or fails to fulfill its obligations under the contract required under proposed § 269.13, the Administrator, in collaboration with the Surface Transportation Board, would take any necessary action consistent with title 49 of the United States Code to enforce the contract and ensure the continued provision of service, including the installment of an interim service rail carrier, providing to the interim rail carrier an operating subsidy necessary to provide service, and re-bidding the contract to operate the service. This section further proposes under paragraph (b) that the entity providing interim service would either be Amtrak or an eligible petitioner under § 269.5. This proposed paragraph is based on the statutory directive in 49 U.S.C. 24711(d).

### **III. Regulatory Impact and Notices**

#### 1. Executive Orders 12866 and 13563 and DOT Regulatory Policies and Procedures

FRA evaluated this proposed rule consistent with Executive Orders 12866 and 13563 and DOT policies and procedures. See 44 FR 11034; Feb. 26, 1979. FRA prepared and placed in the docket a regulatory evaluation addressing the economic impact of the proposed rule.

FRA does not expect any regulatory costs because this proposed rule would be voluntary and would not require an eligible petitioner to take any action. In addition, the proposed rule is limited to not more than three long-distance routes as defined in 49 U.S.C. 24102 and operated by Amtrak on the date the FAST Act was enacted. Furthermore, the current market conditions and the investment necessary to operate a long-distance service may further serve to limit the number of eligible petitioners submitting petitions under the proposed pilot program. Of course, if no eligible petitioners participate in the pilot program, then no costs or benefits would be incurred because of the proposed rule. However, FRA is estimating the costs and benefits generated when three eligible petitioners submit bids to operate long-distance rail service.

As discussed above, FRA assumed three entities would submit bids to estimate costs for the bidding scenario. The costs are solely due to preparing and filing a bid to operate service. Amtrak may submit a bid only if another entity submitted a petition to bid on a route. To estimate the cost for preparing and submitting a bid, FRA estimated the time and cost for FRA to review each bid. FRA estimates its review cost would be approximately \$49,834 per bid. Based on the costs of collecting and analyzing data, drafting a bid, and gaining approval within the organization, FRA estimates a railroad or

other entity that bids on a route would incur a cost of approximately three times as much as FRA’s review cost— approximately \$149,503 per bid. If an entity bids on a route, for this analysis, we assumed Amtrak would also submit a bid for the same route. Amtrak may have some of the data necessary to prepare the bid available. Therefore, their cost may be lower than another entity. Based on the costs of analyzing data, drafting a bid, and gaining approval within the organization, FRA estimated Amtrak’s cost to prepare and submit a bid would be twice FRA’s review cost —approximately \$99,669. All bid costs would be incurred during the first year. The table below shows the estimated cost for an entity and Amtrak to bid on one long-distance route.

	<b>FRA Review Cost</b>	<b>Railroad/Other Entity Bidder Cost (FRA Cost * 3)</b>	<b>Amtrak Cost (FRA Cost * 2)</b>
<b>Total Cost per Bid</b>	\$49,834	\$149,503	\$99,669

As stated above, FRA’s total burden estimate assumes three bids would be submitted for long-distance routes. The total cost to entities other than Amtrak would be approximately \$448,509. The total cost to Amtrak would be approximately \$299,007. The sum of these two costs is \$747,516. Since all petitions and bids would occur during the first year, the total cost would be approximately \$747,516 over the four-year period (which could become 8 years if the Secretary renews a contract).

Some benefits are possible from this proposed rule. FRA cannot quantify the benefits but discussed them qualitatively in the regulatory evaluation. If no railroads submit a bid for operating service, Amtrak would continue to operate service as it currently does. Therefore, no benefits would occur because of this proposed rule. However, if other entities are awarded contracts, those entities may be able to operate the

service in a manner that would be beneficial to passengers. Possible benefits include better service and lower cost.

The introduction of competition in the bidding process may increase passenger rail efficiency and generate public benefits by lowering the operational subsidy, and possibly leading to better service and/or lower operating costs to society. FRA expects no change to railroad safety due to this proposed regulation.

## 2. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) and Executive Order 13272 (67 FR 53461, Aug. 16, 2002) require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. FRA has not determined whether this proposed rule would have a significant economic impact on a substantial number of small entities. Therefore, FRA is publishing this IRFA to help the public comment on the potential small business impacts of the requirements in this NPRM. FRA invites all interested parties to submit data and information regarding the potential economic impact on small entities that would result from the adoption of the proposals in this NPRM. FRA will consider all information and comments received in the public comment process to determine the economic impact on small entities.

### *Reasons for Considering Agency Action*

FRA is revising 49 CFR part 269 to comply with a statutory mandate requiring the Secretary to promulgate a rule to implement a pilot program for competitive selection

of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes. The proposed rule would develop this pilot program consistent with the statutory directive.

*A Succinct Statement of the Objectives of, and the Legal Basis for, the Proposed Rule*

The objective of this proposed rule is to implement the statutory mandate in FAST Act section 11307 to develop a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes, as defined in 49 U.S.C. 24102, operated by Amtrak on the date of enactment of the FAST Act.

*A Description of and, Where Feasible, an Estimate of the Number of Small Entities to Which the Proposed Rule Would Apply*

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) requires a review of proposed and final rules to assess their impact on small entities, unless the Secretary certifies the rule would not have a significant economic impact on a substantial number of small entities. “Small entity” is defined in 5 U.S.C. 601 as a small business concern that is independently owned and operated, and is not dominant in its field of operation. The U.S. Small Business Administration (SBA) has authority to regulate issues related to small businesses, and stipulates in its size standards that a “small entity” in the railroad industry is a for profit “line-haul railroad” that has fewer than 1,500 employees, a “short line railroad” with fewer than 500 employees, or a “commuter rail system” with annual receipts of less than seven million dollars. See “Size Eligibility Provisions and Standards,” 13 CFR part 121, subpart A.

Federal agencies may adopt their own size standards for small entities in consultation with the SBA and in conjunction with public comment. Under that authority, FRA has published a final statement of agency policy that formally establishes “small entities” or “small businesses” as railroads, contractors, and hazardous materials shippers that meet the revenue requirements of a Class III railroad in 49 CFR 1201.1-1, which is \$20 million or less in inflation-adjusted annual revenues, and commuter railroads or small governmental jurisdictions that serve populations of 50,000 or less. See 68 FR 24891, May 9, 2003 (codified at Appendix C to 49 CFR part 209).

The \$20 million limit is based on the Surface Transportation Board’s revenue threshold for a Class III railroad carrier. Railroad revenue is adjusted for inflation by applying a revenue deflator formula under 49 CFR 1201.1-1. FRA is using this definition for the proposed rule. For other entities, the same dollar limit in revenues governs whether a railroad, contractor, or other respondent is a small entity.

This proposed rule would apply to the following eligible petitioners: (a) a rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route, or another rail carrier that has a written agreement with a rail carrier or rail carriers that own such infrastructure; (b) a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for provision of intercity rail passenger transportation with a written agreement with the rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation; or (c) a State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for provision of intercity rail passenger transportation and a rail carrier with a

written agreement with another rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation. The only petitioners that may be considered a small entity would be small railroads.

This proposed rule is voluntary for all eligible petitioners. Therefore, there are no mandates placed on large or small railroads. In addition, the proposed rule is limited to not more than three long-distance routes operated by Amtrak. Consequently, this proposed rule is not likely to affect a substantial number of small entities, and most likely will not impact any small entities. However, since small entities can bid for service, FRA requests comments on this finding.

*A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Class of Small Entities that will be Subject to the Requirements and the Type of Professional Skill Necessary for Preparation of the Report or Record*

Since this program is voluntary, small railroads would not have to take any action. Therefore, this proposed rule would not have any negative economic impact on small entities. Small railroads face the same requirements for entry in the pilot program as other railroads. The railroad must own the infrastructure over which Amtrak operates those long-distance routes described in 49 U.S.C. 24102. Any small entity would likely only bid on a route if it was in its financial interest to do so. Accordingly, any impact on small entities would be positive. The pilot program would allow small railroads to enter a market which currently has substantial barriers.

FRA notes this proposed rule does not disproportionately place any small railroads that are small entities at a significant competitive disadvantage. Small railroads are not excluded from participation if they are statutorily eligible. This proposed rule and the underlying statute concern the potential selection of eligible petitioners to operate an entire long-distance route. If Amtrak uses 30 miles of a small railroad's infrastructure on a route that is 750 miles long, that small railroad could not apply under this proposed rule to operate service only over the 30 mile segment it owns (the small railroad would have to apply to operate service over the whole route). Thus, the ability to bid on a route is not constrained by a railroad's size.

*Identification, to the Extent Practicable, of All Relevant Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule*

FRA is not aware of any relevant Federal rule that duplicates, overlaps with, or conflicts with this proposed rule. FRA invites all interested parties to submit comments, data, and information demonstrating the potential economic impact on small entities that would result from the adoption of the proposed language in this NPRM. FRA particularly encourages small entities that could potentially be impacted by the proposed rule to participate in the public comment process. FRA will consider all comments received during the public comment period for this NPRM when making a final determination of the NPRM's economic impact on small entities.

3. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 and the Office of Management and Budget's (OMB) Implementing Guidance at 5 CFR 1320.3(c):

collection of information means, except as provided in section 1320.4, the obtaining, causing to be obtained, soliciting, or requiring the disclosure to

an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit.

FRA expects the requirements of this proposed rule would affect less than 10 “persons” as defined in 5 CFR 1320.3(c)(4). Consequently, no information collection submission is necessary, and no approval is being sought from OMB at this time.

#### 4. Environmental Impact

FRA evaluated this NPRM consistent with its “Procedures for Considering Environmental Impacts” (FRA’s Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 et seq.), other environmental statutes, Executive Orders, and related regulatory requirements. FRA determined this NPRM is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because the proposed rulemaking would not result in a change in current passenger service; instead, the program would only potentially result in a change in the operator of such service. Under section 4(c) and (e) of FRA’s Procedures, FRA concludes no extraordinary circumstances exist for this NPRM that might trigger the need for a more detailed environmental review. As a result, FRA finds this NPRM is not a major Federal action significantly affecting the quality of the human environment.

#### 5. Federalism Implications

Executive Order 13132, “Federalism” (64 FR 43255, Aug. 4, 1999), requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism

implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

FRA has analyzed this NPRM consistent with the principles and criteria in Executive Order 13132. This NPRM complies with a statutory mandate, and, thus, is in compliance with Executive Order 13132.

In addition, this NPRM will not have a substantial effect on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, this NPRM will not have any federalism implications that impose substantial direct compliance costs on State and local governments.

#### 6. Unfunded Mandates Reform Act of 1995

Under Section 201 of the Unfunded Mandates Reform (UMR) Act of 1995 (Public Law 104-4, 2 U.S.C. 1531), each Federal agency “shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and

tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).” Section 202 of the UMR Act (2 U.S.C. 1532) further requires that:

before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement [detailing the effect on State, local, and tribal governments and the private sector].

The \$100,000,000 has been adjusted to \$155,000,000 to account for inflation. This proposed rule would not result in expenditure of more than \$155,000,000 by the public sector in any one year, and, thus, preparation of such a statement is not required.

## 7. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.” 66 FR 28355, May 22, 2001. Under the Executive Order, a “significant energy action” is defined as any action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including any notice of inquiry, advance notice of proposed rulemaking, and notice of proposed rulemaking that: (1)(i) is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (2) the Administrator of the OMB Office of Information and Regulatory Affairs designates as a significant energy action. FRA evaluated this NPRM consistent with Executive Order 13211. FRA determined this NPRM will not have a significant adverse effect on the

supply, distribution, or use of energy. Consequently, FRA concludes this regulatory action is not a “significant energy action” under Executive Order 13211.

#### 8. Privacy Act Information

Interested parties should be aware that anyone can search the electronic form of all written communications and comments received into any agency docket by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT’s complete Privacy Act Statement in the Federal Register published on Apr. 11, 2000, 65 FR 19477, or you may visit <http://www.dot.gov/privacy.html>. Under 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, including any personal information the commenter provides, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice (DOT/ALL–14 FDMS), which can be reviewed at [www.dot.gov/privacy](http://www.dot.gov/privacy).

#### **List of Subjects in 49 CFR Part 269**

Railroads, Railroad employees.

#### **The Proposed Rule**

For the reasons discussed in the preamble, FRA proposes to revise part 269 of chapter II, subtitle B, title 49 of the Code of Federal Regulations to read as follows:

#### **PART 269—COMPETITIVE PASSENGER RAIL SERVICE PILOT PROGRAM**

Sec.	
269.1	Purpose.
269.3	Limitations.
269.5	Definitions.
269.7	Petitions.
269.9	Bid process.

269.11	Evaluation.
269.13	Award.
269.15	Access to facilities; employees.
269.17	Cessation of service.

**Authority:** Sec. 11307, Pub. L. No. 114-94; 49 U.S.C. 24711; and 49 CFR 1.89.

**§ 269.1 Purpose.**

The purpose of this part is to carry out the statutory mandate in 49 U.S.C. 24711 requiring the Secretary to implement a pilot program for competitive selection of eligible petitioners in lieu of Amtrak to operate not more than three long-distance routes.

**§ 269.3 Limitations.**

(a) Route limitations. The pilot program this part implements is available for not more than three Amtrak long-distance routes.

(b) Time limitations. An eligible petitioner awarded a contract to provide passenger rail service under the pilot program this part implements shall only provide such service for a period not to exceed four years from the date of commencement of service. The Administrator has the discretion to renew such service for one additional operation period of four years.

**§ 269.5 Definitions.**

As used in this part—

Act means the Fixing America’s Surface Transportation Act (Public Law No. 114-94 (Dec. 4, 2015)).

Administrator means the Federal Railroad Administrator, or the Federal Railroad Administrator’s delegate.

Amtrak means the National Railroad Passenger Corporation.

Eligible petitioner means one of the following entities, other than Amtrak, that has submitted a petition to FRA under § 269.7:

(1) A rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route, or another rail carrier that has a written agreement with a rail carrier or rail carriers that own such infrastructure;

(2) A State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation with a written agreement with the rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation; or

(3) A State, group of States, or State-supported joint powers authority or other sub-State governance entity responsible for providing intercity rail passenger transportation and a rail carrier with a written agreement with another rail carrier or rail carriers that own the infrastructure over which Amtrak operates a long-distance route and that host or would host the intercity rail passenger transportation.

File and Filed mean submission of a document under this part to FRA at PassengerRail.Liaison@dot.gov on the date the document was emailed to FRA.

Financial plan means a plan that contains, for each Federal fiscal year fully or partially covered by the bid:

(1) An annual projection of the revenues, expenses, capital expenditure requirements, and cash flows (from operating activities, investing activities, and financing activities, showing sources and uses of funds) attributable to the route; and

(2) A statement of the assumptions underlying the financial plan's contents.

FRA means the Federal Railroad Administration.

Long-distance route means those routes described in 49 U.S.C. 24102(5) and operated by Amtrak on the date of enactment of the Act.

Operating plan means a plan that contains, for each Federal fiscal year fully or partially covered by the bid:

(1) A complete description of the service planned to be offered, including the train schedules, frequencies, equipment consists, fare structures, and such amenities as sleeping cars and food service provisions; station locations; hours of operation; provisions for accommodating the traveling public, including proposed arrangements for stations shared with other routes; expected ridership; passenger-miles; revenues by class of service between each city-pair proposed to be served; and

(2) A statement of the assumptions underlying the operating plan's contents.

## **§ 269.7        Petitions.**

(a) In general. An eligible petitioner may petition FRA to provide intercity passenger rail transportation over a long-distance route in lieu of Amtrak for a period of time consistent with the time limitations described in § 269.3(b).

(b) Petition requirements. Eligible petitioners must:

(1) File the petition with FRA no later than 60 days after FRA publishes the competitive passenger rail service pilot program final rule;

(2) Describe the petition as a "Petition to Provide Passenger Rail Service under 49 CFR part 269"; and

(3) Describe the long-distance route or routes over which the eligible petitioner wants to provide intercity passenger rail transportation and the Amtrak service that the eligible petitioner wants to replace.

**§ 269.9 Bid process.**

(a) Notification. FRA will notify the eligible petitioner and Amtrak of receipt of a petition filed with FRA and will publish a notice of receipt in the Federal Register not later than 30 days after FRA's receipt of such petition.

(b) Bid requirements. An eligible petitioner that has filed a timely petition under § 269.7 and Amtrak, if Amtrak desires, may file a bid with FRA not later than 120 days after FRA publishes the notice of receipt in the Federal Register under § 269.9(a). Each such bid must:

(1) Provide FRA with sufficient information to evaluate the level of service described in the proposal, and to evaluate the proposal's compliance with the requirements in § 269.13(b);

(2) Describe how the bidder would operate the route.

(i) This description must include, but is not limited to, an operating plan, a financial plan and, if applicable, any agreement(s) necessary for the operation of passenger service over right-of-way on the route that is not owned by the bidder.

(ii) In addition, if the bidder intends to generate any revenues from ancillary activities (i.e., activities other than passenger transportation, accommodations, and food service) as part of its proposed operation of the route, then the bidder must fully describe such ancillary activities and identify their incremental impact in all relevant sections of

the operating plan and the financial plan, and on the route's performance, together with the assumptions underlying the estimates of such incremental impacts;

(3) Describe what passenger equipment the bidder would need, including how it would be procured;

(4) Describe in detail, including amounts, timing, and intended purpose, what sources of Federal and non-Federal funding the bidder would use, including but not limited to any Federal or State operating subsidy and any other Federal or State payments;

(5) Contain a staffing plan describing the number of employees the bidder needs to operate the service, the job assignments and requirements, and the terms of work for prospective and current employees of the bidder for the service outlined in the bid;

(6) Describe the capital needs for the passenger rail service;

(7) Describe in detail the bidder's plans for meeting all FRA safety requirements, including equipment, employee, and passenger parameters;

(8) Describe, for each Federal fiscal year fully or partially covered by the bid, a projection of the passenger rail service route's total revenue, total costs, total contribution/loss, and net cash used in operating activities per passenger-mile attributable to the route;

(9) Describe how the passenger rail service would meet or exceed the performance required of or achieved by Amtrak on the applicable route during the last fiscal year. At a minimum, this description must include, for each Federal fiscal year fully or partially covered by the bid a projection of the route's expected on-time performance and train delays;

(10) Analyze the reasonably foreseeable effects, both positive and negative, of the passenger rail service on other intercity passenger rail services; and

(11) Describe the bidder's compliance with all applicable Federal environmental laws.

(c) Supplemental information. (1) FRA may request supplemental information from a bidder and/or Amtrak if FRA determines it needs such information to evaluate a bid.

(2) FRA's request may seek information about the costs related to the service that Amtrak would still incur following the cessation of service, including the increased costs for other services.

(3) FRA will establish a deadline by which the bidder and/or Amtrak must file the supplemental information with FRA.

**§ 269.11 Evaluation.**

(a) Evaluation. FRA will select a winning bidder by evaluating the bids based on the requirements of this part.

(b) Notification. (1) Upon selecting a winning bidder, FRA will publish a notice in the Federal Register describing the identity of the winning bidder, the long-distance route the bidder will operate, a detailed justification explaining why FRA selected the bid, and any other information the Administrator determines appropriate.

(2) The notice under this paragraph will be open for public comment for 30 days after the date FRA selects the bid.

**§ 269.13 Award.**

(a) Award. FRA will execute a contract with a winning bidder that is not or does not include Amtrak, consistent with the requirements of this section and as FRA may otherwise require, not later than 270 days after the bid deadline established by § 269.9(b).

(b) Contract requirements. Among other things, the contract between FRA and a winning bidder that is not or does not include Amtrak must:

(1) Award to the winning bidder the right and obligation to provide intercity passenger rail transportation over that route subject to such performance standards as FRA may require for a duration consistent with § 269.3(b);

(2) Award to the winning bidder an operating subsidy, as determined by FRA, subject to the availability of funding, for the first year at a level that does not exceed 90 percent of the level in effect for that specific route during the fiscal year preceding the fiscal year in which the petition was received, adjusted for inflation;

(3) State that any award of an operating subsidy is made annually, is subject to the availability of funding, and is based on the amount calculated under § 269.13(b)(2), adjusted for inflation;

(4) Condition the operating and subsidy rights upon the winning bidder providing intercity passenger rail transportation over the route that is no less frequent, nor over a shorter distance, than Amtrak provided on that route before the award;

(5) Condition the operating and subsidy rights upon the winning bidder's compliance with performance standards FRA may require, but which, at a minimum, must meet or exceed the performance required of or achieved by Amtrak on the applicable route during the last fiscal year; and

(6) Subject the winning bidder to the grant conditions established by 49 U.S.C. 24405.

(c) Publication. The winning bidder shall make their bid available to the public after the bid award with any appropriate redactions for confidential or proprietary information.

**§ 269.15 Access to facilities; employees.**

(a) Access to facilities. If the award under § 269.13 is made to an eligible petitioner, Amtrak must provide that eligible petitioner access to the Amtrak-owned reservation system, stations, and facilities directly related to operations of the awarded route(s).

(b) Employees. The employees of any person, except as provided in a collective bargaining agreement, an eligible petitioner uses in the operation of a route under this part shall be considered an employee of that eligible petitioner and subject to the applicable Federal laws and regulations governing similar crafts or classes of employees of Amtrak.

(c) Hiring preference. The winning bidder must provide hiring preference to qualified Amtrak employees displaced by the award of the bid, consistent with the staffing plan the winning bidder submits.

**§ 269.17 Cessation of service.**

(a) If an eligible petitioner awarded a route under this part ceases to operate the service or fails to fulfill its obligations under the contract required under § 269.13, the Administrator, in collaboration with the Surface Transportation Board, shall take any necessary action consistent with title 49 of the United States Code to enforce the contract

and ensure the continued provision of service, including the installment of an interim service and re-bidding the contract to operate the service.

(b) In re-bidding the contract, the entity providing service must either be Amtrak or an eligible petitioner.

Sarah E. Feinberg,  
Administrator.

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