Public Transportation Gets Us There

APTA Recommendation on Commuter Rail Liability Insurance

This report was prepared by Thompson Coburn LLP and Cline Strategic Consulting, LLC on behalf of APTA.

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Executive Summary

In recognizing the important and significant public benefits of passenger rail to the United States, Congress established a liability cap to protect the industry from potentially catastrophic losses from passenger claims. While the statute does not mandate that Commuter Rail Agencies carry liability insurance to the federal liability cap of $323 million, many agencies are contractually required to maintain liability insurance to the cap because of negotiated access and vendor agreements.

Commuter Rail Agencies found the requisite liability coverage available and affordable for much of the past 30 years. Insurers competed in offering these agencies liability insurance. Insurance underwriters demonstrated flexibility and exhibited capacity. The yearly cost of liability insurance comprised a healthy, but acceptable, portion of the Commuter Rail Agencies' operating budgets. Total insurance premiums fluctuated, but the movement reflected normal market changes or increases following industry or specific agency losses.

The Hardening Insurance Market

Although insurance markets are inherently cyclical, the market for high-level excess liability insurance coverage (i.e., coverage that has a high attachment point after the limits of the primary and other underlying policies are exhausted) has hardened (i.e., suffered a loss of capacity and increased cost) at an unprecedented level in 2019, 2020, and continues today. A confluence of several factors led to this extremely difficult insurance market, as described in more detail below. The current "hard market" is expected to continue for several years. There are indications that a new baseline has been established, and that there is not likely to be a future correction through a "softening" of the market by additional insurers entering the market and providing additional needed capacity.

While the hardening of the excess liability market is not specific to railroad liability insurance for Commuter Rail Agencies, it has greatly impacted passenger rail. Forced to purchase significant limits of excess liability coverage because of their contractual obligations, Commuter Rail Agencies have struggled, and will continue to struggle, to fill their substantial liability insurance requirements. Insurers have exited the market and those that do continue to participate do so with diminished capacity. Moreover, the excess liability insurance that is available for purchase is priced at exorbitant premiums (e.g., an increase of up to 80 percent). Without the ability to easily purchase excess liability insurance to satisfy their contractual obligations, Commuter Rail Agencies face the potential for disruption or cessation of operations. To the extent that the coverage can be found, Commuter Rail Agencies are forced to expend a significant and growing portion of their operating budgets on insurance purchases.

Risk

Of significance, insurance underwriters are not limiting capacity or withdrawing from the market due to the risk that Commuter Rail Agencies present. To the contrary, commuter rail overall has a relatively low loss history and certain Commuter Rail Agencies have few to no losses. Risk of serious accidents has further decreased with the significant investment made by Commuter Rail Agencies in Positive Train Control (PTC). Due to the COVID-19 pandemic, commuter rail ridership has decreased dramatically for more than a year, diminishing total potential liability to passengers and fare revenues. Neither the availability nor cost of excess liability coverage is commensurate with the current risk.

Unlike many other insurance purchasers, Commuter Rail Agencies have no flexibility to reduce their insurance limits if high-level excess insurance is unavailable or priced too high, because they are contractually required by their host railroads or PTC vendors to have this insurance to operate. A March 2021 increase in the statutory cap to $323 million has only exacerbated the situation, forcing these agencies to look to the already difficult insurance market to purchase more insurance in satisfaction of their contractual requirements to continue operating.

Federal Interest

Interviews with Commuter Rail Agencies, risk management personnel, and a market analysis conducted for this report demonstrate that federal intervention in the commuter rail insurance market is necessary. There is clear empirical evidence that the market for commuter rail insurance has become significantly more expensive as the liability cap continues to increase and has much less capacity in terms of insurers willing to participate, forcing Commuter Rail Agencies to turn to foreign markets. Further, there is no evidence that this market will correct or improve on its own without federal involvement. As discussed herein, there is clear precedent for federal involvement in providing critical insurance in difficult markets.

In addition, there is a clear federal interest in maintaining and expanding effective commuter rail operations in the United States. Commuter rail is a key component of improved public transit infrastructure, enhanced mobility, economic recovery, and addressing climate change. Without federal intervention, Commuter Rail Agencies will continue to face a significantly reduced market capacity for coverage along with unreasonable premium costs. This will result in an uneconomic diversion of limited public resources from expenditures that could be made for improved or expanded commuter rail services. At worst, Commuter Rail Agencies could be faced with an insurance market where coverage continues to be prohibitively expensive or simply unavailable, resulting in declines in or even loss of critical commuter rail services. The stability that federal involvement could bring would help foster the desired investment in infrastructure, as well as addressing the economic and operating challenges Commuter Rail Agencies face.

APTA Recommendation

Based on the findings in this report, APTA recommends establishing a Commuter Rail Insurance Program at the U.S. Department of Transportation to provide insurance to commuter rail agencies that operate commuter rail services in the United States.

Assessment of Market Conditions

The Liability Cap

Congress enacted a liability cap in December 1997 and set the cap at $200 million[2]. It subsequently modified the cap in the Fixing America's Surface Transportation Act (FAST Act), increasing it to $294,278,983[3] and indexing it to an inflationary adjustment every five years.[4] The cap sets the total allowable awards to all rail passengers for all claims arising from a single accident or occurrence. Punitive damages recoveries are subject to the liability cap and included in the allowed aggregate maximum recovery.

On February 25, 2021, the Secretary of Transportation issued a notice of statutory adjustment of the cap to $322,864,228. The increase went into effect on March 29, 2021.[5]

The federal statutes do not mandate that Commuter Rail Agencies acquire liability insurance protection or otherwise transfer risk up to the cap; however, these agencies are contractually obligated to carry insurance up to the cap, as described below.

Contractual Obligations

Many Commuter Rail Agencies maintain agreements with freight railroads, Amtrak, or others to utilize track for their passenger rail operations. Typically, those agreements place a contractual obligation on the Commuter Rail Agencies to maintain liability insurance up to the FAST Act's liability cap and to include the other party to the contract as an additional insured on such coverage. Some agencies enter service agreements with third parties, such as operations and maintenance contractors for the system, containing similar requirements. Commuter Rail Agencies have recently invested substantial monies in PTC, and the licensing agreements with PTC vendors also require these agencies insure to the liability cap.

While this assessment is not intended to opine on the legal rights of such third parties under trackage agreements, service agreements, or use licenses, it is noted that failure to comply with contractual insurance requirements could be viewed by such third parties as a material breach. A termination of these essential contracts by a host railroad, service provider, or PTC vendor could result in an operational disruption or cessation for a Commuter Rail Agency. As such, it is essential that these agencies maintain the ability to satisfy their contractual insurance requirements.

While contractual insurance requirements are not uncommon and are found in other industries, the requirements placed on Commuter Rail Agencies are somewhat unique. The statutory liability cap is set high to protect passenger railroads from a catastrophic loss arising from a significant accident or impact. It is in no way tailored to the risk profiles of any individual Commuter Rail Agency or its operations. Second, the cap adjusts upwards for inflation every five years. Contractual insurance provisions tied to the passenger rail liability cap require insurance up to the maximum allowable recovery for the most severe accidents, including the statutory inflationary adjustment every five years.

Contractual insurance provisions in most other industries are rarely set at the maximum possible risk exposure and they do not typically adjust upward during the contract term. Rather, they are typically negotiated to strike a balance between acceptable risk and considerations involving the cost of available insurance.

[2] *49 U.S.C. § 28103(a)(2).*

[3] *The FAST Act (Pub. L. No. 114-94) mandated that the cap not exceed $295 million. In January 2016, the Department of Transportation (DOT) published a Federal Register notice setting the cap at $294,278,983. See Adjustment to Rail Passenger Transportation Liability Cap, 81 Fed. Reg. 1289 (Jan. 11, 2016).*

[4] *Section 11415 of the FAST Act.*

[5] *Adjustment to Rail Passenger Transportation Liability Cap, 86 Fed. Reg. 11571 (February 25, 2021).*

Insurance Participants and Markets

Commuter Rail Agencies are largely without the ability to access insurance markets directly to purchase liability insurance. They use insurance producers (commonly referred to as brokers) to facilitate insurance placements.

The Admitted (State Licensed) Market

Under the McCarran-Ferguson Act[6], the regulation of the insurance industry is left to the various States unless Congress preempts such regulation through its own specific efforts. All of the States have adopted provisions for regulating the marketing and sale of insurance products to their citizens. These regulatory schemes include regulations pertaining to both insurers and producers.

Each State issues licenses to certain insurers, allowing them to market and sell insurance to State residents. A licensed insurer is subject to state requirements and oversight. Licensed insurers are typically required to submit forms, marketing materials, and other information for review by state regulators. They are to abide by state regulations governing both insurance sales and claims practices. In addition, they are subject to enforcement actions brought by state regulators or others, including actions seeking to impose penalties, revocation of licensure, injunctive relief, and other remedies. State regulators are vested with the power to assume control over and even liquidate licensed insurers. This highly regulated insurance market is referred to as the "admitted" market. Admitted insurers pay into State Guaranty Funds, which are made available to policyholders if an admitted insurer becomes financially insolvent.

The Surplus Lines Market

In addition to the admitted market, insurance can be legally purchased through a non-admitted market sometimes referred to as "surplus lines". Surplus lines insurers often offer new insurance products or insure risk that the admitted market is unable or unwilling to insure. They are not licensed by the various States and not subject to the same regulatory oversight as the admitted insurers.

Lloyd's of London is the largest underwriter of surplus lines insurance. It is not, however, an insurer. Rather, it is a marketplace for insurance. It also serves as a marketplace for reinsurance, the contracting between two insurers whereby one cedes certain insured risk to another in exchange for consideration.

With historical origins in marine insurance, policies issued from Lloyd's are underwritten by "syndicates". A syndicate is made up of various insurers, which distribute the assumed risk among themselves. Commuter Rail Agencies look to the Lloyd's market for the placement of much of their required excess liability insurance as it is largely unavailable from domestic insurers in the admitted market. The agencies also seek such insurance from other foreign insurers.

The surplus lines market is not without some regulatory oversight. Surplus lines insurers are subject to regulatory requirements imposed by their domiciliary state or country. In addition, their domiciliary state or country oversees their financial condition. Lloyd's has operated for centuries without concern that claims will go unsatisfied due to financial hardship.

States monitor the eligibility of surplus lines insurers domiciled in the United States. They also identify the eligibility of foreign insurers to participate in sales of their products to State residents. State insurance regulators depend, in part, on their oversight of licensed surplus lines producers to protect State residents purchasing coverage in the surplus lines market.

Producers

Each State issues licensure to producers to sell or purchase insurance for State residents. These requirements apply to both insurance brokers (those acting on behalf of policyholders) and insurance agents (those acting on behalf of insurers). State insurance departments can act against licensed producers as well as producers that fail to secure appropriate licenses for their activities relating to the marketing, sale, or placement of insurance to State residents.

Surplus lines producers must be licensed to sell surplus lines insurance. The States possess some control over surplus lines insurance through their regulation of surplus lines brokers. A surplus lines broker has some obligation to confirm that surplus lines insurers are eligible and financially secure.

[6] *15 U.S.C. § 1011 et seq.*

Commuter Rail Agencies Satisfaction of Contractual Requirements

It would be highly unusual for a Commuter Rail Agency to place all of its liability insurance requirements in one policy issued by an insurer in the admitted market or through a policy issued from the surplus lines market. Underwriters[7] are unwilling to assume this amount of risk.

Insurance Towers

Commuter Rail Agencies must build a "tower" of liability insurance, usually to the cap because of their contractual insurance obligations. The tower starts with a primary liability policy, meaning the policy that will first respond to a loss. It is standard for a primary liability insurer to require the Commuter Rail Agency to hold some level of risk in a self-insured retention[8]. Upon covered loss, the agency would bear responsibility up to the retention, then the primary insurer would pay loss after satisfaction of the retention up to its coverage limit. Excess liability insurance policies are then layered above the primary policy with all such policies combined providing the total limits available for an occurrence. For example, the first layer excess liability policy would assume the risk of loss above the primary up to its limit, with the second layer excess liability policy attaching after exhaustion of both the primary and first layer excess policy. After the second layer excess liability policy exhausts, the third layer excess policy begins paying loss and so forth.

Complicating matters further, Commuter Rail Agencies are frequently required to build a coverage layer in the tower by spreading risk among two or more insurers issuing coverage. Accordingly, the third layer referred to in the above paragraph may not be governed by a policy issued by a single insurer, but instead be made up of several insurers assuming a portion of the risk of losses that enter the third layer.

In theory, primary insurance is the most expensive as there is the highest likelihood of covered loss in the primary layer. Coverage in the top excess layers should be much cheaper in that the likelihood of loss entering the higher layers of coverage is remote. Insurers should set the premium within the layers of the tower based on the underwritten risk and the possibility of loss within that layer. However, this is not always the case with the excess layers procured by Commuter Rail Agencies, as the availability of high-level excess liability insurance is limited.

Some excess insurers have demonstrated preferences for assumption of risk within such a tower. Stated another way, insurers maintain different "appetites" for risk assumption. Some prefer the achievable premium associated with lower excess levels. Some prefer to assume the risk of catastrophic loss associated with the upper levels. Others prefer to be in the middle at various levels.

Coverage Triggers

Policies are typically written for a one-year period. There are several approaches used for liability coverage. Each sets the "trigger" for coverage implicated or potentially implicated coverage layer. Specifically, the "trigger" is identified in a policy's insuring agreement and related definition. Most liability policies coverage of third-party bodily injury and property damage are written on an "occurrence basis". The policies responsible for responding are those in place when the injury or damage occurs. Another approach is referred to as "claims-made" coverage, triggering the policies in place when the claim is made against an insured irrespective of the timing of the injury or damage. There are other variations as well.

Not all policies run on the calendar year. If they did, all insurers, policyholders, and producers would be forced to work through insurance placements at the same time. The timing of the policy year will differ among the Commuter Rail Agencies. Each agency will typically place its entire tower of railroad liability coverage at the same time with concurrent policy periods throughout the tower.

Prior to approaching the expiration of the tower's current policy year, the Commuter Rail Agency will typically review its intended approach with the broker. In a "soft market", one with favorable premiums and much capacity, brokers will shop most of the coverage to build the tower. Ideally, insurers are competing against each other to insure the risk and quoting favorable terms and premiums. Renewals occur when the Commuter Rail Agency

[7] *Underwriting is the process by which an insurance company assesses risk and exposure to determine how much insurance to offer and how much to charge*

[8] *A self-insured retention is a dollar amount specified in an insurance policy that must be paid by the insured before the insurance policy will respond to loss.*

contracts with an incumbent insurer to provide the same coverage as the prior policy year, although the premium may differ for the renewed coverage. In a "soft market", the premium on a renewal policy may decrease as the incumbent insurer is forced to compete with other offerings to retain the business.The process of approaching insurers, permitting underwriting of the risk, and negotiating coverage is time consuming, taking up to four to six months to secure. The complexity increases with additional layers and insurers involved.

For much of the past 30 years, Commuter Rail Agencies succeeded in building their insurance towers without great difficulty. Some domestic insurers participated, although most domestic insurers in the admitted markets lacked the capacity or appetite to provide excess liability insurance to the agencies. Insurance producers had ready access to foreign insurers in the surplus lines markets that were willing to underwrite the risks for Commuter Rail Agencies. Representatives of the Commuter Rail Agencies would sometimes travel to meet with prospective insurers in London, England, Bermuda, and other locations. Underwriters had interest in appreciating the contemplated risk that they were pricing, but also sought to market themselves to the Commuter Rail Agency representatives.

Premiums were not fixed from year to year. A Commuter Rail Agency and its broker understood that if the insurers quoted premium increases, it was due to the particular loss history of that agency or because of other losses relating to passenger rail. They also appreciated that some increase could be expected if the insurance market fluctuated in a normal cycle with less competition among the insurers to underwrite the risk. In that case, Commuter Rail Agencies could adjust to modest premium increases, which were largely predictable.

The Hard Market

Starting in approximately 2019, the market for insurance hardened considerably. The hardening continued in 2020 and persists today. The hard market is pronounced with respect to excess liability insurance. The hard market for excess liability insurance is not specific to passenger rail. It impacts many industries. However, due to the uniqueness of Commuter Rail Agencies' contractual insurance requirements and the nature of their operations, agencies lack the flexibility to adapt to this hard market because of their contractual obligations to insure up to the cap.

Insurance purchasers faced a difficult insurance market in the 1980's. While market cycles have occurred since that time, the present market is the most difficult to place insurance in decades. There is no indication of a softening in the near future. The hard market is projected to continue for several years. Some industry participants believe it is unlikely to return to its pre-hardening state at all, with present conditions and costs setting a new baseline.

The hard market appears to have resulted due to the confluence of several factors, which are discussed in more detail below. Two attributes of the hard market that are most significant to Commuter Rail Agencies seeking to insure their towers are capacity issues and premium increases.

Capacity

"Capacity" is a term used to describe the availability of insurance. Excess liability insurers regularly assess the maximum amount of liability insurance they are willing to assume at any one time. Each insurer collects premiums for assumed risk and invests that collected premium. Insurers seek to strike a balance between the premium collected and the risk they hold, factoring in investment opportunity. To profit, they hope to generate more revenue from the collection of premium and investment income than they pay out in losses and operating expense.

Transparency into the insurers' decision-making process is not available. Underwriters, particularly those in the surplus lines market, closely guard their underwriting process and formulas for setting premiums. Many insurers issuing liability coverage to policyholders cede part of their assumed risk through contractual arrangement with reinsurers. Despite the lack of direct insight, the recently diminished capacity is demonstrated by Commuter Rail Agencies' difficulties in fulfilling their insurance needs.

Several insurers have simply withdrawn from this market altogether, refusing to underwrite any excess liability insurance for Commuter Rail Agencies. Few domestic insurers wrote the coverage over the last decade. Insurers, such as Swiss Re, Zurich, and Arch, recently stopped insuring the risk. Other insurers in Bermuda and Ireland have also withdrawn from the market. These exits result in less total capacity.

Remaining participants are not restoring availability by picking up for these departures. Instead, they are also restricting the amount of total excess liability insurance that they are willing to assume. Many have reduced their capacity for such insurance by one-half or two-thirds in the last two years. This includes coverage underwritten in the surplus lines market, such as insurance provided through foreign insurers.

During our interview process, we learned that some insurance producers were optimistic that a couple of new insurers may enter the market to partially fill the void. However, it was unclear how much capacity these insurers would offer or when they may start participating. It is more likely that participating insurers will withdraw completely or further reduce their capacity in the future.

The capacity shortage has a multitude of impacts on Commuter Rail Agencies. Of primary concern, they face the possibility of potential disruption or cessation of operations if they cannot satisfy their contractual insurance obligations because required total limits cannot be placed in the markets. Several Commuter Rail Agencies identified great difficulty filling all levels in their tower and specifically high-level layers of their tower. Second, decreased capacity has complicated the insurance placement for these agencies, as previously participating insurers are unwilling to provide the same limits that they have in the past. With many insurers unwilling to offer significant limits, Commuter Rail Agencies are required to involve many more insurers to fill a tower. Third, capacity issues are resulting in exponential increases in premiums in a very short time.

Premium Increases

As insurance markets harden, premium increases are to be expected. However, the increases experienced by the Commuter Rail Agencies are unprecedented in recent times and they are particularly pronounced with high-level excess liability insurance. Some agencies have experienced increases as high as 80 percent, with many experiencing a doubling in premiums charged.[9] Some have witnessed price inversion, where premiums for high-level tower layers are more expensive than those for low-level tower layers.

Lack of Correlation with Commuter Rail Agency Risk

Of significance, insurance underwriters are not limiting capacity or withdrawing from the market due to the risk that Commuter Rail Agencies present. To the contrary, commuter rail service overall has a relatively low loss history and many if not most Commuter Rail Agencies have excellent loss history. Risk of serious accidents has further decreased because these agencies have implemented PTC. Due to the COVID -19 pandemic, commuter rail ridership has decreased dramatically for more than a year, further diminishing total potential liability. However, neither the availability nor cost of excess liability coverage is commensurate with the current risk that commuter rail operations present. Stated simply, insurers raised premiums and diminished capacity as this safe industry grew even safer.

Identified Factors for Hard Market

Several factors have led to the extreme hardening in the market for excess liability insurance, including:

- Social Inflation
- Larger than anticipated losses to insurers in other insurance lines
- The COVID-19 pandemic
- Economic uncertainty
- Historically low interest rates
- Increased pricing for reinsurance treaties

This section discusses some of these factors.

Social Inflation

"Social Inflation" is difficult to define. In essence, it is the increased liability exposure presented by increased jury verdicts. The phenomenon is frequently applied to the United States, which relies heavily on juries to decide civil litigation. Large verdicts have been rendered in numerous cases in the recent past. Although none has involved passenger rail, the large verdicts are not isolated in any one industry. Some examples involve: trucking accidents; auto accidents; medical malpractice incidents; mass shooting incidents; pharmaceutical side effects; construction accidents; sexual abuse cases; and numerous products liability cases. With the possibility of increased jury verdicts, litigation funding has grown quickly.

[9] For example, one commuter rail agency paid $1.6 million in coverage in 2019-2020 only to see the premium increase to $3.1 million for its 2020-2021 policy renewal. Another agency experienced a 60 percent increase in its premiums for its 2020-2021 renewal, and expects to see increases in premiums and continued reduced capacity as it heads into its next renewal. Over the last five years, another commuter rail agency saw a doubling of its premium, paying $12.3 million for its December 2020 renewal, compared to $6.3 million just five years earlier.

Insurers: Larger Than Expected Losses

Within this broad category, insurers have paid out higher than expected property losses relating to several natural disasters over the last few years. Insurers assess the risk of significant loss from natural disasters based, in part, on the frequency and severity of past events. The number, severity, and cost of events have increased in the recent past, creating larger than expected total loss payments. In the United States, insurers have paid out claims associated with multiple hurricanes, wildfires, tornadoes, and other weather-related events in recent years. The COVID-19 pandemic has also resulted in higher-than-expected losses to insurers. While the insurance industry has reacted to exclude communicable diseases and pandemics from newly-issued policies, insurers have paid or are presently litigating their coverage obligations to satisfy business income losses under several policies.

Scientists believe that climate change impacts, in part, the frequency and severity of certain weather-related events. While it is likely that insurers are addressing their modeling to take these events into account, the frequency of severe weather events and the resulting loss appear prone to increase going forward.

Economic Uncertainty

Economic uncertainty and lack of investment opportunity is also having an impact on decision-making by insurers and reinsurers concerning capacity and premiums charged for underwritten coverage. Unlike the two factors discussed above, these factors could change over time.

Future Outlook

As many factors play into the insurance markets, their future is not entirely predictable. However, significant factors negatively impacting the insurance markets, such as social inflation and environmental losses, are likely to continue or worsen. Insurers' concerns with these phenomena will persist and they will continue to take a cautious approach, particularly with excess liability insurance. Some market participants think it unlikely that the market will return to its pre-hardened state, meaning the current situation is not the reflection of a natural cycle with a corresponding "soft market" on the horizon. Rather, they believe that the current situation is the new normal, with the capacity issues and premium increases here to stay.

Impact on Commuter Rail Agencies

Commuter rail is a vital resource to our communities. Congress previously recognized the important and significant public benefits of commuter rail by imposing the liability cap to protect it from catastrophic losses. The current market for excess railroad liability coverage is a present threat to many Commuter Rail Agencies.

The liability cap is valuable in setting the maximum exposure to passengers arising from an accident involving passenger rail. However, it became a readily identifiable point for insurance provisions in contractual arrangements that Commuter Rail Agencies need in order to operate. Those requirements for total insurance limits recently increased again and will continue to increase every five years[10].

Commuter Rail Agencies face real concern that they will be unable to fill their insurance towers to meet their contractual obligations as their current policies are scheduled to expire. It is unlikely that the attributes of the present market, including reduced capacity and increased premiums, are going to change for some time. Thereis a possibility they will not change at all. Insurers willing to underwrite the coverage are aware that Commuter Rail Agencies have limited options and contractual obligations to obtain the insurance sought. Increasing premiums are consuming a substantial part of these agencies' total operating budgets. To make matters worse, these difficulties have coincided with a significant decrease in ridership attributable to COVID-19. While ridership is beginning to return as restrictions lift and return to work plans are implemented, it is unclear when commuter rail ridership levels will return to pre-pandemic levels.

Commuter Rail Agencies do not have the means or flexibility to adapt to the changed insurance market. They cannot elect to purchase less insurance. Increased self-insured retentions could potentially help with some premium reduction with the primary insurance but would not impact pricing for excess liability coverage. Commuter rail is historically safe and the industry has implemented PTC on its networks. The availability and pricing for liability insurance is, however, no longer attributable to the underwritten risk for a specific Commuter

[10] *As noted above, section 11415(b) of the FAST Act requires the DOT to adjust the cap every five years after the enactment of the FAST Act to reflect the change in the Consumer Price Index since the last adjustment.*

Rail Agency or the industry as a whole. It is driven by outside forces that are likely to continue to impact the market in the future.

Without some relief or alternative to placing insurance in the markets, Commuter Rail Agencies will continue to find limited capacity for their excess liability insurance needs and suffer premium increases, potentially disrupting or ceasing operations if they cannot find contractually required coverages.

Summary and Findings of Agency Interviews

In preparing this report, we interviewed executives of Commuter Rail Agencies, Commuter Rail Agency risk managers, and brokers representing Commuter Rail Agencies, and other participants in the railroad industry. When analyzing market changes that have occurred over the past several years, the Study Team also considered information reported by brokers in their Quarterly and Annual Reports to Shareholders and other stakeholders. Very little qualitative or quantitative information beyond this exists from the industry.

Data Collection

The Study Team collected data mainly through a comprehensive questionnaire circulated to more than a dozen Commuter Rail Agencies and direct interviews with Commuter Rail Agency risk managers and executives. The questionnaire and interviews covered more than 40 questions and issue areas concerning each agency's Liability Insurance Needs; Current Insurance Structures; Premiums Paid; Brokers Used; Market Capacity to Respond; Perceived Market Changes in Recent Years; Potential Alternative Solutions; and Recent Actions Taken. The response rate for Commuter Rail Agencies was nearly 100 percent. Brokers were hesitant to engage in discussions and only did so to a limited extent.

Data Evaluation

The Study Team analyzed data and other information gathered from the questionnaires and interviews, as well as research of available information from insurance industry sources. The team relied primarily on the information and data gathered from Commuter Rail Agencies mainly for the period covering the past five years. Even though most agencies insure up to the federal liability cap, there are differences in the structures and approach that is often influenced by state or local practices and laws (i.e., existence of state liability caps) as well as other institutions (i.e., use of self-insured retentions and existence of captive insurance entities).

The study was predominately focused on achieving a closer examination of changes in the excess liability market; premiums charged to Commuter Rail Agencies; changes in market share of known insurers; the capacity of insurers to respond to industry demand for coverage; new limitation and exclusions on coverage (e.g., cybersecurity and COVID-19); and potential alternative methods for coverage.

Liability Insurance Needs

The overwhelming majority of agencies reported that they maintained insurance at least up to limits of the federal liability cap, which was adjusted to approximately $323 million on March 29, 2021. Several agencies reported that they exceeded the amount of the federal cap due to their own assessment of risk exposure and availability. Of those agencies that exceeded the cap, they indicated they were unable to secure coverages beyond the level they achieved due to the lack of availability in the market. No Commuter Rail Agency exceeded $400 million in total coverage. One agency reported it was required to carry coverage above the cap because of a third-party contractual relationship. No agencies were required by state or local laws or regulations to carry coverage in excess of the federal cap.

Several agencies reported that they had previously maintained levels of coverage well below the federal cap as recently as three years ago. These agencies previously relied on state liability caps but were forced to secure additional coverage up to the federal cap because of third-party contractual requirements. These relationships were generally with other railroads on which the agencies shared track or with contractors providing PTC services under a license agreement.

Current Liability Insurance Structures

Most agencies we interviewed used self-insured retentions for the initial layer of risk exposure. The attachment point at which insurance was procured generally ranged from $2 million to $7.5 million, but also reached $11 million, and in one case $25 million. In one instance, commuter rail liability is covered by a $50 million captive insurance company that had been incorporated by the state. This coverage was in addition to a self-insured retention.

A number of multimodal agencies secured their primary coverage through a layer of insurance that covered not only commuter rail operations, but also public transit bus, rail, and seniors and persons with disabilities services. In several cases where there was multimodal coverage, the policies were segmented often with lower maximum coverages than what is required for commuter rail. Several agencies also reported that their coverage extended to the Federal Employers' Liability Act (FELA)[11] and General Liability exposure across state lines where they also operated limited service. Policies also generally extended to automobile coverage.

Where agencies had a primary coverage that had broad application, most Commuter Rail Agencies purchased policy coverage at the attachment point where the primary coverage was capped. At that point, the coverage was focused solely on commuter rail operations. However, in one instance, the excess liability policies written for coverage above the self-insured retention and captive insurance coverage also covered other modes of transportation beyond just commuter rail.

Our research also showed that that the excess policies were written to follow the form of the primary coverage. Respondents reported that they have not seen any material changes in this structure over the past five years. However, most reported they had seen changes to the manner in which their tower of coverage was constructed, with many more layers and insurers changing the amount of coverage they offered.

Premiums

All respondents reported significant increases in their annual premiums for excess liability coverage over the past several years, but most observed their primary coverage (less than $50 million) has been flat or has experienced modest increases (under five percent) over the past several years. Overall, the total price increases have ranged from roughly 20 to 80 percent annual increases, largely due to increases in the excess layers. These increases have been most notable in the past two to three years, but some agencies have experienced this trend for the past five years.

Nearly all respondents also observed that insurers at the upper layers of coverage were increasing their premiums so that coverages cost more on a per million dollar of coverage basis than coverage at lower levels of the tower. This "inversion" is a relatively recent phenomenon and does not in any way appear directly tied to the loss record of the individual Commuter Rail Agencies. Brokers working on behalf of the Commuter Rail Agencies reported that the increases at the upper levels of coverage were due to market conditions and losses experienced by insurers in other industries.

Producers/Brokers

Most respondents reported they currently use producers (i.e., brokers) to place their liability coverages. In most cases, the producers are compensated on a commission basis, often with a cap, in addition to administrative fees, but some agencies pay a flat fee for all brokerage and consulting fees. Most arrangements between producers and Commuter Rail Agencies allow for the producer to place excess liability coverages directly with the insurer, if they have the capability to do so, especially in foreign markets. Some agencies use additional intermediary parties (both affiliated and non-affiliated brokers) to place specific coverages and some agencies also employ wholesalers.

In discussions directly with producers, they confirmed that there is little to no domestic market presently for excess liability coverage and thus they are forced to seek coverages from foreign markets, most through London or Bermuda insurance markets.

As far back as 2019, the Producer AON reported in the second quarter that:

> [W]e have seen a continuing constriction of available capacity for Umbrella and Excess Liability placements. Since mid-year 2018, more than $250 million of capacity has disappeared from the marketplace. This reduction has affected the markets in the U.S., Bermuda and particularly in London. These reductions in capacity manifest in many ways:
>
> - Insurers who have ceased writing Excess Liability completely
> - Insurers who have reduced available capacity across the board
> - Insurers who have reduced available capacity for certain classes of business
> - Insurers who are managing deployed capacity by size of Insureds
> - Insurers who are aggregating capacity across their geographical platforms
> - Insurers who are deploying less than their full capacity and or positioning their capacity at different positions in the tower
>
> All of these changes have caused considerable disruption in the market.[12]

[11] 45 U.S.C. § 51 et. seq.

[12] AON, 2020 National Casualty Report, pp. 5-6. aon.com/getmedia/749ffbb3-e88b-4306-8553-7b0171d812cd/Aon-National-Casualty-Report-Digital-Feb2020.aspx (last accessed June 13, 2021).

AMWINS, an excess and surplus lines specialty insurance broker, reported in its "State of the Casualty Market – Q1 2021"[13] that in "the transportation sector, best-in-class risks are seeing single-digit to 15% rate increases, while distressed risks continue to face significant premium jumps and tough market scrutiny." While AMWINS does not write coverages for passenger rail and focuses most of its business on auto and trucking, it noted in those sectors that "the primary space has seen significant changes in underwriting appetite." It further noted that "In excess, capacity is still tight, but shocking rate increases have somewhat relented," but also noted "… capacity for very large towers can still be hard to find."

Willis Towers Watson, in its November 2020 Survey Report[14], reported that "the umbrella/excess liability marketplace continues to experience extensive disruption," and that "deteriorating loss trends continue to negatively impact underwriting profitability driving underwriters to require continued, significant rate increases, to narrow underwriting appetites, to reevaluate coverage grants, and to require changes to program structures, i.e., reducing available capacity and requiring higher attachment points."

The Survey Report further noted that the North American liability marketplace continues to be impacted by significant catastrophic liability losses stemming from traumatic brain injury, wildfires, active shooter events, and opioid claims. The Report stated, "The result is unsustainable combined ratios industry-wide—a primary driver of hardening rates."

The Report also points to loss severity that it shows is increasing along with the percentage of claims that are litigated. Citing data from Chubb and Lewis Brisbois, a legal defense firm, there has been an increase in the median value of the top 50 U.S. verdicts of 318 percent since 2014.

In addition, the Report notes that "carriers are reducing renewal capacity on lead umbrella and excess layers but have not been providing corresponding premium relief." The Survey Report also confirms market conditions that many Commuter Rail Agencies have reported—due to the reduction in overall market capacity, towers of coverage at or above $100 million in total capacity have been seeing larger average excess rate increases than with towers of coverage for less than $100 million.

Similarly, Willis Towers Watson confirms circumstances witnessed by many Commuter Rail Agencies: "underwriting and pricing remains fluid, with carriers continuously reacting to market conditions and, at times, changing their positions over the course of discussions with insureds." Producers that we interviewed expressed the view that insurance markets are cyclical with a history of ebb/flow between hard and soft insurance markets. Most indicated they had not seen a tightening of the market similar to this since the 1980's when the market hardened significantly because of several factors, the long-tail exposure presented by asbestos, environmental, and other claims under old occurrence basis policies. At that time, hearing loss claims were also emerging.

Then, as now, carriers were experiencing losses after paying out more in claims than expected in variety of areas. However, there was still competition among insurers and capacity, including among the 15-20 domestic insurers.

Producers believe that there are several reasons for the recent market hardening. While they are not privy to all relationships that insurers enter into, they believe some of the current market conditions are the result of the availability of reinsurance. It is their belief that insurers are not as interested in writing a lot of coverage now because they are losing money on investments and reinsurance options might not be as plentiful. They also identified significant losses due to hurricanes, wildfires, and other occurrences, and newer emerging risks related to cybersecurity and COVID-19.

All producers that we interviewed expressed the same concerns about availability and pricing and expressed uncertainty about how long the market would remain unstable. They also believe that two key factors that should have lowered premiums—the implementation of PTC and lower ridership due to COVID-19—will not be reflected in premium pricing for a while due to the fact that insurers use a "rearview mentality" when underwriting risk; that is, they look at actuarial data over a significant period (e.g., 10 years) to evaluate risk and thus the presumed reduction in risk associated with PTC and reduced ridership due to the impact of COVID-19 has not yet appeared in that data. In addition, there is still uncertainty surrounding COVID-19 itself in general and that will likely exert some form of upward pressure on premiums.

[13] *AMWINS, State of the Casualty Market – Q1 2021. amwins.com/resources-insights/article/state-of-the-casualty-market. (last accessed June 13, 2021).*

[14] *Willis Towers Watson, Insurance Marketplace Realities 2021 – Domestic casualty. willistowerswatson.com/en-US/Insights/2020/11/insurance-marketplace-realities-2021-domestic-casualty. (last accessed June 13, 2021).*

Market Capacity

All Commuter Rail Agency respondents who purchase coverage up to the federal liability cap reported the environment for renewals has been challenging because of shrinking market capacity and significant premium increases. Many respondents reported their producers have witnessed a significant exodus of capacity from the excess insurance markets; some indicated it was as much as $500 million in capacity that was lost. Although there had previously been capacity in the passenger rail market that offered coverage towers of $500 million to $600 million, they now reported that maximum limits were approximately $400 million. One agency responded that it had sought coverage up to $400 million and it was either unavailable due to a lack of available capacity or it was likely to be extremely expensive.

One agency reported that in 2020 it fell short of the federal liability cap, which was approximately $294 million at that time. For a brief period, it was operating with a deficiency in coverage of $57 million. Today, the agency, along with other respondents, maintains that it cannot operate with deficiencies in coverage because of third-party contractual obligations that would prohibit continued operations.

Many respondents reported they had been made aware of specific insurers that had previously issued passenger rail liability insurance, in particular high-level excess liability coverage, that had exited the market or restricted the amount of passenger rail insurance that they would underwrite because of reduced capacity. The explanations for this included: recent large losses; the need to re-examine their underwriting models; failure to attract investors; social inflation; and a general loss of appetite in upper management to assume similar risk exposure. Some of the insurers that ceased to underwrite passenger rail excess liability coverage included: AXA XL (Dublin), Allied World Assurance Company (AWAC), Ascot (Bermuda), Swiss Re, and Zurich, which had withdrawn earlier from the market.

According to several respondents, a number of insurers applied a new reduced line size including AIG, Apollo, AXA XL (London and Bermuda), Liberty, and Argo Re. In addition, the following markets reduced capacity: Aspen, Canopius, CV Starr, Hamilton Re, Hiscox, Liberty Specialty, Markel, Munich Re, and Sompo Intl.

Federal Legislation Addressing Market Issues

In developing legislative options for addressing the current pricing and availability issues facing the Commuter Rail Agencies, our Study Team reviewed and analyzed four different programs where the Federal Government became involved in attempting to address insurance and liability issues in other markets or sectors.

Air Transportation Safety and Systems Stabilization Act of 2001

Background—Congress enacted the Air Transportation Safety and Systems Stabilization Act of 2001 in September 2001 (P.L. 107-42) in response to the terrorist attacks of September 11. The Act was designed to provide substantial financial assistance to the airline industry to address the enormous impact of the 9/11 events on that industry.

Structure and Key Features—The Act established the Air Transportation Stabilization Board, which was designed primarily to provide $10 billion in Federal loan guarantees to airlines experiencing financial difficulties following the terrorist attacks. In addition to these loan guarantees, the Act also provided two forms of insurance assistance: (1) direct insurance provided to air carriers by the Federal Aviation Administration (FAA); and (2) premium subsidies for air carriers through reimbursements from the FAA. This insurance assistance was funded from the Aviation Insurance Revolving Fund in the Department of the Treasury (which served as the depository for premiums paid for the FAA insurance.)

The direct insurance was comprehensive, covering loss or damage in the operation of aircraft in the United States. It was designed to cover 100 percent of losses and required no deductibles or coinsurance. The premium subsidy was designed to reimburse air carriers for post-9/11 increases in the cost of insurance, measured by the difference between the premium costs for the period ending September 10, 2001, and the premium costs after the terrorist attacks.

Implementation—The direct insurance program appears to have paid out more than $10 million for three incidents that occurred between 2009 and 2014, with the payments fully covered by amounts in the Fund. (The original program has largely expired; the FAA's authority continues to apply to carriers with DOD contracts.) The premium subsidy was authorized for only 180 days; the FAA provided $68 million in subsidies to air carriers but because of funding constraints it appears that the reimbursements were only provided for 30 days.

Terrorism Risk Insurance Act

Background—Congress enacted the Terrorism Risk Insurance Act (TRIA) in 2002 (P.L. 107-297) in response to the terrorist attacks of September 11. Following the 9/11 events, most primary insurers incorporated terrorism exclusions into their policies, and most reinsurers abandoned the market, leaving many industries (notably real estate, transportation, construction, and energy) without any insurance coverage for future terrorism events. Congress enacted TRIA to address this major economic problem and to provide protection from the Federal Government in the event of future large-scale terrorist attacks.

Structure and Key Features—TRIA established a Terrorism Insurance Program in the Department of the Treasury. While sometimes referred to as a reinsurance, the Program is more accurately described as a structure under which the Federal Government pays a share of the compensation for insured losses from major terrorism events that exceed a specified dollar level. The private insurance market must cover a certain amount of the losses before the federal share kicks in, creating a type of two-tier insurance coverage structure. Private insurers participating in the Program are also precluded from incorporating terrorism exclusions into their policies. To be covered by the Program, the event in question must be certified as an "act of terrorism" by the Secretary of the Treasury, with the concurrence of the Secretary of Homeland Security and the Attorney General.

Implementation—Although TRIA was apparently designed as a short-term measure that would allow the private insurance market time to develop approaches to future terrorism events, the Act has been extended several times, most recently through December 31, 2027. Based on available information, it does not appear that the Program has resulted in insurance payment costs to the federal budget.

Price-Anderson Nuclear Industries Indemnity Act

Background—Congress enacted the Price-Anderson Nuclear Industries Indemnity Act (Price-Anderson Act) in 1957 (P.L. 85-256) and has renewed it several times in the intervening years. The Act was designed primarily to encourage the private sector, particularly electric utility companies, to develop nuclear facilities at a time when the available liability coverage was viewed as insufficient to address the risks of a nuclear accident. To address this problem, the Act mandated a level of private insurance coverage and established a federally-mandated second tier of liability coverage through a fund financed by the reactor industry.

Structure and Key Features—The Price-Anderson Act set up a two-tiered structure for insurance against nuclear incidents. For the first tier, companies that acquire nuclear reactor licenses from the Nuclear Regulatory Commission (NRC) are required to obtain a specified amount in liability coverage per reactor (originally $60 million, now more than $450 million) from the private insurance market. For the second tier, each reactor company is required to contribute a specific amount per reactor into the Price-Anderson fund in the event of an accident resulting in claims that exceed the amount available under the first-tier private insurance coverage.

Payments into the fund by reactor companies are not required until there is a nuclear accident, but fund administrators may borrow money to provide "front end" resources in the event of an accident. If an accident occurs that is likely to result in claims in excess of the first-tier private insurance and the second tier Price-Anderson fund, the NRC is required to report to the President and the Congress, and, under subsequent amendments to the Act, Congress committed to provide compensation for those high-dollar claims.

Implementation—The Price-Anderson Act was originally intended to expire in 1967, on the assumption that after the nuclear industry had operated safely for a period of years the reactor companies would be able to obtain sufficient insurance in the private markets. This assumption has not proven to be correct. As a result, the Act has been extended periodically over time, now through 2025. These extensions have increased the amount of individual private (first-tier) insurance required and increased the amount of fund contributions per reactor. However, in terms of claims, it appears that all claims against private reactor companies have been paid from primary insurance, and that the second-tier insurance from the fund has not been called upon for claims.

National Flood Insurance Act

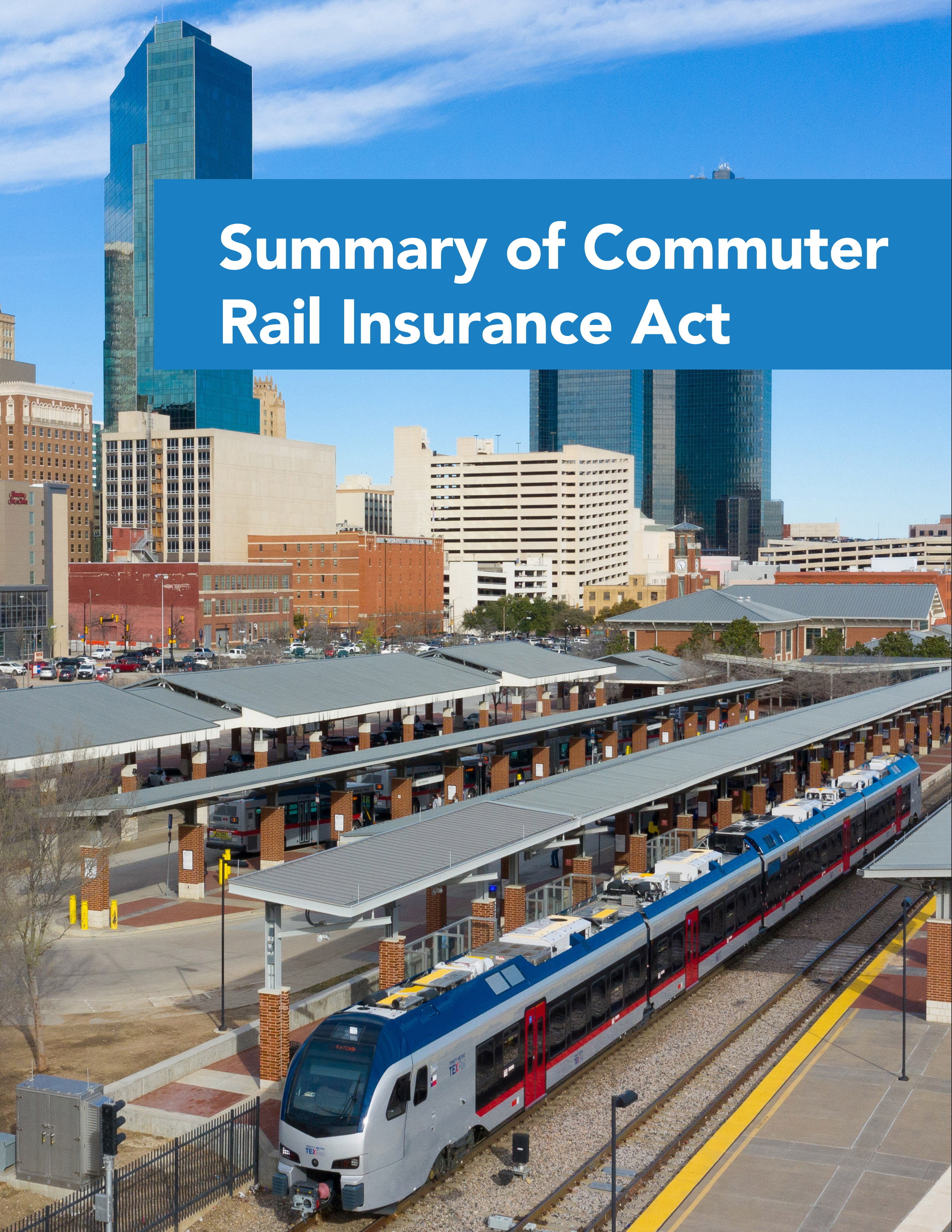
Background—Congress enacted the National Flood Insurance Act of 1968 (P.L. 90-448) to establish the National Flood Insurance Program (NFIP), which is administered by the Federal Emergency Management Agency (FEMA). The NFIP provides subsidized flood insurance to homeowners, renters, and businesses. One of the primary purposes of the Act is to encourage the purchase of insurance and to supplement and subsidize a private insurance market that otherwise could not provide flood insurance at a price that homeowners could afford.

Structure and Key Features—Flood insurance is available to anyone living in one of the 23,000 participating NFIP communities. Insurance is provided by more than 50 participating insurance companies and by FEMA directly. Historically, the premiums for insurance provided under the NFIP have been subsidized, that is, set below actuarily based rates. In administering the NFIP, FEMA has distinguished between "risk premium rates"—rates based on actuarial principles, and "chargeable rates"—rates that can reasonably be charged to insureds to encourage them to purchase insurance.

In the early years of the program, premiums were normally able to cover losses, but in later years, particularly with the occurrence of catastrophic weather events like Hurricane Sandy and Hurricane Katrina, the losses have often far exceeded the available resources in the Program and it has been necessary for FEMA to borrow money from the Treasury to fully reimburse the losses incurred.

Implementation—The Act has been reauthorized numerous times over the years. The consistent challenge facing the program and FEMA has been keeping premiums affordable while at the same time providing some level of fiscal solvency for the Program. Since premiums have historically been insufficient to cover losses, especially when catastrophic flood events have occurred, the Program has experienced substantial deficits, with an average annual loss of about $600 million.

Summary of Commuter Rail Insurance Act



The Commuter Rail Insurance Act establishes a Commuter Rail Insurance Program (Program) at the U.S. Department of Transportation (DOT). The Program provides insurance to commuter rail agencies that operate commuter rail services, either directly or through contracted services, to cover passenger injury, death, or damage to the property of passengers arising out of or in connection with the operation of commuter rail service. The Program terminates five years after the date on which the Secretary of Transportation (Secretary) issues a final rule to implement the provisions of the Commuter Rail Insurance Program if the Secretary makes a specific determination that market capacity exists or will exist at a reasonable cost for commuter rail services. Participation by commuter rail agencies in the Program is voluntary.

The legislation creates a Commuter Rail Insurance Revolving Fund (Revolving Fund) administered by DOT. The Revolving Fund provides liability insurance coverage between $50 million and DOT's Rail Passenger Liability Cap (currently $323 million) and provides payment for covered losses. Commuter rail agencies are directly responsible for the first $50 million of liability coverage. The agencies may apply to DOT to participate in the Program and obtain insurance coverage up to the Rail Passenger Liability Cap under an annual renewable liability policy. The Revolving Fund serves as the depository for premiums paid by participating commuter rail agencies for the insurance provided and as the source for reimbursement of covered losses incurred. Under the legislation, the Secretary makes an initial deposit of Federal funds in the Revolving Fund for the first program year to cover anticipated losses. Subsequently, after the Secretary determines that the Revolving Fund has sufficient amounts to cover anticipated covered losses in the remaining program years, the Secretary shall repay the initial deposit to the Treasury.

To participate in the Program, commuter rail agencies submit an application and include the following information: the amount of insurance being requested (which cannot exceed the existing Liability Cap); documentation establishing that the agency has implemented or will implement means of securing liability protection for the first $50 million in liability coverage; specified information on the agency's commuter rail operations; and the agency's accident history, claims filed, and claims paid. The Secretary is required to act on an application within 30 days of receipt and, in the case of an annual renewal, within 20 days. The Secretary may deny coverage under the Program only if an applicant repeatedly fails to provide timely and accurate information.

The Secretary establishes premiums for the liability insurance to be provided on an annual basis in consultation with the Federal Office of Insurance at the U.S. Department of the Treasury. Premiums must be "actuarily fair"—meaning priced in an amount equal to expected losses and premised on an actuarily based assessment of risk in commuter rail operations. Risk and costs of other insurance markets would not be considered in establishing premiums. In establishing the Program, the Secretary shall determine whether the premium structure will be uniform among all participating agencies or tailored to an individual agency's risk profile. Premiums are required to be paid in accordance with a schedule established by the Secretary.

The Secretary investigates, audits, and pays claims determined to be valid. Policies and procedures would be established for the filing of claims for payment and determining the validity of claims in a fair and timely manner. The Secretary is required to promptly pay claims determined to be valid and within the scope of coverage. Claims could not be denied without good cause shown and agencies would have the ability to respond to and address the issues forming the basis for the potential denial. The legislation requires the Secretary to notify Congress if there were a catastrophic loss in commuter rail operations that would likely result in claims that exceed the amounts available in the Revolving Fund to reimburse covered losses.

Under the legislation, DOT also establishes a Working Group, which would include representatives of commuter rail agencies and private providers of insurance. The Working Group would conduct an annual analysis of market conditions regarding the availability and affordability of liability insurance for commuter rail operations. The Working Group is required to complete its annual analysis within 60 days after a program year and DOT would provide the analysis to Congress.

At the end of Program Year 3 and upon review of the Working Group's report, the Secretary is required to make a specific determination, based on the analysis of existing market conditions, as to whether market capacity exists or will likely exist at a reasonable cost for commuter rail services at the end of the fifth year of the Program. If the Secretary's determines that market capacity does not exist or will likely not exist at the end of the fifth year, then the Program continues.

Under the legislation, if the Program terminates after the fifth year, the Secretary is required to pay any outstanding claims for losses arising while the Program was in effect. The legislation requires the Secretary to issue regulations and procedures to implement the Program within 90 days of the date of enactment of the Act.

Legislative Basis

This legislation is modeled in part and includes provisions based on the Federal Aviation Administration's Air Transportation Safety and Systems Stabilization Act (FAA Act), the Terrorism Risk Insurance Act (TRIA), and other laws on Federal insurance programs. Specifically, the establishment of a Federal insurance program providing direct insurance to specific parties is derived from the FAA Act; the use of a Revolving Fund is derived from the FAA Act and prior 1994 aviation legislation (P.L. 103-272); the use of a level of private insurance coupled with a Federal insurance or reinsurance coverage for higher tiers of liability is derived from TRIA and the Price-Anderson Nuclear Industries Indemnification Act; and the claims process, an annual analysis of market conditions, and other administrative provisions are derived from TRIA.

Commuter Rail Insurance Act

SECTION 1. SHORT TITLE.

This Act may be cited as the "Commuter Rail Insurance Act".

SEC. 2. DEFINITIONS.

In this Act, the following definitions apply:

(1) APPLICANT.— The term "Applicant" means a Commuter Rail Agency that applies for insurance coverage from the Secretary under the Program established by this Act.

(2) ACTUARILY FAIR PREMIUM.—The term "Actuarily Fair Premium" means a premium set at an amount or level so that the premiums paid by insured parties over a specified term or period of time are equal to the expected value of the compensation provided for Covered Losses over the same term or period of time, with "expected value" defined as the probability of occurrence of the insured-against event multiplied by the compensation received in the event of a Covered Loss.

(3) COMMUTER RAIL SERVICES.—The term "Commuter Rail Services" means commuter or other short-haul rail passenger transportation in metropolitan and suburban areas that is regulated by the Federal Railroad Administration, which may have reduced fare, multiple-ride, and commuter tickets and morning and evening peak period operations.

(4) COMMUTER RAIL AGENCY.—The term "Commuter Rail Agency" means any local, State, or regional public entity that operates Commuter Rail Services in the United States, either directly or through contracted services, and that is subject to section 28103 of title 49 and section 11415 of the Fixing America's Surface Transportation Act (FAST Act) (P.L. 114-94; December 4, 2015).

(5) COVERED LOSSES.—The term "Covered Losses" means any loss that is based on personal injury to a passenger, death of a passenger, or damage to the property of a passenger occurring during a Program Year and arising out of or in connection with the operation of Commuter Rail Service and that results in a claim by a Commuter Rail Agency for payment from the Secretary under the terms of the insurance coverage provided under this Act.

(6) DEPARTMENT.—The term "Department" means the United States Department of Transportation.

(7) DOT RAIL PASSENGER LIABILITY CAP.—The term "DOT Rail Passenger Liability Cap" means the limitation on rail passenger transportation liability established under section 28103 of title 49, United States Code, as adjusted pursuant to section 11415 of the FAST Act (P.L. 114-94).

(8) FUND.—The term "Fund" means the Commuter Rail Insurance Revolving Fund established by this Act.

(9) PRIVATE INSURER.—The term "Private Insurer" means: (a) any entity that is licensed or admitted to engage

in the business of providing insurance in any State and engages in such business on a regular basis; and (b) any entity or syndicate of entities providing insurance in the surplus lines market when placed through a producer licensed or admitted to engage in the business of placing such insurance in any State.

(10) PROGRAM.—The term "Program" means the Commuter Rail Insurance Program established by this Act.

(11) PROGRAM LEVELS OF INSURANCE.—The term "Program Levels of Insurance" means liability insurance coverage between $50 million and the DOT Rail Passenger Liability Cap.

(12) PROGRAM YEAR.—The term "Program Year" means each year of the five-year duration of the Program, subject to the conditions set forth in Section 12.

(13) SECRETARY. —The term "Secretary" means the Secretary of Transportation.

SEC. 3. ESTABLISHMENT OF COMMUTER RAIL INSURANCE PROGRAM.

(a) ESTABLISHMENT AND DURATION OF PROGRAM.—There is hereby established in the Department the Commuter Rail Insurance Program. The Program shall be in effect for the five-year period beginning on the date that the Secretary issues a final rule as provided in Section 10, subject to the Secretary's determination on market conditions as provided in Section 12(b). In the event of the termination of the Program, the Secretary shall be subject to the post-termination obligation regarding claims as provided in Section 12(c).

(b) AUTHORITY AND RESPONSIBILITY OF THE SECRETARY.—Notwithstanding any other provision of law, the Secretary shall administer the Program, shall provide insurance coverage to Commuter Rail Agencies at the Program Levels of Insurance, and shall provide payments from the Fund for Covered Losses in accordance with this Act and the terms of the insurance policies issued under this Act.

(c) ELEMENTS OF PROGRAM.—

(1) PROVISION OF INSURANCE.—Upon application by a Commuter Rail Agency pursuant to Section 4, the Secretary shall provide Commuter Rail liability insurance coverage under an annual renewable liability insurance policy.

(2) SCOPE OF COVERAGE.—The insurance provided by the Secretary under this Act shall be designed to provide payment for Covered Losses arising out of or in connection with the operation of Commuter Rail Service.

(3) AMOUNT OF INSURANCE.—The amount of insurance provided shall be any and all amounts of liability insurance coverage between $50 million and the DOT Rail Passenger Liability Cap, as requested by the Commuter Rail Agency in its application.

(4) TERM.—The term of the insurance provided shall be for one year, renewable on an annual basis for each Program Year in the five-year duration of the Program, subject to the conditions set forth in Section 12.

(5) ADDITIONAL INSUREDS.—A Commuter Rail Agency securing insurance coverage under the Program may include additional insureds under such coverage if (A) inclusion of such additional insureds is required under the terms of a written agreement that is necessary for the operation of such Agency's Commuter Rail Services or (B) such additional insureds are named on a Commuter Rail Agency's liability coverage of up to $50 million. The Secretary may not prohibit or restrict the inclusion of additional insureds that meet the criteria in this paragraph.

(d) CONTRACTS FOR SERVICES.—The Secretary may employ such persons or contract for such services, including outside consultants from the insurance industry, as may be necessary to implement the Program.

SEC. 4. ESTABLISHMENT OF COMMUTER RAIL INSURANCE REVOLVING FUND.

(a) ESTABLISHMENT OF FUND.—There is hereby established within the Department a Commuter Rail Insurance Revolving Fund to finance the Program established under this Act. The Fund shall serve as the depository of premiums paid for insurance provided under the Program and as the source of payment of Covered Losses incurred by participating Commuter Rail Agencies.

(b) INITIAL DEPOSIT INTO FUND.—

(1) DEPOSIT.—To assure that there are sufficient amounts in the Fund in the first Program Year to pay for all Covered Losses anticipated at the time, the Secretary shall, within 45 days after the date of enactment of this Act, make an initial deposit of Federal funds into the Fund in such amount as the Secretary determines to be necessary and appropriate. For purposes of making such initial deposit, the Secretary is authorized to issue bonds or other obligations to the Secretary of the Treasury. The Secretary of the Treasury is authorized and directed to purchase such obligations, and for that purpose the Secretary of the Treasury is authorized to use as a public debt transaction the proceeds from the sale of securities issued under chapter 31 of title 31, and the purposes for which securities may be issued under chapter 31 of title 31 are extended to include any purchase of the Secretary's obligations under this paragraph.

(2) REPAYMENT.—At such time as the Secretary determines that the Fund has sufficient amounts, from the receipt of premiums, to pay for anticipated Covered Losses over the remaining Program Years, the Secretary shall repay to the Secretary of the Treasury the amounts borrowed under the obligations issued pursuant to paragraph (1).

(c) ADMINISTRATION OF FUND.—

(1) INVESTMENTS.—The Secretary may invest any part of the amounts in the Fund in interest bearing securities of the United States Government. The interest on, and the proceeds from the sale or redemption of, such securities shall be deposited in the Fund.

(2) FUND BALANCES.—Any balance in the Fund in excess of the amount the Secretary determines to be necessary for the requirements of the Program and for reasonable reserves to maintain solvency of the Fund shall be deposited at least annually into the Treasury as miscellaneous receipts.

SEC. 5. APPLICATIONS FOR INSURANCE.

(a) SUBMITTAL.—Any Commuter Rail Agency may submit an application to the Secretary for insurance under the Program established by this Act. Participation in the Program by Commuter Rail Agencies is voluntary.

(b) REQUIRED CONTENTS.—A Commuter Rail Agency Applicant shall include in its initial application for insurance under the Program:

(1) the amount of insurance coverage requested, which may not exceed the DOT Rail Passenger Liability Cap;

(2) appropriate documentation demonstrating that the Applicant has implemented, or will implement by the effective date of the insurance provided under the Program, means of liability protection for the first $50 million in liability from one or more Private Insurers, captive insurers, risk pools, or other means of risk transference, all of which may include a reasonable amount of self-insurance;

(3) information regarding the Applicant's Commuter Rail Services, including service area, revenue miles operated, hours of service, average daily passenger levels, right-of-way used for operations and whether owned or used by agreement, average rolling stock fleet age, and such other related information as the Secretary may require;

(4) documentation regarding the Applicant's Commuter Rail accident history over the past 10-year period (or such shorter period as the service has been in operation), together with a listing and description of all liability insurance claims filed during such period in connection with Commuter Rail accidents, the amount of reimbursement from Private Insurers for such claims, and the amount paid out in claims by the Applicant

using its self-insurance retention; and

(5) such other information as the Secretary may reasonably require.

In its application for annual renewal of insurance, a Commuter Rail Agency Applicant shall include such updated information on the topics and matters described in this subsection as the Secretary may require.

(c) ACTION ON APPLICATION.—

(1) TIMING OF ACTION.—The Secretary shall act on each initial application within 30 days after the Applicant provides all information and documentation required under subsection (b), and shall act on each annual renewal application within 20 days after the Applicant provides all information the Secretary requires for such renewal.

(2) LIMITATION ON APPLICATION DENIALS.—The Secretary may deny an application for insurance under the Program only if the Secretary finds that the Applicant has consistently and repeatedly failed to provide timely and correct information required to satisfy the required contents of an application for insurance under the Program. Before denying any initial application or application for renewal, the Secretary shall provide the Commuter Rail Agency Applicant with written notice of such potential denial and the reasons therefore, and shall provide the Agency with a reasonable opportunity to respond to and address the issues forming the basis for such potential denial.

(d) PAYMENT OF PREMIUMS.—To secure and maintain insurance coverage under the Program, a Commuter Rail Agency shall pay the premiums due on such schedule as the Secretary may establish.

SEC. 6. INSURANCE PREMIUMS.

(a) CALCULATION AND ASSESSMENT OF ACTUARILY FAIR PREMIUMS.—

(1) ESTABLISHMENT OF PREMIUMS.—The Secretary shall establish, on an annual basis for each Program Year, the premiums to be charged to Commuter Rail Agencies for insurance coverage under the Program. In establishing such premiums, the Secretary shall consult with the Federal Office of Insurance in the Department of the Treasury.

(2) BASIS FOR PREMIUM AMOUNTS.—The premiums charged shall not exceed an Actuarily Fair Premium for the insurance coverage provided for the Program Year in question. The annual premiums shall reflect an actuarily based assessment of risk in the relevant Commuter Rail Services and shall not consider risks or costs in other insurance markets.

(3) UNIFORM OR INDIVIDUAL PREMIUMS.—In establishing premiums for the insurance provided under the Program, the Secretary may establish uniform amounts per dollar of coverage to be applicable to all participating Commuter Rail Agencies, or may establish individual premium amounts for each of the participating Commuter Rail Agency.

(4) DEPOSIT OF PREMIUMS.—All premiums received by the Secretary shall be deposited into the Fund.

(b) ADMINISTRATIVE EXPENSES.—Notwithstanding subsection (a), the Secretary may charge up to 110 percent of the Actuarily Fair Premium, on an equal basis to all participating Commuter Rail Agencies, if the Secretary determines that the additional amount is needed and will be used to pay the costs of administering the Program.

SEC. 7. PAYMENT OF CLAIMS.

(a) GENERAL AUTHORITY.—The Secretary shall have the powers and authorities necessary to investigate, -audit, and pay claims from the Fund for Covered Losses under the insurance provided to Commuter Rail Agencies under this Act.

(b) CLAIMS PROCESS.—The Secretary shall establish policies and procedures under which Commuter Rail Agencies insured under the Program may file and certify claims for payment. Such policies and procedures shall include a requirement that each claim be accompanied by a certification from the Commuter Rail Agency claimant that (1) the claim is made in good faith and is not fraudulent; and (2) the claim is for a Covered Loss within the scope of the applicable insurance coverage under the Program.

(c) REVIEW AND PAYMENT.—The Secretary shall determine the validity of claims in a fair and timely manner and shall promptly pay all claims determined to be valid and within the scope of coverage of the insurance provided under the Program. The Secretary may, on the basis of audit and investigation and after notice to the Commuter Rail Agency claimant, adjust the amount of the claim to be paid under the applicable insurance coverage. The Secretary may not deny a claim without good cause and without first providing the Commuter Rail Agency claimant with notice and an opportunity to respond to and address the issues forming the basis for the potential denial.

SEC. 8. ANALYSIS OF MARKET CONDITIONS.

(a) WORKING GROUP.—The Secretary shall establish a Working Group consisting of representatives from the Commuter Rail Agencies and representatives from Private Insurers to perform an annual analysis of market conditions regarding the availability and affordability of liability insurance for Commuter Rail Services. Each such analysis shall be completed within 60 days after the end of each Program Year, and the Department shall submit the results of each analysis to Congress.

(b) SECRETARIAL DETERMINATION.—At the end of Program Year 3 and upon review of the Working Group's report, the Secretary shall make a specific determination, based on the analysis of existing market conditions, as to whether market capacity exists or will likely exist at a reasonable cost for Commuter Rail Services at the end of the fifth year of the Program, in accordance with Section 12(b). Within 90 days of the Working Group's report to the Department, the Secretary shall submit the specific determination to Congress.

SEC. 9. NOTICE TO CONGRESS.

The Secretary shall notify Congress in the event of a catastrophic loss in Commuter Rail Services that is likely to result in claims that exceed the amounts available in the Fund to reimburse Covered Losses.

SEC. 10. REGULATIONS.

Within 90 days after the date of enactment of this Act, the Secretary shall, following notice and comment, issue a final rule to implement the provisions of this Act.

SEC. 11. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated, for each year of the Program, such amounts as may be necessary to carry out the provisions of this Act.

SEC. 12. TERMINATION OF PROGRAM.

(a) TERMINATION DATE.—Subject to subsection (b), the Program shall terminate on the five-year anniversary of the date in which the Secretary issues a final rule in accordance with Section 10.

(b) SECRETARIAL DETERMINATION.—The Program shall only terminate after the fifth year if the Secretary makes a specific determination after Program Year 3 in accordance with Section 8(b) that market capacity exists or will exist at a reasonable cost for Commuter Rail Services.

(c) CONTINUED AUTHORITY TO ADDRESS CLAIMS.—In the event of the termination of the Program, the Secretary shall take such actions as may be necessary to investigate, audit, and pay claims for Covered Losses arising out of or in connection with any event occurring during the period in which the Program was in effect. A claim may be filed after the termination date of the Program, and shall be paid in accordance with Section 7, if the event on which such claim is based occurred on or before such termination date.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