

# SURFACE TRANSPORTATION BOARD

Passenger Rail Advisory Committee (PRAC)

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Rail Passenger Liability Insurance and Indemnification Reform

Historical Context, Market Conditions, and Policy Recommendations

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Prepared for:

Surface Transportation Board

Passenger Rail Advisory Committee

Prepared by:

Railroad Liability Subcommittee

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## Executive Summary

Rail passenger liability insurance and indemnification requirements remain among the most significant economic and ironically most artificial structural barriers to expanding passenger rail service in the United States. While federal policymakers have taken multiple actions since the late 20th century to stabilize the risk market—most notably through the establishment of a limited statutory liability cap—those actions have not kept pace with changes in insurance market capacity, risk exposure, the evolving nature of passenger rail operations, and the transportation marketplace.

This report presents the recommendations of the PRAC Railroad Liability Subcommittee to the Surface Transportation Board and the Passenger Rail Advisory Committee. It provides historical context on railroad liability insurance, reviews federal actions taken to date, and explains why current statutory and contractual frameworks no longer align and with the benefit of hindsight never aligned, with insurance market realities and

transportation market realities. The paper concludes with policy recommendations intended to lower costs, reduce barriers to passenger rail growth a competitive marketplace, and align liability exposure with real-world risk and safety performance.

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## I. Purpose and Scope

- Provide the Surface Transportation Board and the Passenger Rail Advisory Committee with a consolidated overview of rail passenger liability insurance history
- Document federal actions taken to address liability and indemnification challenges
- Explain current insurance market conditions affecting passenger rail
- Present policy recommendations for consideration by the Board and federal stakeholders

This paper focuses on passenger rail liability requirements for passengers, and does not address employee liability, freight-only operations, or workers' compensation frameworks.

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## II. Purpose and Role of the Surface Transportation Board and the Passenger Rail Advisory Committee

### A. Surface Transportation Board

The Surface Transportation Board (STB) is an independent federal agency established by Congress in 1996 following the termination of the Interstate Commerce Commission. The STB is charged with the economic regulation of rail transportation and exercises adjudicatory and regulatory authority over matters involving the national rail network.

In carrying out its statutory responsibilities, the STB:

- Oversees the construction, acquisition, operation, and abandonment of rail lines
- Reviews and approves rail carrier mergers and transactions
- Resolves disputes involving rail transportation service and access

- Facilitates the efficient flow of commerce and the development of rail infrastructure
- Exercises regulatory oversight over certain aspects of passenger rail service as directed by statute

The STB's mandate includes ensuring that the national rail system operates in a manner that is efficient, competitive, and responsive to public needs, while balancing the interests of rail carriers, passengers, shippers, and the broader economy.

Given that STB has regulatory authority regarding a competitive rail marketplace, and a duty to ensure the efficient flow of commerce, the fact that the current insurance regimen in the United States, as it applies to passenger rail transportation, discourages competition and reduces efficiency, could give the STB some regulatory authority over the matter.

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## B. Passenger Rail Advisory Committee

The Passenger Rail Advisory Committee (PRAC) was established by the STB in 2023 pursuant to the Federal Advisory Committee Act. The PRAC was formed to provide advice and guidance to the Board on passenger rail issues on a continuing basis to assist the STB in fulfilling its statutory responsibilities related to passenger rail service.

The PRAC's scope of activities includes providing information, advice, and recommendations to the Board on issues affecting the development and operation of railroad passenger services, including:

- Improving efficiency on passenger rail routes
- Reducing disputes between passenger rail carriers and freight rail hosts regarding the use of freight-owned facilities and infrastructure
- Addressing passenger rail on-time performance issues
- Improving regulatory processes related to intercity passenger rail to the benefit of the public, the communities served, and the environment

The PRAC functions as a discretionary advisory body. Its recommendations are non-binding and are intended to inform the Board's consideration of passenger rail policy and regulatory matters.

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### C. Role of the Railroad Liability Subcommittee

The Railroad Liability Subcommittee operates under the auspices of the PRAC and was established to examine issues related to passenger rail liability, insurance, and indemnification. Consistent with PRAC bylaws, the Subcommittee develops findings and recommendations for consideration by the full PRAC, which may then advise the Board in a public meeting.

This paper reflects the Subcommittee's work to inform the PRAC, and ultimately the STB, of the historical context, current market conditions, and policy considerations relevant to rail passenger liability and indemnification.

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## III. Historical Background of Railroad Passenger Liability Insurance

### A. Common-Law Liability and Early Rail Insurance

From the inception of passenger rail in the United States, railroads were subject to common-law tort liability, exposing operators to potentially unlimited damages for passenger injuries and fatalities. As railroads expanded rapidly during the 19th and early 20th centuries, mass-casualty accidents created large and unpredictable financial exposure for passenger transportation providers.

In that era, passenger rail proved uniquely difficult to insure due to:

- High passenger concentrations
- The potential for hundreds of claims arising from a single incident
- Large aggregate loss exposure relative to other transportation modes

As a result, railroads relied on combinations of self-insurance, layered excess coverage, and contractual risk allocation.

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## B. The Pre-1997 Liability Crisis

By the 1990s, expanding tort exposure, rising jury awards, and a shrinking excess liability market placed passenger rail—particularly Amtrak—under severe financial strain. Insurers increasingly limited their exposure or exited the market altogether. Without federal intervention, passenger rail service faced a credible risk of becoming uninsurable.

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## IV. Federal Action: Establishment of the Passenger Rail Liability Cap

### A. 1997 Statutory Cap

In 1997, Congress enacted a federal passenger rail liability limitation establishing a \$200 million aggregate cap per accident or incident for passenger rail claims. The cap applied to all passenger rail operators but not freight operators and included all passenger claims, including punitive damages.

The cap was intended to:

- Preserve the availability of liability insurance
  - Prevent catastrophic losses from eliminating passenger rail service altogether
  - Provide certainty to operators, insurers, and to a lesser extent host railroads
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### B. Market Stability Following Enactment

For nearly two decades following enactment, the liability cap successfully stabilized the insurance market. Passenger rail agencies generally reported:

- Adequate insurance capacity
  - Competitive underwriting
  - Predictable premium cycles
  - The ability to meet contractual insurance requirements
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## V. Changes Introduced by the FAST Act

## A. Inflation Indexing

The Fixing America's Surface Transportation (FAST) Act of 2015 modified the statutory framework by:

- Increasing the cap to approximately \$294 million
- Requiring automatic inflation adjustments every five years

A subsequent adjustment in 2021 raised the cap to approximately \$323 million, with another adjustment scheduled for 2026.

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## B. Structural Disconnect

Automatic inflation adjustments occur without regard to:

- Insurance market capacity
- Claims experience
- Safety performance improvements such as Positive Train Control
- Global reinsurance market conditions

This disconnect has increasingly undermined the original stabilizing purpose of the liability cap.

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## VI. Current Insurance Market Conditions

### A. Hardening of the Excess Liability Market

Beginning in 2019, the market for high-limit excess liability insurance hardened significantly. Passenger rail agencies now face:

- Reduced carrier participation
- Heavy reliance on international markets
- Substantial premium increases
- Difficulty assembling complete insurance "towers"
- Higher percentage of claims paid out of self-insurance.

These challenges persist despite improvements in rail safety.

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## B. Timing and Implementation Challenges

Current law requires new liability cap adjustments to take effect 30 days after publication, while insurance placement often requires four to six months. This timing mismatch exacerbates market instability and increases the risk of coverage gaps. Many operators have stated that they are unable to acquire adjusted limits within the 30 days required under the FAST Act.

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## VII. Sovereign Immunity and Indemnification Barriers

Many state-created passenger rail agencies are legally constrained by sovereign immunity statutes that limit or prohibit indemnification of third parties, including host railroads.

Sovereign immunity is a legal doctrine that protects federal and state governments and its agencies from being sued without their consent. This principle is rooted in the ancient idea that the "king can do no wrong," and has been adopted into modern legal frameworks to ensure that government functions are not hindered by litigation. However, this immunity is not absolute and has been waived in certain situations, such as when the government engages in commercial activities or when specific legislation, like the Federal Tort Claims Act, provides for limited waivers. Understanding and navigating the boundaries of sovereign immunity is crucial for addressing liability issues and ensuring that affected parties have a path to seek redress.

Sovereign immunity also prevents many governmental entities (other than government-owned Amtrak, who does not have sovereign immunity) from providing host railroads with indemnification regardless of fault, which most railroads require to allow passenger operations on their privately owned rail lines. A state that has Sovereign Immunity therefore may not, and sometimes cannot, provide these protections to host railroads, absent waivers or changes in state law. Potential private sector operators have so far been both unwilling and unable to insure up to the levels required by host railroads.

This issue is made even more complex because each state has different insurance statutes on the books and treats indemnification and sovereign immunity differently. This problem can be resolved with 50 different solutions, or one federal approach that deals directly with

the operation of passenger trains. Because indemnification and insurance laws vary by state, passenger rail projects face inconsistent legal outcomes and increased transaction costs. This fragmented framework discourages host railroad participation and complicates insurance placement nationwide.

Important context is that the STB's predecessor, the ICC, was founded in part as a mechanism for preemption, to assure a federal approach to the national network.

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## VIII. Railroad Liability Subcommittee Recommendations

### Recommendation 1: Reset and Rationalize the Liability Cap

Since the convening of the PRAC the RR Liability Subcommittee has been meeting on a regular basis to educate themselves on the insurance and liability issue via numerous domestic and international Subject Matter Experts ("SME").

As a result of the meeting the Liability Subcommittee presented the following recommendations to the entire PRAC Committee although no formal action has been taken by the full committee.

The Subcommittee recommends:

- Resetting the statutory cap to \$200 million as a starting point, or rescinding automatic inflation indexing
  - Establishing an empirical, data-driven methodology for future adjustments
  - Convening an expert committee to evaluate risk, claims history, and insurance capacity
  - Allowing a minimum of 365 days for agencies to place new insurance following any increase
  - Evaluating a federal backstop for catastrophic losses above the statutory cap until an industry reserve pool can be established, informed in part by existing practices in other industries such as defense and utilities.
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Recommendation 2: Evaluate the Potential for and Costs of a National Passenger Rail Insurance Pool

The Subcommittee recommends evaluating the feasibility of:

- A nationally or regionally managed insurance pool
  - Coverage for commuter, intercity, long-distance, and high-speed rail
  - Implementation as possible under STB authority
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### Recommendation 3: Evaluate the Implementation of a Uniform Approach to Indemnification and Sovereign Immunity

The Subcommittee recommends:

- Evaluating current indemnification practices nationwide
  - Identifying federal legal or statutory mechanisms for uniform indemnification, such as preemption
  - Engaging host railroads to define acceptable risk thresholds
  - Moving toward a single national framework rather than a state-by-state approach
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## IX. Conclusion

Federal intervention has historically been required to preserve rail service during periods of market failure. The current fragmented liability and indemnification framework, while well-intentioned—no longer reflects insurance market realities or safety performance.

Absent reform, escalating statutory limits and shrinking underwriting capacity will continue to constrain passenger rail expansion and increase costs for publicly funded agencies. Collateral impacts will be felt in the freight rail sector, for example in hazardous materials transportation. A data-driven reset of liability policy, combined with insurance pooling and national indemnification standards, offers a sustainable path forward that protects passengers while enabling the continued growth of passenger rail in the United States.