



BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

STEPHEN R. MALPHRUS
STAFF DIRECTOR FOR MANAGEMENT

April 30, 2004

Mr. Hugo Teufel
Associate General Counsel (General Law)
Department of Homeland Security
Office of the General Counsel
Washington, DC 20528

Re: RIN 1601-AA14

Dear Mr. Teufel:

This responds to the interim rule with request for comments published on February 20, 2004 (69 FR 8074) by the Department of Homeland Security (DHS) to implement the Critical Infrastructure Information Act of 2002 (the CII Act). On behalf of the Board of Governors of the Federal Reserve System (the Board), I submit the following comment on the interim rule.

Our comment focuses on DHS's proposal to permit indirect submission of Critical Infrastructure Information (CII). While the interim rule removed the references that were in the proposed rule permitting indirect submission, DHS has stated that the final rule will likely include such submission. CII thus could be received by other federal agencies and forwarded to DHS. Board staff continues to believe that such indirect submissions of CII are not authorized and are beyond the scope of the CII Act. Therefore, Board staff does not believe the final rule should provide for indirect submissions of CII to other federal agencies.

Our objection to indirect submissions is based on the language of the CII Act. To be CII, among other requirements, the information must be "voluntarily submitted to a covered Federal agency for use by that agency regarding the security of critical infrastructure . . ." 6 USC § 133(a)(1). The CII Act defines "a covered Federal agency" to mean only the DHS. 6 USC § 131(2). Similarly, the term "critical infrastructure protection program" covers only DHS as it means "any component or bureau of a covered Federal agency . . ." and DHS is the only such agency. 6 USC § 131(4). Thus, to be CII, the information must be information submitted to DHS for use by DHS. The CII Act does not expressly authorize the submission of CII to any agency other than DHS.

Further, permitting the submission of CII outside of DHS also raises the issue of whether the information is protected as CII. Protection of the information as CII has significant consequences as that designation allows the information to be exempt from disclosure under the Freedom of Information Act (FOIA) and subjects its improper disclosure to penalties. 6 USC §§ 133(a)(1), (b), and (f). Information submitted to federal agencies other than DHS is not information "submitted to a covered Federal agency." *Id.* Therefore, arguably, submissions to federal agencies other than DHS do not receive the CII protections.

Finally, as noted in our comments, dated June 16, 2003, on the proposed rulemaking of April 15, 2003, allowing for the submission of CII to agencies other than DHS also raises serious operational concerns for those agencies. In this regard, bank regulatory agencies like the Board receive and review large amounts of confidential business information of financial institutions in carrying out their varied responsibilities. Although much of this information is submitted pursuant to a "legal requirement," some may be submitted voluntarily. If an agency were required to treat information needed for the performance of official functions as CII merely because a submitter identifies it as such, the information's use may be unnecessarily limited thereby impairing an agency's ability to carry out its responsibilities. See for example, 6 USC §§ 133(a)(1)(C), (D). This result does not appear consistent with the CII Act, which provides that an agency is under no obligation to treat critical infrastructure information that it independently obtains in a manner outside of the CII process as CII. See 6 USC § 133(c). This permits both DHS and non-DHS agencies to fulfill their statutory functions without unnecessary confusion and burden. Further, insofar as concerns may exist that DHS would not be apprised of information regarding vulnerabilities of the infrastructure to terrorism, section 202 of the Homeland Security Act provides for the sharing of this type of information between federal agencies and DHS.

Therefore, Board staff recommends that the final rule, like the interim rule, limit the submission of CII to DHS.

Sincerely,

A handwritten signature in black ink, appearing to read "S. R. Maerz". The signature is written in a cursive, somewhat stylized font.