

Association of American Railroads.txt

Subject: RIN 1601-AA14: comments of AAR  
Date: Mon, 16 Jun 2003 16:29:03 -0400  
From: "Carethers, Regina" <RCarethers@aar.org>  
To: <ciilregcomments@DHS.gov>

Attached are the comments of the Association of American Railroads in the above-referenced proceeding. A copy of AAR's comments also is being hand delivered

. <<DHS Comments.doc>>

Gina Carethers  
Legal Secretary  
(202) 639-2525

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  Type: WINWORD File (application/msword)  
  Encoding: base64  
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Subject: RIN 1601-AA14: comments of AAR  
Date: Mon, 16 Jun 2003 16:23:04 -0400  
From: "Carethers, Regina" <RCarethers@aar.org>  
To: "RegComments, CII" <CII.RegComments@HQ.DHS.GOV>

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BEFORE THE  
DEPARTMENT OF HOMELAND SECURITY

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RIN 1601-AA14

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PROCEDURES FOR HANDLING CRITICAL  
INFRASTRUCTURE INFORMATION:  
NOTICE OF PROPOSED RULEMAKING

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COMMENTS OF THE  
ASSOCIATION OF AMERICAN RAILROADS

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On behalf of its member railroads, the Association of American Railroads (AAR)<sup>1</sup> submits the following comments in response to the Department of Homeland Security's (DHS) notice of proposed rulemaking seeking comments on a proposed rule to implement Section 214 of the Homeland Security Act (HSA). Because they are a vital sector of the economy, and own physical assets which constitute part of the Nation's critical infrastructure, railroads have a strong interest in this legislation and the implementing regulations.

As part of its ongoing effort to enhance homeland security, Congress correctly recognized the importance of the assets and systems, both physical and virtual, which have become essential to the effective functioning of our economy and to society's well being. Preventing attack on, or disruption of, critical infrastructure is, and must be, a top

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<sup>1</sup>AAR is a trade association whose membership includes freight railroads that operate 77 percent of the line-haul mileage, employ 91 percent of the railroad workers, and account for 94 percent of the freight revenue of all railroads in the United States. Amtrak, which operates the

priority. In furtherance of that goal, Congress recognized the sensitive nature of certain information related to the Nation's critical infrastructure and the need for those in possession of such information to work with DHS to reduce vulnerabilities. Section 214 of the HSA encourages such cooperation by imposing strict limitations on the use, and further disclosure, of critical infrastructure information (CII) that is voluntarily submitted to DHS (and accompanied by a specified statement), and establishing procedures for the safeguarding of such CII.

Railroads own, and operate over, critical infrastructure throughout the country. Railroads ship numerous commodities that are essential to the nation's economy. Some of the commodities shipped are hazardous in nature. Railroads are fully aware that an attack on the rail industry's infrastructure could be a means of utilizing those commodities to cause injury to persons and disruption to the economy. For the sake of the health and safety of rail employees and the general public, railroads have made and will continue to make substantial efforts to enhance security throughout their systems. The railroad industry already has established a close working relationship with DHS in a cooperative effort to enhance the security of the railroad network.

The regulations implementing §214 must facilitate the important goals that Congress set forth in the HSA. To encourage parties with CII to provide it to DHS, Congress sought to assure that, when submitted voluntarily, such CII (designated "Protected CII") will be protected from disclosure and its release strictly controlled. Congress has made clear that such CII must be utilized only for certain specific

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nation's inter-city passenger trains also is a member of AAR.

purposes. For example, such CII may not be disclosed under the Freedom of Information Act. §214(a)(1)(A). It may not be used in a civil lawsuit. §214(a)(1)(C). Though state and local governments are important partners in protecting the nation's security, if provided with such CII, they may use it only in a limited way, and further disclosure is prohibited. §214(a)(1)(E).

Because of its importance to homeland security, Congress clearly wanted access to and use of Protected CII to be severely limited. Consistent with those restrictions, the proposed rule states that Protected CII may be used by a state or local government “*only* for the purpose of protecting critical infrastructure or protected systems, or in furtherance of an investigation or the prosecution of a criminal act” §29.8(d)(3), and further disclosure to another party by a state or local government may not be authorized by DHS without written consent of the person or entity that submitted the Protected CII. §29.8(d)(2). To assure that other governmental agencies are cognizant of their responsibilities, Protected CII may be made available to a state or local government only pursuant to an “express agreement . . . that acknowledges the understanding and responsibilities of the recipient.” §29.8(b). Proposed rule 29.8(g)(1) states that if Protected CII is provided to a state or local government agency, such information may not be made available pursuant to any state or local law requiring disclosure of records or information. This is an appropriate and critical aspect of the proposed rule, as the purpose of the HSA would be defeated if, notwithstanding the various restrictions and protections required by the Act, Protected CII could be disclosed to the public by state or local governments.

However, two provisions of the proposed rule appear to undercut the overall goal of the HSA, as well as the preceding parts of the proposed rule, by stating that state or local agencies or authorities are not prohibited from attempting independently to obtain Protected CII directly from the entity that submitted the Protected CII. §29.3(d) and § 29.8(g)(2). Even more troubling is that the proposed rule appears to leave open the possibility that CII so obtained could be disclosed without restriction pursuant to a state or local disclosure law. §29.8(g)(2). It will be extremely difficult to effectuate Congress' purposes in enacting the HSA if Protected CII, the sensitivity of which is duly recognized, may be collected wholesale by state or local governments and further disseminated, without restriction, pursuant to state or local law.

At the very least, these two provisions should be made consistent with each other, and the latter consistent with the HSA. See §214(c). Proposed §29.3(d) states that the procedures being established by the rule do not limit the ability of a federal, state or local government agency independently to obtain information "under applicable law." However, 29.8(g)(2) contains no such express limitation. Therefore, that provision should be amended to read

These procedures do not limit or otherwise affect the ability of a State or local government entity, agency, or authority to obtain, ***under applicable federal, state or local law***, information directly from the same person or entity voluntarily submitting information to DHS.

This will make it clear that the HSA confers no independent right on any governmental entity, or third party, to obtain information, and that information may be obtained, if at all, only pursuant to otherwise applicable law. Additionally, any such right would be subject to further restrictions that might be imposed pursuant to another applicable federal law.

For example, the Research and Special Programs Administration (RSPA) determined that a Florida county's attempt to obtain information on hazardous materials releases was preempted under the Hazardous Materials Transportation Act (HMTA). §49 U.S.C. 5125(b)(1)(D). 65 Fed. Reg. 81950, 81954 (2000). The Federal Railroad Safety Act (FRSA) preempts any state law related to railroad safety or railroad security when there is a federal regulation covering the same subject matter. 49 U.S.C. §20106. The HSA amended HMTA and FRSA to bring regulations issued by the Secretary of DHS within the preemptive scope of those laws. Moreover, FRSA's preemption provision does not permit any regulation of rail safety or security by a local governmental authority regardless of whether the Secretary has issued a regulation covering the same subject matter. *CSX Transp. v. City of Plymouth*, 86 F.3d 626 (6<sup>th</sup> Cir. 1996).

Additionally, the real, and serious, tension created by proposed rule §29.3(d) and §29.8(g)(2) should be addressed by DHS, and the agency must read and implement its statutory mandate to most effectively carry out the intent of Congress. At the very least, State and local authorities should be actively discouraged from seeking Protected CII from sources other than DHS. Instead, if state and local governments perceive the need for Protected CII, they should be encouraged, rather than seeking it directly from the party with the CII, to work with DHS and ultimately to obtain the CII from DHS. This will enable such requests to be narrowly tailored to encompass only information truly needed by the state or local government for the purpose of protecting critical infrastructure or for criminal investigations/prosecutions, and to avoid overly broad

requests. Critically, it will ensure that the CII retains all the protections afforded by §214 of HSA. And, importantly, it will also prevent other parties from obtaining the CII pursuant to a state disclosure law. There is little to be gained, and potentially much to be lost, by state or local efforts to obtain CII independent of DHS, especially if doing so leaves open the possibility that CII may ultimately be disclosed to other parties.

In order to be fully consistent with Congress' purposes in enacting the HSA, the final rule issued by DHS should clearly delineate procedures to assure, to the extent possible, that Protected CII will maintain its protected status in all situations.

Respectfully submitted

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