BEFORE THE
TRANSPORTATION SECURITY ADMINISTRATION
DEPARTMENT OF HOMELAND SECURITY

TSA–2023–0001

VETTING OF CERTAIN SURFACE TRANSPORTATION EMPLOYEES

COMMENTS OF THE ASSOCIATION OF AMERICAN RAILROADS AND
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The Association of American Railroads ("AAR") and the American Short Line and Regional Railroad Association ("ASLRRA") (jointly, "the Associations") respectfully submit these comments in response to the notice of proposed rulemaking ("NPRM") issued by the Transportation Security Administration ("TSA").[1] The NPRM proposes to implement provisions of the *Implementing Recommendations of the 9/11 Commission Act of 2007* ("9/11 Act") for the security vetting of certain public transportation and railroad employees.[2] These comments first set forth general concerns with the process, then provide responses, to the extent appropriate, on specific topic areas.

Background

AAR is a non-profit industry association whose membership includes freight railroads that operate 83 percent of the line-haul mileage, employ 95 percent of the workers, and

[1] TSA, *Vetting of Certain Surface Transportation Employees*, Notice of Proposed Rulemaking, 88 Fed. Reg. 33472 (May 23, 2023) ("NPRM").

[2] *Id.* at 33472; *Implementing Recommendations of the 9/11 Commission Act of 2007,* Pub. L. 110-53, 121 Stat. 266 (2007).

account for 97 percent of the freight revenues of all railroads in the United States. In addition, the AAR's passenger railroad members, which include Amtrak and various commuter railroads, account for more than 80 percent of U.S. passenger railroad trips. ASLRRA is a non-profit trade association representing approximately 500 short line and regional railroad members and hundreds of railroad supply company members in legislative and regulatory matters. Short lines operate 50,000 miles of track in 49 states, or approximately 30% of the national freight network. Together with their Mexican and Canadian counterparts, U.S. freight railroads form an integrated, continent-wide network that provides the world's best freight rail service.

The Associations' members have worked closely with the federal government since the tragic events of September 11, 2001, to ensure the physical and cyber security of their networks. Railroads operate 24-hours per day, seven days a week, and focus continuously on the safety and security of their workers and their operations. By tapping into a robust range of private and public capabilities, railroads have been, and continue to be, prepared to prevent and respond effectively to threats and malicious activity, whether physical or cyber. Railroads have been proactive in meeting the public interest in assuring the suitability and reliability of the rail workforce, including by maintaining thorough background checks that encompass criminal history, citizenship, and immigration status. These well-vetted rail workers have demonstrated and validated the same commitment by serving as the linchpin for meeting TSA's highest priorities for rail and transit security. Most notably, these workers ensure timely reporting of significant security concerns and secure transport of hazardous commodities

designated as rail security sensitive materials.[3] The industry thus stands ready to work with TSA on furthering those shared priorities and offers these comments in the spirit of that constructive relationship.

Summary

The proposed rule is not required by the 9/11 Act, and the Department of Homeland Security ("DHS") currently has the capability to vet rail and transit workers without a rulemaking. Further, TSA has waited sixteen years to act on the asserted mandate to regulate, yet federal security assessments have not demonstrated a risk-based justification for the proposed permanent and costly proposal. Indeed, if actual security conditions or considerations motivated this rulemaking, then either DHS or TSA could have initiated its vetting at any point since the enactment of the 9/11 Act. Both federal government organizations opted not to do so. A period that long reflects not an omission, but rather a determination that the security vetting has been unnecessary from a risk-based security perspective.

Executive Order 12866, *Regulatory Planning and Review*, directs that "Federal agencies should promulgate only such regulations as *are required by law, are necessary to interpret the law, or are made necessary by compelling public need,* such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people."[4] No regulation, however, is required by law. At the relevant sections of the 9/11 Act (i.e., sections 1411 and 1520) Congress neither mandates, nor even

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[3] *See* 49 CFR §§ 1570.203 (*Reporting significant security concerns*), 1580.205 (*Chain of custody and control requirements*).

[4] Executive Order 12866, *Regulatory Planning and Review*, 58 FR 51735 (Oct. 4, 1993)(emphasis added).

references, the promulgation of a regulation. Elsewhere in the statute, when requiring regulation, Congress does so expressly.

Nor is regulation by TSA required to interpret the law. Each of the relevant statutory sections is clear in directing the Secretary of Homeland Security to conduct the name-based security background check. By 2007, Congress was very familiar with the DHS's vetting capabilities and implementation from having both authorized, and appropriated funds for, those programs and functions. The 9/11 Act's mandate to DHS alone, and not to private employers, is clear and needs no interpretative regulation.

Moreover, TSA has not established a "compelling public need" for regulation in the area its NPRM seeks to cover. The assertion of such a need faltered in the face of the agency's inaction for more than sixteen years. Furthermore, even though no railroad or transit worker has been vetted pursuant to sections 1411 or 1520 of the 9/11 Act, there has been no rail-industry event(s) of terrorism or violent extremism, much less one to precipitate TSA's issuance of its NPRM.

TSA should halt this unnecessary regulatory expansion. Instead, the agency should leverage the expertise and experience of the Surface Transportation Security Advisory Committee ("STSAC"). The STSAC was mandated by the *TSA Modernization Act of 2018* and its members are appointed by the TSA Administrator.[5] The STSAC's purpose is to "advise, consult with, report to, and make recommendations to the Administrator on surface transportation security matters, including the development, refinement, and implementation of policies, programs, initiatives, rulemakings, and security directives pertaining to surface transportation

[5] *See* 6 U.S.C. § 204.

security."[6] Two of the Committee's unanimous recommendations, both accepted by the TSA Administrator, focus specifically on developing and applying risk-based criteria to guide determinations of the necessity and proper scope of security vetting of surface transportation workers. As these recommendations reflect the consensus of government officials and industry representatives, the effort to implement them should be allowed to proceed.

General Comments

1. The 9/11 Act does not require a rulemaking.

Congress enacted the 9/11 Act over sixteen years ago. The law contains two provisions that are cited by TSA as the authority for the NPRM's proposed requirements for the agency to conduct the terrorist watchlist, immigration status, and criminal history checks – specifically, sections 1411 and 1520. Section 1411, requires that, "[n]ot later than 1 year after the date of enactment of this Act, the Secretary shall complete a name-based security background check against the consolidated terrorist watchlist and an immigration status check for all public transportation frontline employees."[7] Similarly, section 1520 requires that, "[n]ot later than 1 year after the date of enactment of this Act, the Secretary shall complete a name-based security background check against the consolidated terrorist watchlist and an immigration status check for all railroad frontline employees."[8] In prescribing this singular, name-based security background check by DHS, neither provision requires, recommends, or even cites a rulemaking

6 *Id.*

7 Pub. L. 110-53, 121 Stat. at 413, § 1411.

8 *Id.* at 444, § 1520.

for employee vetting, much less authorizes the comprehensive structure for fee generation on a perpetually renewed basis every 5 years.

TSA admits that "one might arguably interpret the 9/11 Act so narrowly as to require only (1) a one-time, name-based security background check…."[9] This assertion overlooks the crucial point—Congress' clear intent that a permanent rule is neither required nor necessary. Indeed, section 1522 recognizes as much, stating that only "*[i]f* the Secretary issues a rule, regulation, or directive requiring a railroad carrier or contractor or subcontractor of a railroad carrier to perform a security background check of a covered individual, then…" the affected railroad carrier, contractor, or subcontractor would be required to ensure certain due process protections to impacted employees.[10] Congress did not dictate that DHS must issue such rule, regulation, or directive. In addition, the Conference Committee's Report accompanying the bill clarifies that "*[i]t is not the intent of the Conference that this provision imply that it favors* the Department of Homeland Security (DHS) requiring private employers to undertake security background checks. Rather, the Conference intends for the provision to ensure that *if such regulations were ever to be promulgated by DHS*, that it would contain due process protections…."[11] The significance of both these provisions is clear. Congress did not direct, or even necessarily intend, that DHS or TSA promulgate an employer-targeted regulation to initiate the vetting mandated for DHS, much less a permanent, fee-based mandate, repeated every five years, which will impose tens of millions of dollars in costs.

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[9] NPRM at 33506.

[10] Pub. L. 110-53, 121 Stat. at 448, § 1522 (emphasis added).

[11] *Implementing Recommendations of the 9/11 Commission Act of 2007*, H.R. 1, Conference Report No. 110-259, at 349 (July 25, 2007) (emphasis added).

It cannot be ignored that within the 9/11 Act, when Congress means to require regulation, it does so expressly. For example, section 1517, which has a similar drafting structure to sections 1411 and 1520, specifically requires regulatory action—"Not later than 6 months after the date of enactment of this Act, the Secretary *shall develop and issue regulations* for a training program…."[12] Section 1520, a mere three sections afterward, does not contain such a mandate. Even the ensuing section includes a regulatory requirement, which, again, is directed expressly.[13] The same is true for provisions of the 9/11 Act surrounding section 1411, namely sections 1408 and 1413.[14] If Congress had intended a rulemaking on security vetting, it could have easily crafted these provisions to expressly require that action by using the same sort of language that was used elsewhere within the 9/11 Act. Significantly, Congress opted not to do so.

Crucially, Congress did not need to require issuance of a regulation for the mandated security background check of frontline employees by DHS because such action could have been—and still can be—taken under existing federal vetting programs. In December 2017, a joint government-industry working group produced a report and "Information Resource" for the Assistant Secretary for Infrastructure Protection at DHS that addressed "how trust judgments regarding access for the critical infrastructure workforce could benefit from security data in the

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[12] Pub. L. 110-53, 121 Stat. at 439; *see* 121 Stat. at 429, § 1512 ("Not later than 12 months after the date of enactment of this Act, the *Secretary shall issue regulations*…").

[13] Pub. L. 110-53, 121 Stat. at 447 ("The Secretary of Homeland Security shall establish through regulations, after an opportunity for notice and comment, a process by which any person may report to the Secretary of Homeland Security regarding railroad security problems, deficiencies, or vulnerabilities.")

[14] Pub. L. 110-53, 121 Stat. at 419, § 1413 ("The Secretary shall establish through regulations…."); 121 Stat. at 409, § 1408 ("Not later than 90 days after the date of enactment of this Act, the Secretary shall develop and issue detailed interim final regulations, and not later than 1 year after the date of enactment of this Act, the Secretary shall develop and issue detailed final regulations.")

possession of the federal government."[15] The initiative focused particular attention on vetting workers for "terrorist ties" against the national Terrorist Screening Database ("TSDB"), the database against which the "security background check" mandated by the 9/11 Act would be conducted.

DHS maintains several programs for vetting of private sector workers—including for "terrorist ties" against the TSDB—which are risk-based. Utilizing such programs, either TSA or DHS could have initiated the security vetting proposed in the NPRM. Indeed, on several occasions, the railroad industry's security committee proposed doing just that; however, the industry was not taken up on that offer. The opportunity remains for DHS to do so as Congress envisioned, without the need for regulation, nor the imposition of fees.

2. <u>There is no risk-based justification for the proposed rule.</u>

Railroad workers do not pose a risk to national security. Importantly, both prior to and since enactment of the 9/11 Act, there have been no incidents of terrorism or violent extremism involving a railroad worker in the United States. Nor have any assessments by DHS, TSA, DOT, the FBI, or any other federal department or agency indicated concern with either the extensiveness of onboarding background checks or the reliability of the railroad industry's workforce in supporting, and meeting, security priorities and objectives. Instead, railroad workers have proven valuable partners to their employers and to the federal government in meeting the security needs of the nation.

[15] Critical Infrastructure Partnership Advisory Council, Critical Infrastructure Vetting Working Group, Informational Resource (Dec. 14, 2017) (Submitted to the Office of Infrastructure Protection and the Critical Infrastructure Cross-Sector Council).

Significantly, freight and passenger railroads have long maintained thorough workforce security background check programs that cover criminal history, plus citizenship and immigration status. These programs have been assessed by TSA and no indications of concern have been identified. As relevant context, in 2006, DHS and DOT issued recommended security action items for freight railroads.[16] Security Action Item 15 specifically addressed background checks of railroad workers: "To the extent feasible and practicable, utilize photo identification procedures for company-designated critical infrastructure. Establish procedures for background checks and safety and security training for contractor employees with unmonitored access to company-designated critical infrastructure."[17] TSA assessed compliance with the voluntary measures, and even provided clarifications describing the appeal and redress procedures that railroads should implement as an integral element of the background check process. Not only did these efforts fulfill aspects of the proposed rule's mandates, specifically with respect to citizenship or immigration status and criminal history, the limited findings of adverse information also emphasized the reliability and low-risk nature of this critical infrastructure workforce.

Moreover, the rulemaking process for TSA's Rail Transportation Security rule coincided with the thorough assessments of railroads' implementation of the Security Action Items from 2006.[18] As a result, the responsible officials at TSA were well-aware of the scope and effectiveness of railroads' background check programs for their workforces. While the Rail

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[16] DHS and DOT, *Recommended Security Action Items for the Rail Transportation of Toxic Inhalation Hazard Materials* (June 23, 2006) ("Security Action Items").

[17] *Id.* at 3.

[18] *See* TSA, Rail Transportation Security, Final Rule, 79 Fed. Reg. 72130 (Nov. 26, 2008).

Transportation Security rule sets three categories of key requirements – (1) appointment of primary and alternate security coordinators; (2) reporting of significant security concerns; and (3) specific actions to assure secure transport of rail security sensitive materials ("RSSM")—none of those priorities included the vetting mandate.[19] In fact, the results from TSA's assessments of the Security Action Items no doubt enabled the agency to place reliance on railroads' frontline employees as the linchpin for compliance with the Rail Transportation Security rule, while not including the vetting mandate. In short, it may be that TSA never acted on the 9/11 Act mandate for DHS's security vetting of railroads' frontline employees because there was no risk-based need for TSA to do so.

This approach by the agency to trust the railroads' already extensive security processes has been fully vindicated. Railroad workers have proven themselves as an asset to the federal government in implementing security measures. The efforts of well-trained and vigilant workers, executed day-to-day, have been why the industry has consistently met the requirements of the Rail Transportation Security rule and other security-related objectives, while also thankfully avoiding the occurrence of any terrorism or violent extremism by a railroad or rail transit worker.

As noted earlier, DHS and TSA maintain the authority under the 9/11 Act to vet workers for "terrorist ties" against the TSDB, which is maintained solely in federal government control with no access provided to industry entities. Therefore, no regulation is necessary to meet the security objective of the legislation if DHS or TSA would perform its authorized name-based

[19] *See Id.* It should be noted that appointed security coordinators, of course, hold security clearances and serve as a trusted liaison for the railroad or rail transit agency with TSA and other federal agencies with responsibilities for security, intelligence, and law enforcement.

security background check. Further, even if TSA were to proceed with the rule, its scope could easily, and should properly, be significantly narrowed so that the railroads' already-extensive background check process during the employee onboarding stage is supplemented with a crosscheck against the TSDB rather than being replaced by a needlessly duplicative, recurring, and costly vetting regulation.

3. The Rule will cause unintended negative consequences for operations that jeopardize network fluidity.

As TSA knows, COVID-19, and its seriously disruptive effects on the economy, dramatically upset labor markets nationally. Demand for rail transportation and, as a result, the volume of rail traffic collapsed during the early stages of the pandemic, forcing railroads to temporarily furlough some employees. As the economy recovered and demand for rail transportation increased, railroads discovered that far fewer furloughed employees chose to return than historical patterns would suggest. This unanticipated development led to workforce shortages that impacted service and caused the industry's economic regulator to require significant reporting on service and employment data by the largest railroads. The industry continues to hire as it recovers from the disruptive effects of the COVID-19 pandemic. Total Class I employment in August 2023 was 122,792 up 10,585 (9.4%) over January 2022.[20] In August 2023, Class I train and engine (T&E) employment (those that operate the trains) was up 13.8% over January 2022.[21] These efforts have helped to improve rail service. These are well-paying, often unionized, jobs that rank within the top 10 percent of all industries in

[20] Surface Transportation Board, Employment Data Form C, available at: https://www.stb.gov/reports-data/economic-data/employment-data/.

[21] *Id.*

compensation and benefits. Requiring a new and costly security vetting process, without any substantial risk-based justification, will introduce disruptive and delaying variables into recruitment, hiring, and continued service recovery.

Significantly, the rule fails to establish or otherwise address an appropriate protocol for TSA's communication with employing railroads and transit systems concerning action on results. It also does not set parameters for the employment (or pre-employment) actions that can or should be taken when certain preliminary vetting results for an individual applicant/employee suggest potential terrorist ties, unauthorized immigration status, or concealment of serious domestic or foreign criminal activity. TSA should therefore address this omission, as it will undoubtedly direct railroads to preclude workers from performance of the wide scope of "frontline" duties covered by the proposed rule during the period of review and appeal.

For applicants, the mandated steps and associated timelines will delay or even preclude entirely the hiring of workers who would otherwise be considered worthy candidates. This is no small loss. As recent events have demonstrated, the labor market is extremely competitive. Thus, it should not be presumed that there will be an endless supply of willing, qualified workers for railroads to hire if worthy candidates are incorrectly disqualified (even temporarily) or choose to seek employment elsewhere rather than needlessly languishing in TSA's ineligibility limbo phase while seeking to exercise their appellate rights. In such cases, either the positions will go unfilled, which will cause significantly detrimental operational disruptions, *or* affected candidates will be bypassed when they might otherwise have merited employment and enjoyed long, productive railroad careers. Such outcomes will inevitably disrupt and delay all the affected railroads' abilities to meet the service needs of their customers and the nation.

In situations where TSA's preliminary ineligibility determinations are given immediate effect, workers who are already on the job, whether experienced or recent hires, will presumably need to be removed from their positions and responsibilities for an indefinite period of time pending a final determination.[22] Once again, this is no small decision, for either the livelihood of the affected individuals or the rail industry's operations at large. Necessary training and certifications will be halted and potentially months of experience, on-the-job training, and coaching/mentoring will be lost. Additionally, during this prolonged limbo phase prior to a final decision being reached by TSA, it is not clear what an affected worker's employment status will be, much less how that will accord with the governing labor agreements. Meanwhile, each affected railroad will have to arrange for and assign replacement personnel, who are willing and able to provide coverage for an indefinite period of time, thereby escalating costs and the risk of staffing shortages, which can lead to service disruptions.

These adverse impacts could be aggravated by the highly detailed and time-consuming appeal and redress process delineated by the proposed rule – with mandated steps and associated timelines, administered by TSA, for each individual for whom the vetting produces a derogatory result. Although a full and fair review is certainly warranted, the proposed rule indicates that more than 250 days can be consumed by the combination of the vetting procedures and full exercise of specified rights to appeal and redress. Again, it is not clear what the railroads will be told regarding the findings on the vetting of workers who are exercising their rights through the extensive review and appeals process. This factor is particularly

[22] *See* NPRM at 33515.

important for crew planning purposes, as crews and crew-planning are integral to operational plans for the railroad network.

For example, while proposed section 1530.417 notes that the "TSA-regulated person" will be told of a "preliminary determination of ineligibility with immediate revocation" ("PDIIR"), the rule gives no guidance for the contents of such notification, nor is the same notice provided under proposed section 1530.415 for a "preliminary determination of ineligibility" ("PDI").[23] Presumably, then, individuals who receive a PDI will be able to continue on with their employment/application for employment for the full 60 days until the PDI becomes "final" since the employing railroad will apparently have no awareness of TSA's preliminary determination of ineligibility. TSA delineates between PDI and PDIIR individuals on the basis of "significant security concerns" being present with the latter, such that "immediate revocation of the associated credential, access, or authorization is warranted."[24] Since TSA apparently has no intention of providing the railroads with notice of or insights into the status of these PDI individuals, they will continue working/onboarding with the railroads until told otherwise. However, it must be asked whether TSA's own PDI notice to an individual who truly presents a risk of terrorism or violent extremism might be the trigger that prompts that individual to take such unthinkable action prior to a final determination on their eligibility.

Given these concerns, if some version of such a rule is issued, it should at least specify the content and procedures for the communication of PDIs and PDIIRs to covered transit agencies and railroads. As required by TSA, all covered transit agencies and railroads have

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[23] *Id.* at 33514-15.

[24] *Id.* at 33488.

trusted agents identified with the appointed primary and alternate security coordinators to whom such information can be communicated. Furthermore, many of the covered transit agencies and railroads have law enforcement departments with officers commissioned and certified by states and appointed pursuant to federal law. TSA could utilize either of these trusted categories of individuals to communicate such information. This clarity in lines of communication will be necessary to mitigate negative impacts on rail operations.

Furthermore, TSA proposes to apply the rule to all contractors who perform any of the broad range of functions covered by the term "rail security sensitive employee." As part of their own due diligence, railroads already require their vendors to conduct security background vetting of their own personnel prior to placing them with the railroad to perform such covered contract work. However, such requirements do not cover terrorist watchlist checks, which are strictly a federal capability, nor do they contemplate the high fees that TSA proposes to charge for the mandated vetting services. If the proposed rule becomes final, the railroads will likely expend substantial time and effort to amend contracts properly and progressively as lawful opportunities permit. Further, in the midst of meeting daily safety and operational demands, validation by railroads that the mandated vetting has been performed for contractor personnel will be exceedingly difficult. Yet, railroads will be held solely accountable for contractors' failures to ensure their workers are vetted – as mandated by the proposed rule. These circumstances are rife with potential for unintentional or inadvertent errors that can result in investigations, determinations of violations, and assessments of substantial civil penalties. In this context, disruptions to availability of contract workers are as well – either due to the failure

of contractors to ensure the mandated checks are conducted or because contractors' workers simply exercise their right to decline to undergo vetting.

The proposed rule also triggers concerns of international importance by failing to address whether and how its requirements apply to, and would impact, Canadian or Mexican citizens who are employed in their respective countries but who currently cross the border into the United States on a regular basis to perform work that falls within TSA's definitions of "security-sensitive job functions for freight rail."[25] Each aspect of these lawful cross-border operations has been carefully curated after close communication with the Federal Railroad Administration ("FRA") and U.S. Customs and Border Protection ("CBP"). Thanks to such collaboration, today's international crew operations help bolster security at our borders, maintain network fluidity, and minimize the impact of blocked railroad crossings in border communities. Unfortunately, the proposed rule stands to have the perverse effect of actually undermining safety by compromising the availability of international crews who are vital to the seamless and secure movement of freight trains across our international borders.

For more than 30 years, Canadian crews have been delivering U.S.-bound trains to rail yards several miles within the United States where they hand control of the train to a U.S. crew and return to Canada, often picking up a Canadian-bound train to operate back over the border. More recently over the last 6 years, similar operations have been occurring at the southern border between certified Mexican and U.S. crews so that they interchange some miles inland rather than stopping for a crew change at the middle of the bridge spanning the Rio Grande River in a way that blocks crossings on both sides of the border and exposes the stationary train

[25] *Id.* at 33476-77.

to vandalism and other threats. Beyond the obvious implications for international train crewmembers, frontline employees of Canadian or Mexican railroads that could be affected adversely include mechanical, engineering, and dispatching personnel.[26] While failing to address this subject directly or in detail, restrictive provisions at multiple segments of the proposed rule seem to preclude railroad workers employed in Canada or Mexico from either working in the United States or even applying to be vetted, which cannot be the intent. For example foreign railroad employees whose duties require regularly entering the United States from Canada or Mexico to perform functions covered by the proposed rule do not have, due to lack of need, the documents mandated for presentation by covered non-citizens to demonstrate eligibility for the "security threat assessment" per the proposed requirements at 49 CFR § 1530.101(b)(8) – specifically, "alien registration number and/or the number assigned to the individual on the U.S. Customs and Border Protection (CBP) Arrival-Departure Record, Form I–94, if issued."[27] Without addressing these concerns, the proposal could have impacts on the fluidity of international rail trade.

In a similar vein, the proposed requirement at 49 CFR § 1530.505 allows for conduct of the mandated TSA security threat assessment for persons "otherwise authorized to be employed in the United States."[28] However, frontline employees who are Canadian or Mexican citizens, while authorized to operate trains, or provide operational support for trains, entering

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[26] With respect to train crew members, there has been a waiver or refinement of regulatory requirements administered by the FRA to meet border security priorities set by CBP in coordination with Canadian or Mexican authorities. By way of separate example, however, a Class I railroad based in Canada also maintains a regulatory waiver approved by FRA authorizing dispatch for train operations in two areas of the northeastern United States from an Operations Center staffed by Canadian citizens in Canada.

[27] NPRM at 33512.

[28] *Id.* at 33516.

the United States, lack the specified attributes or documentation to enable a check of "relevant Federal databases" or "other checks, including the validity of the applicant's alien registration number, Social Security number, or I–94 Arrival-Departure Form number."[29]

The only reference in the proposed regulatory requirement that specifically addresses our international neighbors to the north and south occurs at 49 CFR § 1530.101(b)(7)(iii) with a reference to Canada. Again, this portion of the proposed rule only delineates the information and/or documents that an individual applying for a security threat assessment by TSA must present to validate eligibility. The relevant provision requires:

> (7) Immigration information, and—
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> > (iii) If a commercial driver licensed in Canada, whether the individual holds a Free and Secure Trade (FAST), Secure Electronic Network for Travelers Rapid Inspection (SENTRI), Global Entry or NEXUS card, or a Canadian passport number.[30]

The express connection to "Immigration information" implicates the lack of documentation mandated for presentation by covered non-citizens pursuant to the proposed requirements at 49 CFR § 1530.101(b)(8) – "alien registration number and/or the number assigned to the individual on the U.S. Customs and Border Protection (CBP) Arrival-Departure Record, Form I–94, if issued."[31] No reference at all is made in the proposed rule to Mexico or Mexican citizens employed by railroads based in Mexico who are operating, or supporting the operations of, trains entering the United States at southern border crossings.

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29 *Id.*

30 *Id.* at 33512.

31 *Id.*

This proposed regulation cannot preclude Canadian or Mexican citizens employed in their respective countries who cross the borders of the United States on a regular basis from performing work that falls within the scope of TSA's definitions of "security-sensitive job functions for freight rail."[32] Impeding these workers from performing their regular duties would have seriously disruptive and delaying economic and operational impacts to the North American transportation network. The failure to address the status of Canadian or Mexican citizens in these circumstances risks confusion, misinterpretations, and unintended consequences. Such failure will also interfere with what are normal, and authorized, railroad operations at and near rail crossings on the northern and southern borders of the United States – with the prospect of bottlenecks that undermine supply chains, especially for time-sensitive products and commodities.

Finally, underlying these concerns is frequent and recurring experience with security screening against the TSDB. Unfortunately, the practical reality is that inaccuracies in the consolidated terrorist watchlist are prevalent and false positives are far from uncommon, particularly when the vetting is name-based and the provision of more unique identifiers (e.g., Social Security Numbers) is purely voluntary under the NPRM. Public reporting and discourse are replete with instances of law-abiding citizens and lawful residents suffering denial or significant disruptions or delays in travel as the result of being "flagged" for "terrorist ties" due to erroneous or insignificant information maintained in the database. Too often, affected individuals do not receive an adequate explanation of the bases for the determination of "terrorist ties." Nor, when resolved, are they apprised of how that outcome resulted. The

[32] *Id.* at 33476-77.

proposed rule adds a significant aggravating factor. Any negative employment action occurring after the expansive, and widely known, TSA-mandated security vetting will create the inevitable perception of some form of wrongdoing by the affected workers or applicants. In many cases, the information on which the removal or denial is based may be proven inaccurate or insignificant. But the adverse perceptions will remain, regardless of the outcome on appeal.

A key component of this expectedly negative perception is the almost unfettered discretion that TSA has in determining whether a covered worker is subject to a PDI or PDIIR and the sources of information upon which TSA will rely in making these determinations. Under the proposed regulation, a STA will include TSA checking the following:

> (1) Interpol *and other international databases, as appropriate*.
> (2) Terrorist watchlists *and related databases*.
> (3) Any other databases *or sources relevant* to determining whether an individual poses or *may pose a threat* to transportation security or national security, or of terrorism.[33]

TSA explains that, through the STA process, TSA will be able to "confirm the individual's identity and determine from background information whether he or she poses *or may pose* a threat to transportation security or national security, or of terrorism."[34] TSA further elaborates that the STAs are an "*overall process*, which is comprised of *one or more checks, such as* a [criminal history record check], or a check of databases."[35] Regardless of whether TSA's "overall process" of STAs includes evaluating social media posts, religious affiliations, and/or political organization membership as covered "sources" of other relevant information, such may be the

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[33] *Id.* at 33516 (emphasis added).

[34] *Id.* (emphasis added).

[35] *Id.* at 33493 (emphasis added).

perception of (potentially) affected individuals who may decide simply not to bother with the process of appealing a preliminarily adverse eligibility determination by TSA.

Per the NPRM's Table 12, TSA clearly expects in the first year to make hundreds of PDI determinations for just freight railroad employees alone, with apparently 348 of those determinations expected to be appealed.[36] These numbers, of course, say nothing about the actual number of PDIs that will be made, how many will *not* be appealed, or how many will be reversed by the agency. TSA also provides no estimates into its expectations for PDIIRs: number, number appealed, number reversed, etc. If TSA expects to issue *no* PDIIRs, then it begs the fundamental question of *"WHY"* this proposed rule is even being contemplated. However, if based upon information currently within its sole purview (i.e., the TSDB), TSA actually expects to issue a certain number of PDIIRs upon the proposed rule's implementation, then the questions are (1) what is the expected impact of paperwork and other information collection burdens that TSA is required to consider under the Paperwork Reduction Act, and (2) what actions is TSA taking now with its knowledge/belief that the rail industry currently has security-sensitive employees who should have their associated credential, access, or authorization revoked immediately. Considering these concerns, TSA should consider a means of implementation of the program that minimizes such negative perceptions – with a risk-based approach, more narrow, focused, and justifiable option.

[36] *Id.* at 33498-99.

4. Developing a risk-based approach through the Surface Transportation Security Advisory Committee is a viable alternative.

As has been emphasized repeatedly, the 9/11 Act did not require, or even reference, a rulemaking or other form of regulatory action to "complete a name-based security background check against the consolidated terrorist watchlist and an immigration status check" for rail and public transportation employees. Far more recently, however, in the *TSA Modernization Act of 2018* Congress clearly manifested its intent that government and industry work in concert to define priorities for surface transportation security – and secure their implementation.[37]

With this legislation, Congress directed the TSA Administrator to "establish within the Transportation Security Administration the Surface Transportation Security Advisory Committee."[38] Congress clearly specified the Committee's purpose – to "advise, consult with, report to, and make recommendations to the Administrator on surface transportation security matters, including the development, refinement, and implementation of policies, programs, initiatives, rulemakings, and security directives pertaining to surface transportation security."[39] The voting members of the STSAC are appointed by the TSA Administrator and represent "each mode of surface transportation, such as passenger rail, freight rail, mass transit, pipelines, highways, over-the-road bus, school bus industry, and trucking," encompassing owner operators, trade associations, labor organizations, security experts, and state and local government officials.[40] Nonvoting members comprise federal government officials designated

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37 *FAA Reauthorization Act of 2018*, Pub. L. 115-254, 132 Stat. 3186, Div. K (Oct. 5, 2018).

38 6 U.S.C. § 204(a).

39 6 U.S.C. § 204(b)(1).

40 6 U.S.C. § 204(c)(1).

by TSA, DOT, the United States Coast Guard, and other security, intelligence, and law enforcement departments and agencies as determined appropriate by the TSA Administrator.[41]

As highlighted in the Committee's inaugural report, the TSA Administrator met the Congressional mandate by establishing the STSAC during the first half of 2019.[42] The members formed subcommittees focused on four priority areas of emphasis: Security Risk and Intelligence; Cybersecurity Information Sharing; Insider Threat; and Emergency Management and Resiliency.[43] Working through these groups, the STSAC developed and unanimously approved eighteen recommendations to the TSA Administrator to enhance capabilities for security and emergency preparedness across all surface modes of transportation. By June 2021, the Administrator had accepted all of the STSAC's recommendations.

Significantly, two of the recommendations, developed through the STSAC's Insider Threat Subcommittee, pertain directly to the matters covered by TSA's proposed rule. These recommendations read as follows:

> STSAC Insider Threat FY2021 Recommendation #4: Define parameters for assessing the level of potential insider threat risk posed to organizations in the surface transportation modes – high, medium, or low – based on categories, functions, or level of access of employees, contractors, and vendors.
>
> STSAC Insider Threat FY2021 Recommendation #5: Produce and disseminate recommendations on effective practices for workforce vetting programs for surface transportation organizations tailored to the high, medium, and low risk categories and guided by the matrices developed by STSAC's Insider Threat Subcommittee.[44]

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41 6 U.S.C. §204(c)(1).

42 Surface Transportation Security Advisory Committee – Annual Report to the Administrator of the Transportation Security Administration and to the Congress of the United States for 2020 (March 2021), available at: https://www.tsa.gov/sites/default/files/asac-pdf/stsac-annual-report-march-2021.pdf.

43 *Id.* at 1-2.

44 *Id.* at A-6.

To implement these recommendations, the Insider Threat Subcommittee has focused its work on developing and identifying effective practices for risk-based categorizations based on responsibilities, functions, and access to guide determinations on reasonable and cost-effective types and scope of worker vetting. This approach aligns fully with the mission of the STSAC as specified by Congress: "The Advisory Committee shall consider risk-based security approaches in the performance of its duties."[45] Through the voting and non-voting members, the TSA Administrator has assembled the requisite expertise, experience, and perspective to appropriately address the matters covered by the proposal.

Unfortunately, consideration, drafting, and issuance of the proposed rule has impeded progress in this important work. The STSAC's second report, covering the period of April 2021 through December 2022, cited the status of Insider Threat Recommendations 4 and 5 as "[t]emporary hiatus," noting in explanation that, "[d]ue to TSA's planned issuance of a notice of proposed rulemaking (NPRM) on security vetting of surface transportation workers, efforts to implement this recommendation have paused temporarily."[46] This hiatus must be lifted.

The *TSA Modernization Act of 2018* marks Congress' most recent significant statement on its priorities and intent for security enhancement in surface transportation. With the direction to the TSA Administrator to establish and manage the STSAC and the requirements specified for its mission and functioning, this legislation mandates government-industry

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[45] 6 U.S.C. § 204(b)(2).

[46] Surface Transportation Security Advisory Committee – Annual Report to the Administrator of the Transportation Security Administration (TSA) and Congress of the United States for 2021 – 2022 (August 2023). Posting of this report to TSA's public website remained pending as of September 29, 2023, but should be available at https://www.tsa.gov/for-industry/surface-transportation-security.

collaboration for developing and implementing risk-based approaches to address cyber and physical threats. In this vein, the efforts devoted to meeting STSAC Insider Threat Recommendations 4 and 5 can, and should, inform the decision-making process initiated by the Administrator through the NPRM. The STSAC process could assist in determining whether a rulemaking, or a viable alternative, meets the risk-based security objectives of the law, while helping craft the proper scope of future security vetting measures, whether developed and implemented cooperatively or imposed by regulation.

5. <u>The costs of the rule impose an unnecessary burden on the industry.</u>

Based on tables included in the NPRM, proposed fees for the initial in-person enrollment and vetting are significant and would be as follows: For the Level 2 STAs, $52.00 to $80.00 per covered worker; and for the Level 3 STAs, $69.00 to $105.00.[47] As the NPRM notes, the proposed fees for the 5-year renewals would vary depending upon whether they are conducted in-person or online. For in-person renewals, the proposed fee ranges are: Level 2 STA – $52.00 to $80.00; and Level 3 STA – $60.00 to $92.00.[48] For online renewals, the proposed fee ranges are: Level 2 STA – $32.00 to $50.00; and Level 3 STA – $40.00 to $62.00.[49] This rule covers over 122,000 employees, plus an undetermined number of contractors likely measured in the tens of thousands, and will require upfront payment of fees for all workers at the STA Level 2 – a total cost ranging from $6.3M to $9.8M. These figures are in addition to fees for those hired after

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47 NPRM at 33486.

48 *Id.*

49 *Id.*

the initial checks. The renewal fees will be imposed every five years (a recurring cost ranging from $3.9M to $9.8M, depending on whether renewals are authorized to be accomplished online or not).

Meanwhile, the rule fails to provide a valid justification for the renewal requirement every five years that will impose recurring costs. Covered workers enrolled for the security vetting proposed in TSA's NPRM will undergo continuous or recurring vetting – meaning that each time there is a change in the information maintained in the various databases used for the background checks, covered workers will be vetted anew. With this process, there is no risk-based or security-based rationale for payments of fees every five years for such renewals. The vetting is taking place all the time.

Moreover, the costs delineated in the proposed rule do not adequately reflect compensation for travel expenses for covered employees to get to and from an authorized application center or the overtime and related expenses necessitated by the need to substitute for workers away from their jobs to apply for the mandated Level 2 or Level 3 STA. Nor do the estimated costs incorporate the added administrative burdens that covered railroads will have to implement to manage compliance with the requirements specified under the proposed regulatory regime.

Also inadequately addressed in the NPRM are the costs associated with the disruptive impacts to staffing for sustained safe and efficient operations that will result from extended periods of unavailability as workers appeal, and seek redress for, removal from duties due to indicated derogatory information which proves inaccurate or insignificant from a security perspective. Collectively, these unnecessary additional expenses could divert funds from other

priorities, and are not justified by any current or past assessment of security risk. Rather, experience has demonstrated the very low to minimal risk-profile presented by railroad and transit workers. These employees and contractors assured sustained operations of freight and passenger railroads and public transportation agencies as essential critical infrastructure workers throughout the pandemic. They persisted in meeting their responsibilities at a time when understanding of the virus and availability of effective protective measures were limited. From a security perspective, these workers exercise the vigilance and take the actions that, on a daily basis, produce the industry's impressive record of compliance with TSA's top rail and transit priorities.

Conclusion

For the foregoing reasons, the Associations request reconsideration of whether such an expansive rule is necessary given the absence of a statutory mandate for regulation and the low-to-minimal risk profile of the industry's employees. TSA should halt this rulemaking and pursue the viable alternative of pursuing these goals through the STSAC process. If, despite these circumstances, the agency intends to proceed with the rulemaking, the scope and cost should be narrowed in accordance with these comments.

Respectfully submitted,

Kathryn D. Kirmayer
J. Frederick Miller Jr.
Amber L. McDonald
Association of American Railroads
425 Third Street, SW
Washington, D.C. 20024
(202) 639-2100

Counsel for the Association of American Railroads

Sarah Yurasko
American Short Line and Regional Railroad Association
50 F Street NW, Suite 500
Washington, D.C. 20001
(202) 628-4500

Counsel for the American Short Line and Regional Railroad Association

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