



## Rail Security Regulations

The U.S. Department of Homeland Security (“DHS”), Transportation Security Administration (“TSA”) has adopted final regulations (“Rail Security Regulations”), 73 Fed. Reg. 72130, as codified at 49 CFR Part 1580, intended to improve the security of both freight and passenger rail transportation by addressing the vulnerabilities presented by America’s open infrastructure rail system. These broad regulations are potentially restrictive and are bound to have a significant impact on rail shippers and carriers.

The Rail Security Regulations include requirements for a wide range of rail operations, including:

- Freight carriers operating on a track that is part of the general rail transportation system;
- Hazardous materials shippers that offer, prepare, or load for rail transportation one or more of the following categories and quantities of “rail security-sensitive materials”:
  - Rail cars containing more than 2,268 kg (5,000 lbs) of explosive material;
  - Tank cars containing a material poisonous by inhalation; and
  - Rail cars containing a highway route-controlled quantity of radioactive materials.
- Hazardous materials receivers located in a city or 10-mile surrounding area as identified by the Rail Security Regulations (High Threat Urban

Area or “HTUA”), that receive by rail or unload one or more of the above defined categories and quantities of “rail security-sensitive materials”;

- Passenger railroad carriers, including carriers operating light or heavy rail transit service on track that is part of the general railroad system, carriers operating or providing intercity passenger train service, commuter, or other short-haul railroad passenger service in a metropolitan or suburban area, and public authorities operating passenger train service;
- Tourist, scenic, historic, and excursion rail operators, whether operating on or off the general railroad system;
- Operators of private cars, including business/office cars and circus trains, on or connected to the general railroad system; and
- Operators of rail transit systems that are not operating on track that is part of the general railroad system, including heavy rail transit, light rail transit, automated guideways, cable cars, inclined plan, funicular, and monorail system.

As explained in more detail below, the Rail Security Regulations generally: (1) authorize inspections of facilities and records by the TSA; (2) require the appointment of a “Rail Security Coordinator”; (3) require the disclosure of location and shipping

information for rail cars to the TSA; (4) require the reporting of significant security concerns; and (5) impose requirements for maintaining the chain of custody and control of rail cars. The Rail Security Regulations also amend the TSA's Protection of Sensitive Security Information ("SSI") regulations, codified at 49 CFR Part 1520, to include the above identified freight and passenger rail carriers, shippers and receivers. The SSI regulations now apply generally to maritime and rail security information.

### **TSA Inspections**

TSA inspectors, and any other authorized DHS official, may at any time without advance notice enter the property or facility of a freight carrier, hazardous materials shipper or hazardous materials receiver, or a passenger rail carrier, to inspect the facility, equipment or records of the rail operation. This broad inspection authority is intended to permit TSA to assess security threats and enforce security-related regulations. However, the Rail Security Regulations authorize TSA to enter and inspect a facility or operation to exercise and carry out any duty or power relating to transportation security.

### **Rail Security Coordinator**

Freight carriers, hazardous materials shippers and hazardous materials receivers within a HTUA must designate a primary and alternate Rail Security Coordinator. Operators of private rail cars and passenger rail carriers must designate a Rail Security Coordinator when notified by TSA that a security threat exists concerning that operation. The Rail Security Coordinator serves as the primary contact for intelligence information, security-related activities and communications with the TSA. The Rail Security Coordinator also coordinates security practices and procedures with appropriate law enforcement and emergency response agencies. Either the Rail Security Coordinator or the alternate must be available to the TSA on a 24/7 basis.

### **Location and Shipping Information**

A freight rail carrier, hazardous materials shipper and hazardous materials receiver within an HTUA must implement procedures that allow it to immediately identify to the TSA the location and shipping information for each rail car under its physical custody and control that contains one or more of the

categories and quantities of rail security-sensitive material. The freight rail carrier must provide a telephone number to the TSA that is monitored at all times which the TSA can utilize to request location and shipping information. Upon request by the TSA, the freight rail carrier, shipper or receiver must provide the following information: (1) the rail car's current location; (2) the rail car's routing; and (3) the list of total number of rail cars containing rail security-sensitive materials. Class I freight railroad carriers must provide location and shipping information to TSA within 5 minutes of TSA's request if TSA's request concerns one rail car, or within 30 minutes if TSA's request concerns two or more rail cars. Any other freight railroad carrier must respond to a request for information by the TSA within 30 minutes.

### **Reporting Significant Security Concerns**

Freight carriers, hazardous materials shippers, hazardous materials receivers located within an HTUA, passenger rail carriers and operators of private rail cars must immediately report potential threats and significant security concerns to DHS by telephoning the Freedom Center at 703-563-3240 or 877-456-8722. The Rail Security Regulations define "potential threats and significant security concerns" as incidents, suspicious activities and threat information which includes but is not limited to interference with train crews, indications of tampering with rail cars, suspicious activities at or around rail cars, facilities or infrastructure, bomb threats, suspicious items or activities which result in a disruption of operations, possible surveillance of a train or facility, discharge or discovery of a firearm or deadly weapon on a train, in a station or at a facility, or any other incident that involves the breach of security in connection with a freight or passenger rail operation.

### **Chain of Custody and Control Requirements**

The Rail Security Regulations impose very strict chain of custody and control requirements upon freight rail carriers, hazardous materials shippers and hazardous materials receivers within an HTUA that transfer custody of or receive a rail car containing one or more of the categories and quantities of rail security-sensitive materials. The chain of custody and control requirements generally involve: (1) conducting a security inspection of the rail car for signs of tampering; (2) keeping the rail car in a secure area after the

security inspection has been performed; (3) maintaining positive control of the rail car and ensure that the rail car is not left unattended at any time during transfer; and (4) documenting the transfer of custody in writing or electronically. A rail carrier and receiver “maintain positive control” of a rail car when the carrier and receiver communicate and cooperate with each other to provide for security of the rail car during physical transfer of custody. “Attending” the rail car is part of maintaining positive control. A rail car is “attended” if an employee or authorized representative is physically located within a reasonable proximity to the rail car and is capable of immediately responding to unauthorized access or activity near the rail car.

### Protection of SSI

The TSA’s Protection of SSI regulations govern the maintenance, safeguarding, and disclosure of records and information that the TSA considers sensitive. The TSA defines SSI as information obtained or developed while conducting security activities, including research and development, that would, if disclosed, constitute an unwarranted invasion of privacy, reveal trade secrets or privileged or confidential information, or be detrimental to the security of transportation. The Rail Security Regulations amend the existing Protection of SSI regulations so that information and records concerning freight and passenger rail carriers, suppliers and receivers, including but not limited to security inspections, security training manuals, identifying information for security professionals, critical infrastructure asset information, and research and development information, are

considered sensitive security information and granted protection from disclosure.

While the Rail Security Regulations provide added protections for freight and passenger rail sensitive information, the regulations also impose potentially restrictive requirements that may result in added complications for freight and passenger rail operations. It is imperative that freight and passenger rail carriers, shippers and receivers become familiar with the new Rail Security Regulations to determine whether and how the regulations impact their operations.

Blank Rome LLP has experienced attorneys in numerous practice areas and business sectors. We are available to assist both existing and potential clients with an understanding as to how the Rail Security Regulations may affect your company and its business plans. ■

#### For additional information:

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