



750 9th Street NW | Suite 650 | Washington, DC 20001 | (202) 318-0456 | railsecurity.org

February 6, 2024

Via Federal eRulemaking Portal: www.regulations.gov

Docket Management System
U.S. Department of Transportation
West Building, Ground Floor, Room W12-140
Routing Symbol M-30
1200 New Jersey Ave., S.E.
Washington, D.C. 20590

RE: Comments by the Rail Security Alliance regarding the Federal Railroad Administration’s Notice of Proposed Rulemaking “Freight Car Safety Standards Implementing the Infrastructure Investment and Jobs Act,” Docket No. FRA-2023-0021

Dear Sir or Madam:

The Rail Security Alliance (“RSA”) appreciates the opportunity to comment on the United States Department of Transportation (“DOT”), Federal Railroad Administration’s (“FRA”) notice of proposed rulemaking (“NPRM”) to amend the Freight Car Safety Standards (“FCSS”) to implement certain provisions of the Infrastructure Investment and Jobs Act, codified at 49 U.S.C. § 20171 (the “Act”), which was published in the federal register on December 8, 2023.¹ As outlined below, RSA supports the proposed regulation and commends FRA for prioritizing this important rulemaking to implement 49 U.S.C. § 20171, a federal law that protects the North American freight railcar industry for the benefit of the American people. Below RSA identifies several aspects of the NPRM with which it agrees and identifies areas that warrant further review and/or clarification by FRA to ensure effective implementation.

RSA represents the freight railcar manufacturing segment of the rail industry in North America as well as major suppliers of railcar components. The domestic freight railcar industry is a vital sector of our economy. This sector supports more than 65,000 family-wage jobs and upwards of \$6.5 billion in GDP.² Freight rail is a crucial part of America’s critical infrastructure. Key commodities, energy products, everyday goods, and military equipment, among other things, are safely and efficiently

¹ Freight Car Safety Standards Implementing the Infrastructure Investment and Jobs Act, 88 Fed. Reg. 85,561 (December 8, 2023) (proposed rule).

² Oxford Economics, [Will We Derail US Freight Rolling Stock Production?](#) May 2017.

moved by rail daily. In 2013, then President Obama and Vice President Biden recognized freight rail's importance to the security of our country by explicitly identifying the freight rail industry as critical infrastructure when issuing Presidential Policy Directive 21 (PPD-21).³ Given the challenges the nation's freight rail industry has faced, beginning with the COVID-19 pandemic and the country's ongoing economic and supply chain challenges, RSA has focused on the promotion and enactment of policies and laws that protect the economic and national security of the North American rail industry. Through these efforts, RSA has sought to ensure investments by state-owned enterprises in businesses involved in the production of railway equipment or rolling stock are fair, transparent, and secure. The freight rail industry is the cornerstone of our nation's transportation and infrastructure system and is vital to every state in the U.S. and indeed the entire North American freight rail network.

Working alongside Congressional leaders as well as current and past administrations, RSA has sought to protect U.S. companies against Chinese state-owned rail enterprise ("SOE"), CRRC Corporation Limited (CRRC), as it pursues its goal of displacing those same U.S. companies and dominating railcar manufacturing in the United States and around the world. This \$35 billion SOE⁴ has made aggressive and alarming inroads into the U.S. by using state-backed financing, direct government subsidization (\$1.8 billion since 2015),⁵ below-market pricing, and other anti-competitive tactics to infiltrate domestic railcar manufacturing and with the single end goal of producing all railcars in the People's Republic of China ("China") – wiping out American manufacturing in the process. FRA's NPRM is a critical step toward supporting the continued viability and robustness of the domestic freight railcar manufacturing industry and, therefore, ensuring the safety of the North American rail system.

I. Executive Summary

RSA agrees with FRA's explanation of the purpose and need for this regulation and with FRA's determination that China is the only country that meets the statutory definition of a "country of concern" at this time. In addition, RSA agrees that the content limitations apply only to newly built freight railcars at the time of manufacture and on a go-forward basis. Finally, RSA generally agrees with FRA's analysis of the costs and benefits of the regulation to industry, the federal government, and the American people.

As discussed in more detail below, RSA urges FRA to reconsider, clarify, or refine its proposed rule as follows:

- **Scope and Applicability of the Sensitive Technology Prohibition.** RSA understands FRA's justification for interpreting the sensitive technology provision of the Act to apply only at the time of manufacture and appreciates FRA's desire to strike the appropriate balance between enhancing the safety and security of the U.S. general railroad system of transportation while minimizing the burden to industry and to FRA. Nevertheless, RSA remains concerned that aftermarket application of

³ Presidential Policy Directive 21 (PPD-21) identifies 16 critical infrastructure sectors, including "Transportation Systems." The Department of Homeland Security defines "Freight Rail" as one of the seven key subsectors. See generally, [PPD-21, Critical Infrastructure Security and Resilience](#), Feb. 12, 2013.

⁴ CRRC Corporation Limited, [Annual Report 2020](#), April 2021.

⁵ Oxford Economics, [Off Track: The Role of China's CRRC in the Global Railcar Market](#), July 2022.

sensitive technology that originates from a COC or is sourced from an SOE is contrary to the spirit of the Act and may create a security risk to the U.S. railway system.

- **Definition of Sensitive Technology and Identifying Active Components.** FRA should revise its definition of “sensitive technology” to expressly include only those devices that are physically located on a railroad freight car consistent with the plain language of the Act. In addition, FRA should expand its interpretation of “active components” to expressly include microprocessors, short range wireless processors, and long-range wireless processors, given the central importance of these components in wireless sensor devices.
- **Compliance Certification.** RSA understands proposed Section 215.403 to require railcar manufacturers to certify compliance with the Act after the railcar is built, but before it is first placed into service. Should FRA attempt to audit compliance at the same time it performs a sample car inspection, RSA is concerned this approach may not be effective because a company will likely maintain the relevant records to demonstrate compliance with the proposed regulation at headquarters rather than a manufacturing location. In addition, manufacturers are unlikely to submit their certifications at the same time they request a safety appliance drawing review or sample car inspection because this is too early in the manufacturing process and the bill of materials (“BOM”) may be subject to change based on part availability.
- **Limit the Manufacturer Prohibition to Willful Violations.** RSA strongly urges FRA to revise the proposed regulations to limit the manufacturer prohibition in proposed Section 215.407(b) to willful violations only. Further, FRA should include in the final rule (1) a requirement that the FRA Chief Counsel must provide written notice of a probable violation; (2) an express process by which manufacturers facing prohibition can defend against and appeal a finding of noncompliance; and (3) a process by which manufacturers can be reinstated after the prohibition is triggered. RSA supports a five-year statute of limitations for enforcing manufacturer violations and recommends FRA use a per-car approach to counting violations, consistent with the rest of Part 215.
- **Explicit Recordkeeping Requirement.** RSA recommends FRA include an explicit recordkeeping requirement in the final regulation requiring manufacturers to maintain copies of the annual certifications and supporting documents for a period of five years.

II. **RSA Agrees with FRA’s Interpretation of the Act in Various Respects and Commends FRA For Its Evaluation of the Benefits and Costs Achieved by Implementing this Rule**

RSA agrees with FRA’s explanation of the purpose and need for these amendments to the FCSS including FRA’s positioning of this regulation in the broader context of Congressional action to protect a domestic market in the rail sector. In recent years, Congress has undertaken various actions to encourage a domestic market in the rail sector and protect against an influx of equipment and components manufactured by entities that constitute SOEs, including SOEs from China that Congress has seen explicitly state intentions to take over the passenger and freight rolling stock market in the United States.

Specifically, the Buy America requirements (49 U.S.C. § 22905(a)) apply to high-speed and intercity rail passenger equipment and require the use of goods, products, and materials produced in the U.S. for certain projects and rolling stock. As FRA notes in its NPRM, Congress also passed Section 7613 of the [National Defense Authorization Act](#) for Fiscal Year 2020, Pub. L. No. 116-92 (Dec. 20, 2019), which added a new subsection, 49 U.S.C. § [5323\(u\)](#), to federal public transportation law. Section 5323(u) limits the use of Federal Transit Administration (FTA) funds, and in some circumstances, local funds, to procure rolling stock from certain transit vehicle manufacturers who “are owned or controlled by, is a subsidiary of, or is otherwise related legally or financially to a corporation based in” certain foreign countries, including China. While these laws have significant impacts on certain sectors of the rail industry, FRA correctly points out that these laws do not require American-sourced content in freight rail cars since freight rail equipment is nearly 100% privately owned.⁶ Therefore, these laws do not afford the freight railcar industry protections against an influx of state-subsidized rolling stock or components. The Act, which FRA seeks to implement in this NPRM, closes that gap. This regulation is critical to ensuring the continued security of the U.S. general railroad system of transportation. To that end, RSA notes that Congress did not include any waivers or exemptions to the requirements of the Act, including the content limitations and the sensitive technology prohibition.

A. Country of Concern

FRA is correct in its assessment that, at this time, China is the only country that qualifies as a “country of concern.” Under the Act, as well as the proposed definition in the NPRM, a country must meet three criteria to qualify as a “country of concern.” Each of the criteria within the definition of “country of concern” are separated by “and” instead of “or,” meaning a country must meet each of these three criteria to meet the definition. Thus, FRA has correctly applied the definition of “country of concern” to conclude that, under the Act and the proposed regulation, China is currently the only country of concern to which the content limitations and sensitive technology prohibition would apply.

B. Applicability of Content Limitations

RSA agrees with FRA’s assessment of the applicability of the content limitations of the Act, as well as FRA’s determination that content limitations apply only at the time of manufacture, with content certification obligations imposed on manufacturers alone. Reading 49 U.S.C. § 20171 as a whole, RSA similarly concludes that the Act regulates railroad freight cars by imposing content limitation requirements at the time of initial manufacture but does not require FRA to ensure that the content limitations set forth in Section 20171(b)(2) are met throughout the useful life of the equipment or at each re-entry into service following repair, maintenance, or tank car requalification. For the content limitations, RSA agrees with FRA’s conclusion that the Act’s definitions (including the absence of definitions related to aftermarket activities), its requirement that manufacturers provide annual certification for new railcars, and its requirement that valid certification is only necessary at the time a railroad first freight car begins operation all lend support to this interpretation.

C. Definition of “Components”

In the NPRM, FRA explains that it is adopting the statutory definition of “components,” as set forth in the Act, but interprets the term to exclude small parts such as wear plates, roof liners, screws,

⁶ The U.S. Department of Defense owns a small fleet of freight rail equipment and there is a small portion of freight railcar equipment owned by municipal and state railroads.

or other small pieces of hardware “that do not significantly impact manufacturing costs.”⁷ FRA explains its view that Congress intended for the definition to cover the major components of freight cars, such as trucks, wheel sets, center sills, draft gears, couplers, walkways, and running boards for purposes of calculating the content limitations, but not small parts. RSA agrees with FRA’s understanding that Congress intended the term “components” to exclude smaller parts that do not significantly impact manufacturing costs for purposes of calculating content limitations under proposed section 215.401(b)(1). Furthermore, this interpretation aligns with existing manufacturer traceability requirements (set forth in AAR industry standards) that necessitate tracking of specialized railcar parts but not smaller general use parts (such as screws and bolts).⁸

D. IP Infringement Prohibition

RSA also generally agrees with FRA’s interpretation of 49 U.S.C. § 20171(b)(1)(C), which addresses IP infringement. This provision forbids the inclusion of any content from a COC or SOE that has violated or infringed valid U.S. intellectual property rights of another in any railroad freight car. In the NPRM, FRA explains its understanding that the prohibition in § 20171, paragraph (b)(1)(C) applies not only to the entity determined to be the IP infringer, but also to the content of that infringement.⁹ In the 2009 ITC example referenced in the NPRM, it would be contrary to the purpose of the law to prohibit the entity that was the subject of the ITC determination from sourcing content, but to permit the stolen IP (in this case cast steel railway wheels) to be applied to a railcar. Accordingly, RSA agrees with FRA’s understanding of this provision, as it is consistent with the purpose of the law.

Regarding the duration of the prohibition, RSA disagrees that the prohibition would always be permanent for the underlying IP. To the extent that the IP rights that were the subject of the violation have since lost their protected status other than through violation of law (e.g., where such IP was protected by a patent that has expired or where a trade secret is no longer protected as such for example due to intentional disclosure), RSA would expect that the prohibition would no longer apply. Unauthorized disclosure (e.g., where a trade secret has been misappropriated) would not cause IP rights to lose protection under this prohibition.

RSA further notes that based on the plain language of the statute, this provision is limited only to entities that are either COCs or SOEs. The statute specifically prohibits the inclusion of content “sourced from a state-owned enterprise that has been determined...to have violated or infringed valid United States intellectual property rights of another.” Therefore, to be within the scope of the statute (and the proposed regulation) the entity that is the subject of the prohibition must be (1) the subject of a court or ITC determination and (2) a COC or SOE. To the extent an entity is the subject of a court or ITC determination but is not also an SOE, the entity would be outside the scope of the Act and its implementing regulations. Thus, in the 2009 example discussed by FRA in the

⁷ NPRM at 85566.

⁸ NPRM at 85566. Since 2012, AAR has required bar coding and registration of certain major railcar components to facilitate performance and reliability analyses and product recalls/equipment advisories. AAR’s bar coding/registration requirements set forth in Standard S-920 apply to wheels, axles, roller bearings, complete wheelsets, couplers, truck bolsters, truck side frames, air brake control valves, slack adjusters, cushion units, and tank car pressure relief valves.

⁹ NPRM at 85567.

NPRM, Standard Car Truck Company, Inc. must abide by the terms of the ITC decision, but it would be outside the scope of this provision of the Act because it is not an SOE, as defined in the statute.

The Act is focused on protecting the freight railcar sector against an influx of state-subsidized rolling stock or components from China or any other country that meets the definition of a COC (as defined in the Act). It would be contrary to the purpose and need of the Act and the plain language of the statute to extend the prohibition in paragraph (b)(1)(C) to any entity that is the subject of an ITC IP rights determination if that entity is not an SOE from a COC. However, if an entity sought to apply the misappropriated IP to a railroad freight car and the IP still enjoys protected status, such application would be prohibited, consistent with FRA's interpretation that the prohibition against using stolen IP extends beyond the life of a 10-year limited exclusion period identified in an ITC order and applies to the content of the infringement. RSA urges FRA to make this clarification when issuing its final regulation to ensure (1) its regulations do not extend beyond the scope of the statute and (2) there is no ambiguity in the regulatory history.

E. Cost/Benefit Analysis

FRA has correctly analyzed the costs and benefits of this regulation to industry, the federal government, and the American people. RSA agrees that the anticipated industry costs associated with this proposed regulation are modest given that industry's compliance obligations for the proposed regulation are an incremental addition to what freight railcar manufacturers in both the U.S. and Canada must already do to comply with USMCA. Under USMCA, manufacturers must track the origin of their components and materials to ensure that goods meet the North American content thresholds required by law.¹⁰ Railcar manufacturers do so through tracking the country of origin for the items appearing on the railcar bill of materials and calculating regional value content (a percentage) relative to the net cost of the railcar. To comply with the proposed regulation, railcar manufacturers will effectively need to add a line item to these calculations to evaluate content originating from China. FRA's proposed regulation aligns with the USMCA framework, meaning that the administrative burden of compliance for industry will be relatively low. Manufacturers can rely on documents such as supplier certificates of origin and the bills of materials to support their calculations and establish compliance for purposes of the annual certification requirement.

RSA represents the three largest freight railcar manufacturers of the six identified by FRA in the NPRM. Based on RSA members' experience and their industry knowledge, RSA understands that all six freight railcar manufacturers currently comply with the 15 percent content limitation included in the Act. Therefore, railcar manufacturers will not need to make significant changes to their supply chains to comply with the proposed regulation. This further supports FRA's conclusion that compliance costs associated with the proposed regulation will be minimal. RSA therefore agrees with FRA that complying with content limitations will result in minimal additional costs to industry.

With respect to benefits, FRA identifies the qualitative benefits that may result from implementing the proposed regulation – namely, “mitigation of potential issues related to compromised national security and corporate espionage” and that the proposed regulation would fulfill FRA's statutory mandate.¹¹ FRA appears to associate the national security benefit only with the sensitive technology portion of the proposed regulation, concluding that there would be no benefit to

¹⁰ USMCA, Chapter 4 and Annex 4.1 (Chapter 86).

¹¹ NPRM at 85563.

complying with content limitation. FRA also should account for the benefits of the content limitations, which include mitigating safety issues associated with poor-quality equipment sourced from a prohibited SOE/COC. For example, in the transit context, the Massachusetts Bay Transportation Authority (“MBTA”) contracted with a Chinese state-owned company to supply hundreds of railcars for its rapid transit (“T”) system. After MBTA was required to pull several cars out of service due to quality issues, the MBTA issued a letter to the manufacturer (CRRC MA) outlining the quality concerns and explaining that the manufacturer had abandoned its responsibility to ensure the quality of its railcars.¹² The T has experienced all sorts of quality and safety issues with the railcars manufactured by the Chinese company. By enforcing the statutory content limitations in the proposed regulation, FRA is enhancing the safety of America’s domestic freight railcars, and by extension, the safety and security of goods that move in the North American railway system every day.

III. RSA Encourages FRA to Consider Clarifications to the Sensitive Technology Portion of the Proposed Regulation

A. Scope and Applicability of the Sensitive Technology Prohibition

In the NPRM, FRA acknowledges that the Act could be interpreted to include a continuing prohibition against equipping a railcar with sensitive technology sourced from a COC or SOE for the entire useful life of the railcar. This would impose a continuing obligation on railcar owners and/or sensitive technology suppliers to ensure that any sensitive technology applied to a railcar *after* manufacture complies with the Act. FRA evaluated this alternative in the NPRM, explaining that it considered whether to:

Grandfather in existing freight cars but require any freight car owner that adds or replaces sensitive technology (including the active components within) on a freight car to submit an annual certification that the sensitive technology in each augmented freight car complies with the sensitive technology provision of the proposed rule.¹³

Although FRA did not adopt this approach in the NPRM, RSA views this as a valid interpretation of the Act and agrees with FRA’s conclusion that such an alternative would better protect the U.S. general railroad system of transportation from safety risks and data breaches.¹⁴

RSA understands FRA’s justification for interpreting the sensitive technology provision of the Act to apply only at the time of manufacture and appreciates FRA’s desire to strike the appropriate balance between enhancing the safety and security of the U.S. general railroad system of transportation while minimizing the burden to industry and to FRA. Nevertheless, RSA remains concerned that aftermarket devices applied to a railcar may create a security risk to the U.S. railway system if the device or its “thinking components” originate from a COC or are sourced from an SOE. Post-manufacture application of sensitive technology that originates from a COC or is sourced from an SOE defeats the purpose and spirit of this provision of the Act and creates potential security risks for the individual rail car. In addition, once included in a train consist, this scenario creates potential security risks for an entire train, including any railcars equipped with sensitive technology that

¹² *Boston Globe*, “Has the company building MBTA trains ‘completely abandoned its core responsibilities’” (Jan. 4, 2023) (citing the December 22, 2022, letter to CRCC MA).

¹³ NPRM at 85571.

¹⁴ *Id.* At 85572.

maintains compliance with the sensitive technology limitations of the proposed rule. Simply put, imposing a continuing prohibition would prevent the aftermarket addition of Chinese monitoring technology to U.S. railcars—which poses a national security risk. Although FRA has not adopted a continuing sensitive technology prohibition in its proposed regulation, it will be imperative that sensitive technology suppliers remain vigilant of their supply chains and that railcar owners conduct due diligence of their sensitive technology suppliers to ensure the continuing safety of the U.S. railway system. RSA anticipates that remote monitoring technology is the future of rail rolling stock safety and operational security and wants to ensure proper protections are put in place now, before this technology becomes ubiquitous on freight rail cars.

RSA notes that the Association of American Railroads (AAR) Standard S-2045 affords visibility into whether a railcar is equipped with remote monitoring equipment (“RME”), which is a subset of the technology covered by the Act and the proposed regulation. AAR initially developed and implemented S-2045 in 2006. Under S-2045, a railcar owner must obtain AAR Equipment Engineering Committee (EEC) approval prior to installing RME on the railcar. If the railcar is a tank car, then the railcar owner also must obtain approval from the AAR Tank Car Committee (TCC). S-2045 defines RME as “...any device applied to a railcar or railcar component (including the interior of a closed car) which transmits a signal or records data that can be received by a remote receiver or retrieved later.” The S-2045 standard excludes automatic equipment identification (“AEI”) transponders because AEI tags are one-way devices that utilize radio frequency (“RF”) energy to wayside (or handheld) readers to track railcar movements across the railroad network. In 2022, AAR implemented several revisions to S-2045, including a requirement that a car owner file detailed application documents and drawings prior to installing RME and, effective January 1, 2024, a requirement that all RME must be “intrinsically safe.” To demonstrate a device is “intrinsically safe” an RME supplier must meet the American National Standard Institute (“ANSI”) standard specified in S-2045.¹⁵ Only a car owner is permitted to submit an S-2045 application and the EEC (and the TCC, as applicable) will only grant approval to the car owner.

Notably, AAR S-2045 contains a longstanding requirement for RME registration (by the reporting car owner) in the AAR Umler master file. RME registration consists of a simple Data Element which is populated with a “YES” to indicate a freight car is RME-equipped.

If RME is installed on a new freight car at the time of manufacture, the reporting mark owner (or its agent) will populate the Umler Data Element field with a “YES” when the entire freight car information is registered in Umler. For existing freight cars already in interchange service, if RME is applied to a railcar, the reporting mark owner is required to update the Umler master file by populating the Data Element field. Likewise, if RME is removed on an in-service freight car then the reporting mark owner must update the Umler Data Element to indicate that the railcar is no longer equipped with RME. Thus, there is an existing mechanism to determine if a specific freight railcar is equipped with RME and properly registered in Umler for the life of the railcar. FRA could leverage this standard (and the corresponding Umler field) to enforce proposed Subpart E of Part 215 and to verify whether a railcar is equipped with RME.

¹⁵ S-2045 specifies that “RME and installation must be minimally intrinsically safe to Class I Division 2 all Groups per American National Standard, ANSI/ISA-12.12.01-2015 [Nonincendive Electrical Equipment for Use in Class I and II, Division 2 and Class I, Divisions 1 and 2 Hazardous (Classified) Locations]” or CAN equivalent. S-2045, Paragraph 3.1. ANSI/ISA-12.12.01 provides minimum requirements for the design, construction, and marking of electrical equipment or parts of such equipment in hazardous locations.

RSA has petitioned the AAR EEC to revise S-2045 to add a cross reference to 49 C.F.R. Part 215 Subpart E, which would encourage consistency between S-2045 and the proposed regulation and facilitate compliance and enforcement of the federal regulation. As part of its outreach, RSA has also urged the AAR Umler Committee to modify the description of the RME Data Element (in the Umler Data Specification Manual) to affirm compliance with the sensitive technology provisions of Part 215, Subpart E. If implemented, these AAR actions would enhance FRA's ability to leverage S-2045 (should FRA choose to do so) to facilitate enforcement of the sensitive technology provisions of the Act and the implementing regulations. At its January 18, 2024 meeting, the EEC formed a technical advisory group (TAG) to, among other things, discuss and consider RSA's proposal to amend S-2045.

B. Defining Sensitive Technology and Identifying Active Components

In the NPRM FRA has proposed that the definition of "sensitive technology" in the Act would be the same definition in the regulations. While RSA agrees these definitions need to be consistent, further clarification of devices that are within the scope of the regulatory definition is warranted. When describing sensitive technology, Congress refers to technology that is "located on the railroad freight car."¹⁶ RSA urges FRA to make clear that devices that potentially qualify as sensitive technology include only those devices that are physically located on a railroad freight car. FRA should revise the "sensitive technology" definition by adding this phrase to the definition as follows:

Sensitive Technology means "any device physically located on a railroad freight car and embedded with...".

Modifying the definition in this way will clarify that devices such as hot bearing detectors, truck hunting detectors and wayside readers do not fall within the definition of "sensitive technology" because these devices are not applied to a railcar and therefore are not "located on a railroad freight car." The same is true of devices applied to a locomotive, which is not a "railcar" under the Act. Electronic devices applied to locomotives are out of scope.

Moreover, at the device level, RSA understands that devices are only within the definition of sensitive technology (under the Act or the proposed regulation) if the device can (1) exchange data with another device, such that a two-way exchange occurs; (2) collect data from another device, such that it received and stores information from another device, or (3) connect to another device such that there is a two-way exchange of signals or information with another device.¹⁷ If another device (e.g., an automatic equipment identification transponder) simply reads information from a device applied to a railcar by decoding one-way radio waves, this is not a "connection to" another device as required by the statutory and proposed regulatory definition and would be out of scope.

Assuming a device is compliant with the Act at the device level, the active components also must be evaluated for compliance. As FRA notes in the NPRM, the Act does not define or provide guidance on what constitutes "components necessary to the functionality of the sensitive technology," which is central to determining which devices will be regulated as sensitive technology under the Act. RSA generally agrees with FRA's conclusion that this phrase includes the active

¹⁶ 49 U.S.C. § 20171(b)(1)(B).

¹⁷ 49 U.S.C. 20171(a)(9) ("the term 'sensitive technology' means any device embedded with electronics, software, sensors, or other connectivity, that enables the device to [1] connect to, [2] collect data from, or [3] exchange data with another device").

components that work with the sensitive technology but not associated passive components that cannot collect or transmit data. Specifically, as RSA understands FRA's proposal, all types of processors, transmitters, receivers, and data storage devices are *active* components while printed circuit boards, power supplies, temperature sensors, pressure gauges, resistors, capacitors, etc. are *passive* components. While the language "all types of processors" can be interpreted to include microprocessors, short range wireless processors, or long-range wireless processors, RSA asks FRA to expressly reference these components as examples of active components, given their central importance in wireless sensor devices.

Furthermore, FRA uses permissive language when it states in the NPRM that "components necessary to the functionality of the sensitive technology" includes active components that "may also be able to collect and transmit data."¹⁸ Active components are only those components that do collect and transmit data. Thus, in order to ensure more effective implementation of the regulations by eliminating this ambiguity, RSA asks FRA to clarify that active components are only those components that actually collect and transmit data thus making them necessary to the functionality of the sensitive technology.

Finally, RSA would like to clarify that, contrary to the statement in the NPRM, it has not asserted that all freight car manufacturers currently comply with the sensitive technology provisions of the proposed regulation. Given the need for implementing regulations to delineate how FRA would interpret and enforce the sensitive technology prohibition in the Act, current sourcing practices for sensitive technology suppliers may vary.

IV. Additional Considerations to Enhance Implementation and Enforcement of the Proposed Regulation

A. Compliance Certification

RSA understands proposed Section 215.403 to require railcar manufacturers to certify all railroad freight cars before they are provided for operation on the U.S. general railroad system of transportation. In terms of implementation, RSA anticipates that manufacturers would submit railcar certifications after a railcar is built, but before a railcar is registered in Umler and first placed into service.

While RSA agrees with FRA regarding the scope and ultimate goal of proposed Section 215.403, and supports electronic submission to FRA's Office of Railroad Safety, RSA does not anticipate that manufacturers will submit their certification to FRA at the time a manufacturer requests a safety appliance drawing review and/or sample base car inspection because the railcar is not fully built at that time. RSA notes that FRA does not perform sample car inspections on every car order—these inspections are typically performed on new car designs, or when requested by the railcar manufacturer, owner, or lessee. Regardless, the manufacturing facility FRA would visit for a sample car inspection is not likely to possess the supporting records FRA would audit to confirm compliance with the proposed regulation (e.g., BOMs or certificates of origin). These types of documents are typically maintained at corporate headquarters rather than at a manufacturing location. Further, while a manufacturer may prepare a BOM at varying points in the manufacturing process, that BOM is subject to change based on part availability (which can vary depending on the size and length of a customer contract) up until the time that the railcar is fully assembled. For this reason, pre-certifying

¹⁸ NPRM at 85567.

compliance (e.g., at the time of a sample car inspection) may not be feasible and, may result in an additional administrative burden on FRA if manufacturers need to submit revised compliance certifications after the railcars are built. RSA expects that manufacturers will submit their certifications to FRA at the time the railcar is registered in Umler.

Finally, FRA should create a standard compliance certification form, modeled after the USMCA certification form, to ensure a streamlined process and uniform certification. A proposed form is included as Attachment A to RSA's comments for FRA's consideration.

B. Manufacturer Prohibition

The proposed regulation (and the Act) permit FRA to prohibit a manufacturer from providing railroad freight cars for operation in the U.S. if the Secretary of Transportation determines there have been more than three violations of the Act and the implementing regulations. Consistent with 49 U.S.C. §§ 21301 and 21304, the existing language of 49 C.F.R. § 215.7 and FRA's "Statement of Agency Policy Concerning Enforcement of the Federal Railroad Safety Laws," which is codified in Appendix A to Part 209 (hereafter "FRA Enforcement Policy"), FRA should revise the proposed regulations to clarify that FRA will only impose the manufacturer prohibition in proposed Section 215.407(b) where there have been more than three willful violations of Subpart E.

The proposed regulation will implement 49 U.S.C. § 20171, which is a part of chapter 201 of title 49 of the U.S. Code. The Federal Railroad Safety Act states that "subject to section 21304 of this title [49], a person violating...a regulation prescribed or order issued by the Secretary under chapter 201 [of title 49] is liable to the United States Government for a civil penalty."¹⁹ Section 21304 in turn states that "a civil penalty under this subchapter may be imposed against an individual only for a willful violation."²⁰ While the Federal railroad safety statutes permit FRA to collect fines from *railroads* on a strict liability basis,²¹ there is no indication that Congress intended to impose strict liability on a manufacturer for a violation of 49 U.S.C. § 20171. Rather, Congress gives the Secretary of Transportation discretion to exercise this prohibition by using the phrase "may prohibit." Therefore, it is appropriate for FRA to align proposed Section 215.407 with 49 U.S.C. § 21304, Section 215.7 and the FRA Enforcement Policy and apply a willfulness standard.

FRA has already developed guidance on the meaning of "willful" in the context of penalties against a non-railroad person, including individuals.²² FRA "considers a 'willful' violation to be one that is an intentional, voluntary act committed either with knowledge of the relevant law or reckless disregard for whether the act violated the requirements of the law."²³ FRA goes on to explain that "neither a showing of evil purpose...nor actual knowledge of the law is necessary to prove a willful violation, but a level of culpability higher than negligence must be demonstrated."²⁴ Furthermore,

¹⁹ 49 U.S.C. §21301

²⁰ 49 U.S.C. §21304.

²¹ 49 U.S.C. §21301; *see also* 49 C.F.R. Part 209, Appendix A (acknowledging FRA may collect fines from the railroads on a strict liability basis but typically apply the considerations set forth in the FRA Enforcement Policy).

²² *See* [49 U.S.C. §21304](#); 49 C.F.R. Part 209, Appendix A.

²³ 49 C.F.R. Part 209, Appendix A.

²⁴ *Id.*

under the FRA Enforcement Policy, “FRA will apply the same definition of “willful” to corporate acts.”²⁵ For example, if a manufacturer exercises reasonable diligence but unknowingly relies on a supplier certification for sensitive technology or a component that later is proven to be inaccurate, incomplete, or false, resulting in a violation of the Act, this is not a willful violation. RSA strongly urges FRA to incorporate a willfulness standard into the regulation such that the manufacturer prohibition in proposed Section 215.407(b) is only triggered when a manufacturer has three or more willful violations of Subpart E.

In the final rule, FRA should include a process by which manufacturers can defend against or appeal a finding of noncompliance. At a minimum, FRA should ensure that:

- A person will receive written notice of probable violation from the FRA Chief Counsel;
- A respondent will have the opportunity to reply within 30 days (with the Chief Counsel authorized to extend the time for filing for good cause shown);
- A respondent may elect to make an informal response by submitting written explanations, information or other materials as respondent may desire in response to the charges or in mitigation of the proposed penalty;
- In the alternative to an informal response, a respondent may request a hearing; and,
- The respondent has the opportunity to file an appeal.

Given the severity of the prohibition, it is critical that the written notice of probable violation come from the FRA Chief Counsel’s office following appropriate legal review. FRA acknowledges that it anticipates utilizing the *Railroad Safety Enforcement Procedures* to enforce the penalties in proposed section 215.407 in the same manner as other civil penalties enforced by FRA.²⁶ RSA agrees that FRA could employ the existing provisions in Part 209 (Railroad Safety Enforcement Procedures) to establish these procedural steps. For example, the above procedural elements and others are included in Subpart B of Part 209 (the hazardous materials penalty provisions). FRA should expressly include these procedural steps in the final rule to ensure adequate due process for railcar manufacturers.

RSA understands that a railcar manufacturer would be permitted to continue its manufacturing operations during the pendency of FRA’s effort to exercise the prohibition in proposed section 215.407(b). RSA recommends FRA include a process by which manufacturers subject to enforcement under proposed section 215.407(b) can resume providing freight railcars for operation in the U.S. freight railroad interchange system after coming back into compliance. RSA currently understands that a manufacturer would need to provide some type of written letter or petition indicating that it is in compliance and that any civil penalties have been paid, but there is not any clear process identified in the NPRM.

Finally, RSA seeks clarity on how FRA will count violations of these regulations and encourages FRA to employ a per-car approach to issuing violations, consistent with the rest of Part 215. Assuming violations would be counted on a per-car basis, it is particularly critical that FRA incorporate a willfulness standard (as described above) when determining whether to prohibit a manufacturer from providing additional railcars under proposed section 215.407(b). Otherwise, a manufacturer may be subject to this prohibition for one unintended non-compliance that applies to

²⁵ *Id.*

²⁶ NPRM at 85568.

an entire lot or railcar order. RSA understands that any violations of the Act or proposed regulations would be subject to a five-year statute of limitations for enforcement.

C. Explicit Recordkeeping Requirement

RSA agrees with FRA's interpretation that the Act requires manufacturers to maintain all records to support certification, including content calculations. RSA recommends FRA include an explicit recordkeeping requirement in the final regulation requiring manufacturers to maintain copies of the annual certifications and supporting documents for a period of five years, in line with other FRA recordkeeping provisions (e.g., 49 C.F.R. § 225.27, which requires that railroads retain certain records related to railroad injuries for a five-year period) and the recordkeeping requirements under USMCA.

* * *

RSA shares FRA's interest in safety and in protecting the viability of America's domestic freight railcar manufacturing sector. We appreciate the opportunity to comment on the NPRM and urge FRA to continue to prioritize promulgating these regulations to implement this critical law.

Sincerely,



Erik Olson
Executive Director
Rail Security Alliance

