



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 27, 2007
(House)

STATEMENT OF ADMINISTRATION POLICY

H.R. 1401 – Rail and Public Transportation Security Act of 2007

(Rep. Thompson (D) MS and 18 cosponsors)

The President supports a comprehensive approach to rail and public transportation security, and the Administration has already made important strides in improving the security of surface transportation systems under Executive Order 13416, *Strengthening Surface Transportation Security*. The Administration welcomes the opportunity to work with Congress to further improve the security of our rail and public transportation systems and appreciates the inclusion of provisions for administratively enforcing surface transportation security regulations. However, the Administration has very serious concerns with several of the bill's provisions and strongly opposes House passage of the bill in its current form. If H.R. 1401 were presented to the President with the whistleblower provision as currently drafted, his senior advisors would recommend that he veto the bill.

The Administration strongly opposes the whistleblower protection provision contained in the bill. DHS and DOT employees already are afforded adequate whistleblower protections. Section 112 of H.R. 1401 would permit an employee to make an individualized determination – without further review and perhaps without all relevant information – to disclose classified information. Such an independent, uncoordinated decision to disclose classified information could work to jeopardize the rail and transportation security that this legislation seeks to strengthen. Moreover, this bill would place unacceptable substantive and procedural limitations on the ability of the United States to assert the state secrets privilege in litigation, raising grave constitutional concerns and hindering the ability to protect classified and sensitive information, perhaps to the detriment of rail and transportation security.

Mandating risk assessment methodologies is not technically justified. H.R. 1401 requires the Secretary of Homeland Security to assign transportation providers to tiers of risk. There are significant concerns that a mandatory risk-based tiered approach will not be able to accommodate evolving risk analysis methodologies, regional threat dynamics, and changing strategic risk objectives. The Secretary needs broad discretion in defining risk criteria, in addition to assigning providers to tiers, in order to address the changing threat environment.

Stakeholder coordination should not be overly prescriptive. H.R. 1401 contains overly rigid and duplicative stakeholder coordination requirements. The National Infrastructure Protection Plan (NIPP) provides a framework for facilitating efficient policy consultations between all levels of government and the private sector. For each mode of transportation a Government Coordinating Council (GCC) and a Sector Coordinating Council (SCC) has been established. This approach is a valuable and flexible tool for collaboration and building consensus. The Administration has endorsed the use of the GCC and SCC process in Executive Order 13416 and strongly

recommends the use of the existing coordination process rather than the bill's coordination requirements.

The bill's grant proposals are not necessary and constrain the Administration's risk-based flexibilities. The Administration strongly opposes provisions in the legislation that would remove flexibility to shift grant funds on the basis of risk among the different transportation sectors to the areas of greatest need in order to respond to the evolving threat environment.

In addition, while the Administration supports using grant funds to reimburse public sector entities for overtime costs during periods of heightened security, the Administration does not believe that the grants should include reimbursement for operational costs incurred by private sector entities fulfilling their security responsibilities and opposes the expansion of private sector entities that are eligible for federal assistance. Further, the Administration does not support new requirements to use transit security grant funds for the hiring of full-time security or counterterrorism personnel or other uses of grant funds that would supplant rather than supplement State, local, and provider efforts to enhance security.

The Administration also believes that flexibility in establishing the appropriate amount of cost sharing for projects should be allowed. Additionally, the grant authorization levels in Sections 105 and 106 of the bill (over \$1.3 billion in FY 2008) far exceed the amounts proposed in the President's FY 2008 Budget.

Finally, various sections of the bill would require preferential treatment on the basis of race, national origin, or gender in connection with the grants and other programs. Such provisions raise constitutional questions in the absence of a record demonstrating that these provisions satisfy constitutional standards.

Responsibility for grant making must not be fragmented. The Administration would strongly oppose any amendment providing for a security grant program that divides the administration and responsibility for grants between DHS and any other agency. Executive Order 13416 clarified that the Secretary of Homeland Security is the principal federal official responsible for transportation security. As such, DHS should have sole authority to award and administer any transportation security grants in coordination with other homeland security and infrastructure protection programs. Creating a separate grant program that divides responsibility between two executive departments sets up an unnecessarily complicated administrative process and creates confusion among stakeholders as to which department is responsible for transportation security.

The Administration needs rulemaking flexibility and scheduling flexibility. The Administration strongly objects to the bill's unrealistic regulatory and programmatic deadlines. Many of these deadlines are highly impractical given the amount of consultation and coordination required by the bill and required by other laws. Deadlines should be established that are achievable, given the complexity of the tasks required.

Name-based checks of categories of employees need to be tailored to risk-based analysis. The bill's requirements for name-based checks against terrorist watch lists and immigration status databases are unnecessarily broad and fail to distinguish between employees who have unescorted access to restricted areas and those that do not. The requirements would challenge agency resources and technical infrastructure because there is no central and reliable database of

all covered employees.

The Administration looks forward to continuing to work with Congress to address its concerns as the legislation moves forward.

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