

## Insight



# Forgotten Regulatory Cargo: The Importance of Regulatory Focus After the Norfolk Southern Derailment

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## EXECUTIVE SUMMARY

- In determining a policy response to the damage wreaked by the recent Norfolk Southern freight train derailment and gas release, policymakers should focus on the specific issues that caused the derailment, rather than a laundry list of tangentially related regulatory measures.
- Based upon preliminary findings from relevant agencies, the primary area on which policymakers should concentrate is how rail operators manage and disclose the unique safety risks involved in transporting hazardous materials.
- There are already multiple measures in the regulatory pipeline that could potentially address the safety risks involved, but for unclear reasons, recent administrations have taken virtually no substantive action.

## INTRODUCTION

It has been nearly one month since a Norfolk Southern freight train carrying various chemicals derailed near East Palestine, Ohio. As noted in the National Transportation Safety Board's [preliminary report](#), the damage sustained from the incident compromised a set of hazardous material (hazmat) tank cars that, in turn, produced a significant risk of pressure buildup and potential explosion. To avoid a more catastrophic explosion, first responders conducted a release and controlled burn of the train's hazardous cargo. The immediate environmental dangers from this action, however, spurred widespread evacuations around the area and there remain concerns of ongoing or farther-reaching contamination.

There is clear political pressure for a response at the federal level. Last month, Department of Transportation Secretary Buttigieg released a broad set of [regulatory proposals](#). This week, a group of Senators introduced the [Railway Safety Act of 2023](#) that includes a similarly broad swath of policy provisions. While it is understandable for policymakers to use the political moment to push such expansive proposals through, it does not necessarily make for the soundest policy outcomes.

A narrowly tailored regulatory response would be more appropriate in preventing similar future incidents than simply compiling a laundry list of preferred policies – such as a proposal establishing a minimum train crew staffing requirement – that may, at best, have only some [tangential relation](#) to the accident. To that end, this analysis finds that: 1) the main regulatory focus should be the safety procedures involved with hazmat railcars, and 2) there are already measures in the regulatory pipeline – that have been languishing for years across

administrations – that may provide some utility in preventing or mitigating similar incidents in the future.

## IDENTIFYING THE CRITICAL ISSUE

The first step in addressing how to respond to such an incident from a regulatory perspective is discerning the area in which additional regulations may or may not provide the best cost-benefit balance. While there are sure to be further findings as the relevant safety authorities continue to monitor and study the aftermath of the derailment, there are some broad aspects one can pull from preliminary information. In this instance, there were two main elements to this event that perhaps deserve greater regulatory scrutiny: 1) the actual derailment of the train and 2) the release the hazardous chemicals. To prioritize scarce regulatory resources, however, it seems clear that the latter is the item on which lawmakers should focus more energy.

Take, for instance, a hypothetical train carrying loads of steel bars or some other relatively inert cargo. That train derailing would be an unfortunate mess with hefty, but far from overwhelming, costs. It would mostly involve managing and cleaning up the immediate area of the incident rather than mandating miles-wide evacuations and rigorous monitoring of environmental conditions. As this recent incident demonstrates all too well, the variable that turned it from a mess into a disaster was that hazmat cargo was involved.

Data from the Department of Transportation (DOT) bear this dynamic out even further. Pulling from the past 10 years of available data, the following table details the main statistics of an “average year” for (non-Amtrak related) [derailment incidents writ large](#) against those involving the transportation of [hazmat cargo](#):

	Incidents	Reported Damage (\$M)	Damage per Incident (\$)
Overall Derailments	585	\$105.40	\$180,170.94
Haz-mat Related Derailments	26	\$24.70	\$950,000.00

The bottom line is that while hazmat related derailments are typically rare (at only 4 percent of the total), the average incident will involve monetized damages greater than five times that of a more typical derailment incident.

## RULEMAKINGS LYING IN WAIT

Having established that hazmat transportation rules ought to be the primary focus of any significant regulatory actions going forward, it is worth looking to see if DOT – and, in particular, the Pipeline and Hazardous Materials Safety Administration (PHMSA) – already has preventative measures in the works. As it turns out, there are a handful of the agency’s rulemakings that have been sitting in the pages of the “Unified Agenda” (UA) – an administration’s biannual guide to rulemakings it has planned – for several years. As further detailed below, while the bulk of these rulemakings’ “lifetimes” came during the lean regulatory years of the Trump Administration, it is notable that the Biden Administration has had at least two years to take substantive action on these items but has not done so.

The first of these rules is titled “Hazardous Materials: Advancing Safety of Highway, Rail, and Vessel

Transportation” (Regulation Identifier Number (RIN): [2137-AF41](#)). Per its most recent summary, the rulemaking “would amend the Hazardous Materials Regulations to adopt a number of modal specific amendments that would enhance the safe transportation of hazardous materials. PHMSA, in consultation with the Federal Motor Carrier Safety Administration, the Federal Railroad Administration, and the United States Coast Guard, proposes amendments identified during Departmental review and from industry petitions for rulemaking.” The particular RIN goes back to 2018 and began as an ostensibly deregulatory measure under President Trump, but has since transitioned to a more “pro-safety” measure:

**Unified Agenda And Regulatory Plan Search Results**

Unified Agenda and Regulatory Plan Search Criteria: Terms=2137-AF41;

Number Of Records Found: 9 [View All RIN Data \(Max 350\)](#) [Download All RIN Data in XML](#)

Agency	Agenda Stage of Rulemaking	Title	Publication	RIN
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Fall 2018	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Spring 2019	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Fall 2019	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Spring 2020	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Fall 2020	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Modal Regulatory Reform Initiatives	Spring 2021	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Advancing Safety of Modal Specific Provisions	Fall 2021	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Advancing Safety of Highway, Rail, and Vessel Transportation	Spring 2022	<a href="#">2137-AF41</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Advancing Safety of Highway, Rail, and Vessel Transportation	Fall 2022	<a href="#">2137-AF41</a>

There has been no substantive action on the rulemaking, though, across either administration:

<https://www.federalregister.gov/documents/search?conditions%5Bterm%5D=2137-AF41>

The most recent entry for that rulemaking also lists [2137-AF25](#) as a “Related RIN.” That rulemaking has been in the works since 2016:

**Unified Agenda And Regulatory Plan Search Results**

Unified Agenda and Regulatory Plan Search Criteria: Terms=2137-AF25;

Number Of Records Found: 13 [View by Page](#) [View All RIN Data \(Max 350\)](#) [Download All RIN Data in XML](#)

Agency	Agenda Stage of Rulemaking	Title	Publication	RIN
DOT/PHMSA	Prerule Stage	Hazardous Materials: PIPES Act of 2016 Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Fall 2016	<a href="#">2137-AF25</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Spring 2017	<a href="#">2137-AF25</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Fall 2017	<a href="#">2137-AF25</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Spring 2018	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum-Based Fuel	Fall 2018	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Spring 2019	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Fall 2019	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Spring 2020	<a href="#">2137-AF25</a>
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DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Fall 2021	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Spring 2022	<a href="#">2137-AF25</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: PIPES Act Requirements for Identification Numbers on Cargo Tanks Containing Petroleum Based Fuel	Fall 2022	<a href="#">2137-AF25</a>

The only formal action on record for this item was a 2016 Advanced Notice of Proposed Rulemaking (ANPRM)

. Granted, it focuses on petroleum fuel loads, so it may not be perfectly relevant to the East Palestine incident, but it represents another example of a years-long paucity in action – even in the face of underlying legislation directing DOT to act.

The final example this analysis has uncovered is the rulemaking entitled “Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail” (RIN [2137-AF21](#)), which has the following history:

Unified Agenda and Regulatory Plan Search Criteria: Terms=2137-AF21;

Number Of Records Found: 14 [View by Page](#) [View All RIN Data \(Max 350\)](#) [Download All RIN Data in XML](#)

Agency	Agenda Stage of Rulemaking	Title	Publication	RIN
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: Real-Time Emergency Response Information by Rail	Spring 2016	<a href="#">2137-AF21</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information	Fall 2016	<a href="#">2137-AF21</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2017	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Fall 2017	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2018	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Fall 2018	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2019	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Fall 2019	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2020	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Fall 2020	<a href="#">2137-AF21</a>
DOT/PHMSA	Long-Term Actions	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2021	<a href="#">2137-AF21</a>
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DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Spring 2022	<a href="#">2137-AF21</a>
DOT/PHMSA	Proposed Rule Stage	Hazardous Materials: FAST Act Requirements for Real-Time Train Consist Information by Rail	Fall 2022	<a href="#">2137-AF21</a>

The only real action on the rulemaking came in the form of another [ANPRM](#) on the last full day of the Obama Administration. The rulemaking represents another legislatively driven program that DOT has seemingly sat on for years. What makes this even more jarring was that there was fairly recent legislation instructing DOT to act on the matter. Per the last part of the rule’s [most recent UA summary](#): “The Infrastructure Investment and Jobs Act of 2021 amended Section 7302 of the FAST Act to remove the provision requiring railroads to provide electronic train consist information to fusion centers and instead require the electronic train consist information be provided to emergency response officials responding to or investigating an incident involving the transportation of hazardous materials by rail. Finally, the amended language instructs the Secretary of Transportation *to issue these regulations no later than December 5, 2022* [emphasis added].”

While it is impossible to know the extent to which these rules would have made a difference in the Norfolk Southern incident, there is reason to suspect that they may have had some impact. For instance, in the days following the derailment and release of the chemicals, [reports](#) emerged that Ohio officials did not receive the proper information regarding the nature of the train’s hazardous cargo. Perhaps the additional information required under these rules would have helped alleviate the confusion Ohio authorities faced in the immediate response to the situation.

## CONCLUSION

An incident like the Norfolk Southern derailment certainly merits a policy response, particularly on the regulatory front. On top of initial policy proposals from Congress and administration, Congressional committees

in both chambers are calling for [hearings](#) and other means to gather more [information](#). As these investigations develop, however, it is important to focus any regulatory efforts on the critical aspects involved in a potential future incident—and not as an excuse to usher in a host of preferred, but unrelated, new regulations. Addressing the core hazmat safety deficiencies should be the key aim, and considering the ideas already in the regulatory hopper would be a good place to start.