

# Rush To Regulate After Ohio Derailment Draws Skeptics

By **Linda Chiem**

Law360 (March 2, 2023, 9:49 PM EST) -- The Biden administration and lawmakers have proposed new mandates for trains carrying hazardous materials after a Norfolk Southern train derailed in rural Ohio last month, but some experts are skeptical that knee-jerk regulations could prevent such disasters.

This week, the U.S. Department of Transportation announced a national initiative calling for focused inspections on routes that carry high-hazard flammable trains, as well as other trains carrying large volumes of hazardous materials commodities.

Additionally, House and Senate lawmakers said they're preparing new legislation that would mandate enhanced alerting systems, inspection protocols and stiffer penalties for potential safety violations — even as National Transportation Safety Board investigators are still piecing together what might've caused the fiery Feb. 3 derailment in East Palestine, near the border of Ohio and Pennsylvania.

Transportation disasters of a size and scale like this one are often followed by **strict regulatory scrutiny**, and the Biden administration and Congress are under increasing pressure to swiftly implement measures that would prevent similar derailments.

So far, labor unions, environmental advocates and safety proponents demanding railroad accountability have embraced the proposals, while other industry watchers worry that a rush to regulate might be more harmful than helpful.

The Federal Railroad Administration said Wednesday that it's immediately stepping up inspection of tracks on routes carrying high-hazard flammable trains, using human visual inspections and Automated Track Inspection technology. Earlier this week, the FRA issued a safety advisory urging railroads to more closely examine their wayside defect detectors, or so-called hotboxes, which are systems that monitor overheated bearings and provide audible real-time warnings to train crews.

Benjamin Dierker, executive director of the Alliance for Innovation and Infrastructure, a think tank specializing in infrastructure policy, told Law360 on Thursday that context is important when public policy changes are being considered.

He said the statements issued by the administration and lawmakers backing these new proposals can give the impression that rail is experiencing unprecedented safety concerns — with some citing 1,000 derailments a year — when rail safety has actually been improving for decades, with derailments in particular declining.

"It is more correct to say we are down to 1,000 derailments, rather than stress that number as a problem," Dierker said. "More can and should be done, but we should recognize it in its context. Derailments in 2021 were at half the number they were in 2000."

Marc Scribner, a senior transportation policy analyst with the Reason Foundation, a libertarian think tank, told Law360 on Thursday that the rush to regulate is "premature" when there are still plenty of unknowns surrounding potential causes of the derailment.

"That impulse does not lend itself well to this situation in terms of actually getting the policy right and promoting the safest outcomes," Scribner said. "[So far,] it's largely been political ax-grinding and

positioning of pet projects or pet proposals as solutions, even though there's no clear line between this particular incident and any of those proposals."

The NTSB's investigation into the cause of the derailment is still ongoing, but its **preliminary findings** on Feb. 23 underscored investigators' earlier suspicions about an **overheated wheel bearing**. The NTSB analyzed readings from the hot bearing detectors, or HBDs, located along the railway.

The NTSB said Thursday that it's also looking closely at aluminum protective housing covers on certain derailed tank cars that were transporting vinyl chloride — a toxic, colorless and flammable chemical used to make a variety of hard plastics. Local officials and the railroad made the controversial decision to do a controlled vent and burn of the vinyl chloride that released toxins into the air and surrounding community. Those aluminum protective housing covers melted in the blaze.

"Before recommending any particular course of action, we should know what was going on here and how certain regulatory approaches may or may not have prevented this," Scribner said. "Gathering all the facts is critically important."

Legal experts have told Law360 that train crew staffing, tank car design standards, enhanced rail safety technology, track inspection protocols and classifications for hazardous materials-carrying trains are just some of the policy areas that will be examined closely in the months ahead.

Lawmakers in both the House and Senate this week floated legislation containing a grab bag of rail safety enhancements that they say would prevent future train disasters like the one in East Palestine.

There's the **Railway Safety Act of 2023** backed by Ohio Sens. Sherrod Brown, a Democrat, and J.D. Vance, a Republican; Sen. Bob Casey, D-Pa.; Sen. Marco Rubio, R-Fla.; Sen. John Fetterman, D-Pa.; and Sen. Josh Hawley, R-Mo.

That bill, announced Wednesday, lays out several enhanced rail safety protocols like requiring rail carriers to notify state officials in advance about trains carrying hazardous materials; new rules for train size, weight and wayside defect detectors; and a permanent mandate for railroads to operate with crews of at least two people.

Additionally, the bill seeks to raise the maximum fine that the DOT can impose on rail carriers for safety violations from \$225,000 to 1% of a railroad's annual operating income. That could be hefty, considering many of the largest Class I railroads register billions in annual operating income.

Meanwhile, in the House, Reps. Ro Khanna, D-Calif., and Chris Deluzio, D-Pa., on Tuesday introduced the Decreasing Emergency Railroad Accident Instances Locally Act, or **DERAIL Act**, which would broaden the definition by which trains are classified as high-hazard flammable trains.

The DOT currently defines an HHFT as either a train with a continuous block of 20 or more tank cars loaded with Class 3 flammable liquids, or a total of 35 or more such tank cars loaded with Class 3 flammable liquids dispersed across the entire train. Class 3 flammable liquids include crude oil or ethanol.

The DERAILED Act would expand the HHFT definition to also cover the Class 2 category for flammable gasses, and give the U.S. transportation secretary the authority to add other materials to the definition. Notably, the bill seeks to substantially lower the threshold definition for HHFTs to mean a "single train transporting one or more loaded tank cars of a Class 3 flammable liquid or a Class 2 flammable gas and other materials the secretary determines necessary for safety."

Kristen Boyles, managing attorney of Earthjustice's Northwest regional office in Seattle, told Law360 on Thursday that the DERAILED Act is a good step, particularly the one-car threshold for what would constitute an HHFT.

"But even if that definition became law — which it should — there still needs to be safety measures put in place for high-hazard flammable trains, so we're back to [needing] modern brake systems, updated tank cars, slower train speeds, shorter trains, etc.," Boyles said.

Greg Regan, president of the Transportation Trades Department, AFL-CIO, on Thursday praised the new regulatory and legislative proposals, saying rail unions and workers have been sounding the alarm about safety concerns in the freight rail industry for years.

"We welcome recent federal regulatory action and congressional reform efforts, such as the bipartisan Railway Safety Act and the DERAIl Act, and believe these are good first steps to address some of the current systemic issues that harm the freight rail system," Regan said in a statement to Law360. "We look forward to continuing to work with our partners in Congress to produce comprehensive rail safety legislation."

"Currently, there are no federal regulations guiding wayside detectors, including their placement along tracks or temperature thresholds," Regan added. "There's not even a federal definition of wayside detection technologies. Rail workers are eager to see a complete set of federal regulations on the installation, operation, testing, repairs and maintenance of all wayside detection technologies, including defect detectors."

--Editing by Alanna Weissman and Emily Kokoll.