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DOT to crack down on hazmat rail shippers

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A report issued earlier this year by the U.S. Department of Transportation's Office of Inspector General recommended more aggressive enforcement of federal regulations governing the shipment of hazardous material by rail, and the Federal Railroad Administration agreed.

The FRA has now committed to implementing recommendations in the OIG report by making it easier for inspectors and agency lawyers to initiate criminal investigations, and to impose more and higher civil penalties, beginning this month.



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As a result, the transportation industry should expect to see higher fines and potentially even criminal investigations relating to the shipment of hazardous material by rail. Individuals who willfully or recklessly violate federal hazardous materials regulations face criminal fines of up to \$175,000 and 10 years in prison. Companies also can be charged criminally for violations by their employees. These criminal penalties have long been on the books, but (until now) seldom or never enforced. The industry now needs to adjust its regulatory expectations and prepare for newly invigorated enforcement efforts.

Federal law tasks the DOT with regulating the transportation of hazardous material, which includes countless substances from crude oil to sulfuric acid. DOT exercises its enforcement authority over the shipment of hazmat by rail through the FRA, the enforcement authority of which extends beyond railroads to anyone who ships hazmat by rail. The U.S. Department of Justice is responsible for bringing civil and criminal lawsuits for violations that are not resolved informally by FRA.



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FRA in 2015 issued 1,670 recommended hazmat violations, including 883 violations against non-railroad hazmat shippers, resulting in more than \$4 million in civil penalties.

However, no hazmat violations (or any others) were referred to DOJ for prosecution. FRA proclaimed that in 2015 its "stepped-up enforcement of railroad safety regulations led to the highest-ever civil penalty collection rate in the agency's 50-year history."

Despite FRA's claim of "stepped-up enforcement" in 2015, on Feb. 24, 2016 the OIG issued an audit report titled, "FRA's Oversight of Hazardous Materials Shipments Lacks Comprehensive Risk Evaluation and Focus on Deterrence."

OIG undertook the audit "due to the public safety risks that transporting crude oil and other hazardous materials pose(.)" The report specifically notes the highly publicized 2013 derailment of a crude oil train near Lac-Mégantic, Quebec, Canada, as well as recent incidents in Alabama, North Dakota and Virginia, which the report claims "underscore the importance of mitigating the risk of a hazardous material release in the event of a train accident." As the title suggests, the report is generally critical of FRA's enforcement efforts with respect to hazmat shipments.

The report concludes that "FRA pursues limited civil penalties for violations of hazardous materials regulations and, despite departmental requirements in several DOT Orders, does not refer cases ... for criminal investigation," meaning that "penalties have little deterrent effect, and criminal penalties are not being pursued." In particular, the report notes:

- Only 4 percent of violations resulted in penalties. In 2013-2014, for example, inspectors found 33,864 hazmat violations, but referred only 1,355 to DOT lawyers for imposition of penalties.
- Over the last five years, penalty cases have settled, on average, for five cents on the dollar compared to what FRA could have imposed.
- FRA did not refer any hazmat violations to OIG for criminal investigation, when according to OIG, 20 percent "may have warranted" it.

Based on these and other findings, OIG recommends that FRA intensify its hazmat enforcement efforts by increasing civil penalties and “require(ing) all staff, including inspectors, to directly report to OIG all suspected criminal violations.” An FRA memorandum appended to the report indicates FRA’s “concur(rence) with OIG’s recommendations as written,” and sets “target action dates for completing the recommendations” between Aug. 15, 2016, and March 15, 2017.

FRA’s newly invigorated enforcement policy could result in greater DOJ involvement in civil and criminal litigation over hazmat violations. Railroads and hazmat shippers accustomed to resolving violations informally with the FRA should anticipate that DOJ will be far more aggressive.

Railroads and shippers should also take particular note of a recent DOJ policy that increases the possibility individual employees could be criminally prosecuted for serious hazmat violations.

In September 2015, DOJ issued an internal guidance memorandum that has become known as the “Yates Memorandum” after its author, Deputy Attorney General Sally Yates. The memorandum notes that “(o)ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing” via civil litigation and criminal prosecution.

Thus, the Yates Memorandum encourages prosecutors to bring charges or lawsuits against individual employees in cases of corporate wrongdoing — not as a substitute for enforcement against the businesses that employ them, but in addition to it.

Taken together, OIG’s report and the Yates Memorandum signal more aggressive civil and criminal enforcement actions, including against individuals, for violations of rail hazmat regulations. This is particularly true given the increased public focus on rail hazmat events like the Lac-Mégantic incident, for which Canadian authorities brought criminal charges against six railroad employees.

Railroads, shippers and others subject to FRA hazmat regulation must confront this new reality and the following precautions can help:

1. Implement and enforce a robust hazmat training and compliance program.
2. Having a mitigation and crisis management plan in place.
3. Never cover up violations. OIG’s report singled out false statements to inspectors as worthy of criminal investigations.
4. Prepare to fight back in court when appropriate. New government enforcement programs typically must “justify their existence” by producing high-profile results. Those pressures can lead to overreaching or misconduct by the government.

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