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Re: FRA’s Position on Conducting Safety Inspections during COVID-19 Public Health Emergency

Gentlemen:

This letter is in reply to your September 30, 2020, letter to the Federal Railroad Administration (FRA) regarding FRA’s position on conducting safety inspections during the coronavirus disease 2019 (COVID-19) public health emergency. In that letter, the American Chemistry Council, the Fertilizer Institute, and the Chlorine Institute (“the Associations”) asked FRA to change certain aspects of its position published in August 2020 on the conduct of FRA safety inspections during the COVID-19 public health emergency.¹ Specifically, the Associations ask FRA to reconsider its position that regulated entities may not require FRA safety inspectors to fill out questionnaires, waivers, or documents of any kind, whether written or oral, as a condition of entry or access, and request that FRA inspectors comply with reasonable requests for health checks prior to entering regulated facilities.

Although FRA shares the Associations’ concern for the health and well-being of both employees of regulated entities and FRA safety inspectors, FRA declines to modify its position as the Associations request. As noted in FRA’s August 2020 position statement, FRA’s authority to regulate and enforce the Federal railroad safety laws and implementing regulations includes a right of entry to regulated entities’ premises to conduct inspections to determine

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compliance with these Federal railroad safety requirements, subject only to the condition that
inspections occur at reasonable times, in a reasonable manner, and with a display of proper
credentials (upon request). Federal law does not permit regulated entities to impose additional
requirements on the exercise of FRA’s safety inspection authority.

As detailed in FRA’s August 2020 position statement, however, FRA requires its employees to
follow applicable guidance from the Centers for Disease Control and Prevention (CDC) and
other Federal public health agencies. FRA safety inspectors are required to adhere to social
distancing; use appropriate personal protective equipment (PPE); and stay home if they feel sick
or experience any COVID-19 symptoms (e.g., fever or chills, cough, shortness of breath or
difficulty breathing, fatigue, muscle or body aches, headache, new loss of taste or smell, sore
throat, congestion, or runny nose). Consistent with CDC guidance, any FRA inspector who
feels sick or experiences any symptoms of COVID-19 must: notify the appropriate supervisor,
self-isolate until the CDC’s criteria to discontinue home isolation are met, consult with a
healthcare provider, and comply with any applicable State and local government health
requirements. Also, consistent with CDC guidance, an FRA inspector who suspects personal
exposure to COVID-19, or tests positive for COVID-19, must comply with the CDC’s
recommendations to help prevent the spread of COVID-19 before returning to work. Further,
an FRA inspector who becomes sick at work must go home and follow the applicable CDC
guidance discussed above.

As noted in FRA’s August 2020 position statement, the U.S. Department of Transportation
maintains a robust internal reporting procedure in the event any employee, including an FRA
inspector, is diagnosed with COVID-19 or comes into contact with someone diagnosed with
COVID-19. If an FRA inspector is diagnosed with COVID-19 or comes into contact with
someone who has been diagnosed with COVID-19, the Department, and FRA specifically, will
work to support the contact tracing efforts of the relevant public health agency in the State(s)
where the inspector works.

Prior to entering a regulated entity’s facility for an inspection or on-site audit, all FRA
inspectors will continue to follow CDC guidance on maintaining social distancing,
exercising proper hygiene, and self-monitoring for potential symptoms of, or exposure to,
COVID-19. FRA inspectors will also, to the extent possible and without interfering with
FRA’s inspection and oversight responsibilities, adhere to specific regulated entities’
policies designed to mitigate the spread of COVID-19. For instance, if a regulated entity
requires its employees to wear a particular form of PPE, FRA inspectors will do the same
if the facility provides the PPE. However, as FRA’s August 2020 position statement
makes clear, FRA does not find requests for health checks, including temperature checks
and health questionnaires, to be reasonable under the law.

FRA is confident that the measures already in place appropriately provide for employee

\[2 \text{ See } 49 \text{ U.S.C. } \S\S \ 20107(b), \ 5121(a) & (c). \]
safety during the COVID-19 public health emergency. Should concerns arise regarding granting any individual FRA inspector access to a regulated entity’s facility because of COVID-19, FRA will make appropriate staff available to address those concerns. FRA encourages any regulated entity with such concerns to contact Mr. Mark Maday, Staff Director, FRA Office of Railroad Safety, Hazardous Materials Division, at mark.maday@dot.gov or (202) 493-0479.

FRA looks forward to working with you to help ensure safety during this national public health emergency.

Sincerely,

Karl Alexy
Associate Administrator for Railroad Safety
Chief Safety Officer