September Legislative and Regulatory Report

LEGISLATIVE

Congress Passes Continuing Resolution and FAST Act Extension

Nearly every year since the 1970s, Congress has failed to finalize a full-year appropriations bill before September 30, the start of the new fiscal year—and this year was no exception. To prevent a government shutdown, the U.S. House of Representatives introduced a short-term funding measure known as a continuing resolution. The bill subsequently passed both the House and the Senate with bipartisan support and was signed into law by President Trump early on October 1.

The CR will maintain fiscal year 2020 funding levels for federal agencies through December 11, 2020. Consistent with previous CRs, the bill contains a provision stating that "no grants shall be awarded for such programs funded by this Act that would impinge on final funding prerogatives." Although the U.S. Department of Transportation will receive pro-rated amounts for certain competitive grant programs, including the Better Utilizing Investments to Leverage Development program, USDOT will likely wait until a full appropriations bill is passed before soliciting grant project applications. Congress now has just over two months to either pass a one-year appropriations package or enact an additional CR.

This year, September 30 marked another important deadline for transportation agencies: the expiration of the 2015 Fixing America's Surface Transportation Act. Despite both House and Senate progress advancing separate five-year proposals, lawmakers were unable to agree on a final long-term surface transportation reauthorization. Instead, they incorporated a one-year extension of FAST Act programs and funding into the CR package.

The legislation extends FY20 funding levels for surface transportation programs authorized under the FAST Act through September 30, 2021. To ensure the Highway Trust Fund can cover operations throughout the duration of the extension, the bill provides for a $13.6 billion transfer from the U.S. Treasury general fund, directing $10.4 billion into the HTF's Highway Account and $3.2 billion into its Mass Transit Account. Because the extension is intended to simply maintain existing funding levels rather than make substantive changes, it includes very few adjustments beyond striking and replacing expiration dates. One exception is an adjustment to increase the FAST Act's five-year aggregate limit on multimodal funding awarded under the Infrastructure for Rebuilding America grant program from $500 million to $600 million over six years. Roughly $46 million of multimodal funding remains from years FY16-FY20, meaning that up to $146 million would be available in the next round of INFRA.

REGULATORY

OCEMA Files Motion to Dismiss Complaint Alleging Shipping Act Violations

On September 18, the Ocean Carrier Equipment Management Association, Consolidated Chassis Management, and 10 international ocean carriers filed a motion with the Federal Maritime Commission to dismiss the Intermodal Motor Carrier Conference's formal complaint alleging violations of the Shipping Act of 1984. In its complaint, IMCC claimed respondents inflated prices and denied truckers chassis choice, resulting in $1.8 billion in overcharges over the last three years.

Given that motor carriers are not regulated by the Shipping Act of 1984, OCEMA and respondents argue the complaint should be dismissed because FMC lacks subject matter jurisdiction over the relationship between ocean carriers and motor carriers. IMCC's complaint focused on alleged violations of Section 41102(c) of the Shipping Act. The motion to dismiss notes this section does not apply to the transportation of cargo, including chassis. Respondents further contend IMCC's complaint lacked substantive proof of the alleged violations and failed to include chassis providers, which they argue are an "indispensable party" to the case. Respondents therefore concluded that IMCC failed to state a claim for which relief may be granted.

IMCC may submit a response to the motion within 15 days, in which case OCEMA would subsequently have seven days to respond to the filing. The initial decision in this proceeding is due August 24, 2021, and the final decision by FMC is due March 10, 2022.

USITC Concludes Preliminary Phase of Investigations into Chassis from China

The U.S. International Trade Commission unanimously voted on September 11 to continue its antidumping and countervailing duty investigations into chassis and subassemblies from China. The investigations were initiated in August in response to a petition filed simultaneously with USITC and the Department of Commerce by the Coalition of American Chassis Manufacturers. Based on its findings during the preliminary investigation, USITC determined there is a reasonable indication that the U.S. chassis industry is materially injured by imported chassis from China that are "allegedly sold in the United States at less than fair value and are allegedly subsidized by the government of China."

The report of USITC's preliminary investigation details the Commission's determinations and views based on data questionnaires as well as written statements and testimony by parties to the investigation and non-party stakeholders. USITC collected information from groups accounting for 95 percent of U.S. chassis production and nearly all U.S. imports of

chassis. Though most of this data is redacted, the report covers domestic capacity and production volumes, U.S. imports and market share, and pricing data.

USITC found that imported chassis were pervasively priced lower than U.S. chassis and that the domestic industry lost a considerable number of sales due to this price difference, therefore concluding that "the underselling by subject imports was significant." Respondents argued imported chassis are often favored due to non-price differences, such as the ability to support high volume orders, flexibility in lead times, and faster deliveries. USITC notes it intends to further examine whether the domestic industry's reported capacity matches its actual production abilities and the extent to which U.S. and Chinese chassis producers compete for different order volumes.

As a result of USITC's preliminary phase determination, Commerce will continue its investigations, with its preliminary countervailing determination expected around October 23, 2020 and preliminary antidumping duty determination by January 6, 2021. If Commerce's determination is affirmative, USITC will publish a notice of scheduling in the Federal Register and begin its final phase of the investigations.

FMCSA Proposes Pilot Program for Interstate CMV Drivers Under 21

While drivers under 21 years old may obtain a commercial driver's license, they are currently limited to operating commercial motor vehicles within state lines. To study the safety effects and other potential impacts of lowering the interstate driving age, the Federal Motor Carrier Safety Administration initiated a pilot program in 2018. This program, currently underway, allowed 18- to 20-year-olds with military experience operating heavy duty vehicles to participate in interstate commerce. On September 10, 2020, FMCSA proposed a new pilot program to study non-military drivers under the age of 21.

The proposed pilot program would study drivers within the following two categories: 1.) 18- to 20-year-old CDL holders who operate CMVs in interstate commerce while taking part in a 120-hour probationary period and a subsequent 280-hour probationary period under an apprenticeship program established by an employer; and 2.) 19- and 20-year-old drivers who have operated CMVs in intrastate commerce for at least one year and 25,000 miles. Further, FMCSA will establish a baseline to compare safety records by selecting a control group of 21- to 24-year-old drivers. The program would last up to three years, followed by a report to Congress containing FMCSA's final recommendations, including suggested amendments to laws and regulations governing the minimum age of interstate drivers.

In May 2019, FMCSA requested information on the various training, insurance, operational, data, and participation requirements it should consider in the proposed pilot program. Based on stakeholder feedback from this notice, participant drivers would be restricted from operating special configuration vehicles and vehicles carrying passengers or hazardous materials. The pilot program would require CMVs to be equipped with

vehicle safety technologies such as forward-facing video event recorders, active-braking collision mitigation systems, and speed limiters set to 65 miles per hour.

Comments are due November 9, 2020. FMCSA is seeking general comments on the proposed pilot program as well as responses to six specific questions, including whether younger drivers should be limited to a certain driving distance radius.

Department of Labor Proposes Rule to Clarify Independent Contractor Status

The U.S. Department of Labor issued a notice of proposed rulemaking to clarify its interpretation of independent contractor status under the Fair Labor Standards Act. The FLSA does not define the term "independent contractor," instead DOL and courts have used a multifactor test to distinguish independent contractors from employees. DOL acknowledges the test's "underpinning and the process for its application lack focus," which has resulted in uncertainty among businesses and workers. The NPRM, published on September 25, proposes changes to the "economic reality" test for worker classification and adds a provision explicitly stating that independent contractors are not employees under the FLSA.

Since 1954, DOL has relied on several versions of a multifactor economic reality test to analyze the level of economic dependence between workers and potential employers. However, the test's outdated factors and lack of specific guidance have led to inconsistent interpretations and numerous legal challenges. DOL proposes revising the measure of economic dependence so that the test properly examines whether workers are dependent on a particular business for their continued employment. To establish a more focused approach to the economic reality test, the proposed rule identifies two core factors: the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss. DOL will also consider three additional factors that are afforded less weight, including: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is an integrated unit of production.

The NPRM notes that workers in some states may not be affected by the proposed rule as the FLSA allows states and localities to establish more stringent worker classification standards than required by federal law. The proposal, if adopted, is therefore unlikely to impact California's efforts to implement the ABC test under Assembly Bill 5. Comments on DOL's proposed rulemaking are due October 6, 2020.