



# November Legislative and Regulatory Report

## LEGISLATIVE

### Senate Introduces FY21 THUD Appropriations Bill

Earlier this year, the U.S. House of Representatives passed 10 of the 12 annual appropriations bills. However, since the Senate had not yet produced any appropriations legislation of its own prior to the end of the 2020 fiscal year, Congress instead enacted a continuing resolution. The short-term funding measure extended FY20 appropriations for federal agencies through December 11, 2020.

On November 10, the Senate Committee on Appropriations published all 12 of its fiscal year 2021 appropriations bills. The FY21 Transportation, Housing, and Urban Development bill would provide \$74.8 billion in total funding, which is approximately \$1.1 billion lower than the House version, though most reductions are limited to the proposal's housing provisions.

Consistent with the House-passed version, the Senate THUD bill includes \$1 billion for the Better Utilizing Investments to Leverage Development grant program in FY21. Whereas last year's appropriations bill required funds be split evenly between rural and urban projects, the FY21 Senate bill would require at least 30 percent of funds go toward projects in rural areas. The bill provides \$340 million for the Consolidated Rail Infrastructure and Safety Improvements program, \$160 million below the amount in the House bill. Unlike the House legislation, the Senate THUD proposal does not include a set-aside for grade crossings. Additionally, the Senate bill proposes \$200 million for Port Infrastructure Development Program grants, reserving 25 percent of funds for small projects. The House bill included \$300 million for PIDP grants, of which at least \$275 million must go toward projects in coastal seaports or Great Lake ports.

Of note, the Senate's explanatory statement directs FMCSA to complete several outstanding tasks, including a report analyzing workforce trends, trucking safety, workforce training needs, and strategies to mitigate the ongoing truck driver shortage. Senate appropriators further recommend: the National Highway Traffic Safety Administration finalize its rulemaking to establish truck underride guard standards; the Federal Highway Administration submit a report containing recommendations to improve inland waterway transportation; and USDOT's Office of Research and Technology develop a mode-neutral framework to facilitate the development of emerging technologies within freight transportation.

Congressional leaders are currently working to resolve the differences between the House and Senate appropriations proposals. To avoid a government shutdown, Congress must pass a one-year appropriations package or additional continuing resolution by December 11.



## REGULATORY

### **FMCSA Grants Petition Preempting Washington State Meal and Rest Break Laws**

In December 2018, the Federal Motor Carrier Safety Administration granted a petition submitted by the American Trucking Associations, determining California’s meal and rest break provisions for drivers operating commercial motor vehicles are preempted by federal hours of service regulations. Following the decision, the Washington Trucking Association filed a petition in April 2019 requesting FMCSA make a similar determination regarding Washington State’s meal and rest break requirements. On November 17, 2020, FMCSA published an order granting WTA’s petition, effective immediately.

In its petition, WTA referenced FMCSA’s decision to preempt California’s meal and rest break laws and contended Washington’s similar provisions therefore also warranted a preemption order. WTA further argued the state laws are more stringent than and incompatible with federal HOS requirements, offer no safety benefits beyond those already provided by the Federal Motor Carrier Safety Regulations, and impose an unreasonable burden on interstate commerce. FMCSA received 33 comments in response to WTA’s petition, of which 24 supported preemption. The remaining comments included a letter from 15 Members of Congress—led by Senator Murray (D-WA) and Congressman DeFazio (D-OR) and signed by then-Senator Harris (D-CA)—opposing the petition, citing a preemption decision would “undermine protections for workers and attack the sovereign authority of states to uphold those protections.”

At this time, there are no lawsuits seeking to overturn FMCSA’s recent determination. However, separate court petitions filed by the State of California and the International Brotherhood of Teamsters to reverse FMCSA’s 2018 decision remain pending.

### **California Court of Appeals Rules Federal Law Does Not Preempt ABC Test**

In recent years, several lawsuits have challenged California’s Assembly Bill 5, which established the stringent ABC test to determine whether workers should be classified as employees or independent contractors. In January 2020, the Los Angeles Superior Court, in a case involving drayage company Cal Cartage, ruled that AB 5 was preempted by the Federal Aviation Administration Authorization Act of 1994. However, this decision was overturned by the California Court of Appeals on November 19, 2020.

In its unanimous decision, the appellate court argued that “the ABC test is not preempted because it is a generally applicable employment law that does not prohibit the use of independent contractors, and therefore does not have an impermissible effect on prices, routes, or services.” The court also cited the availability of a business-to-business exemption within AB 5 to argue that the law does not prohibit the use of independent contractors. Cal Cartage has indicated it plans to appeal the decision.

Of note, a separate lawsuit filed by the California Trucking Association is currently pending further action before the Ninth Circuit Court of Appeals. This case resulted in a



preliminary injunction, which has been in place since January 2020, prohibiting the state from enforcing AB 5 provisions on the trucking industry. The court last heard oral arguments in September 2020. While the recent decision in the Cal Cartage case does not directly affect the preliminary injunction, it could impact future proceedings in the CTA lawsuit case as well as the State of California's request to lift the injunction.

### **FMC Denies Ocean Carriers' Motion to Dismiss Claim Filed by IMCC**

In September 2020, 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. FMC's designated Administrative Law Judge denied respondents' motion to dismiss on November 18, 2020, thereby allowing the case to proceed.

In her decision, Judge Wirth stated that IMCC's complaint provided "sufficient factual allegations to plausibly allege a violation of the Shipping Act." She further addressed respondents' claims arguing FMC lacks subject matter jurisdiction over the relationship between ocean carriers and motor carriers, confirming that FMC has the authority to investigate allegations of ocean carriers affecting and exerting control over chassis availability through their regulations and practices. Additionally, the decision cited FMC's interpretive rule on detention and demurrage, which noted that ocean carriers may "substantially affect chassis availability via chassis pools owned by ocean carrier agreements such as OCEMA" and exert control over chassis through "box rules." The judge concluded ocean carriers' alleged misconduct would directly impact the receiving, handling, storing, or delivering of property, which is covered under Section 41102(c) of the Shipping Act.

As required by the initial order, the decision directs respondents to submit their response to IMCC's complaint by December 8, 2020. Both parties must also file a joint status report with a proposed schedule by December 18, 2020.

### **HTA Calls for Increased Oversight of Detention and Demurrage Charges; FMC Expands FF29 Investigation**

On November 16, 2020, a coalition of over 50 organizations led by the Harbor Trucking Association sent a letter requesting the Federal Maritime Commission enhance its oversight of demurrage and detention charges due to recent chassis shortages at the Ports of Long Beach, Los Angeles, and New York/New Jersey. The coalition alleged that heavy congestion, the lack of advance empty container notifications, as well as chassis and skilled labor shortages have resulted in over \$150 million in unreasonable detention and demurrage charges this year. The letter further requested that FMC suspend such charges and prohibit carriers from filing or collecting any surcharges for congestion, trucking or equipment "until they have made a constructive action to remedy the problems."



Possibly in response to the concerns raised by HTA's coalition, FMC issued a supplemental order on November 20, expanding the scope of its Fact Finding 29 Investigation into the impacts of COVID-19 on the maritime supply chain. The order authorizes FF29 to investigate ocean carrier alliances calling on the Ports of Long Beach, Los Angeles, and New York/New Jersey. The investigation will seek to determine if these alliances are employing policies and practices related to detention and demurrage, container return, and container availability for U.S. export cargoes that violate the Shipping Act.