# December Legislative and Regulatory Report

## LEGISLATIVE

### Lawmakers Scramble to Pass FY21 Appropriations and COVID Relief Package

Following a string of Continuing Resolutions to keep the government funded through December, on December 21 Congress transmitted to the President the $1.4 trillion FY 2021 appropriations package combined with $900 billion in COVID-19 relief. Despite Senate and House leaders reaching an agreement on the amounts for all 12 appropriations bills in late November, the revitalized push for emergency relief funding in response to COVID-19 delayed efforts to finalize the package. After about a week of protesting the legislation, saying the relief portion did not go far enough to help struggling Americans, the President signed the bill on December 27.

The $1.4 trillion in regular appropriations will provide government funding through the end of FY21 on September 30, 2021. Included in the package is $25 billion in discretionary appropriations for the U.S. Department of Transportation. Consistent with FY20 levels, the TIGER/ BUILD program will receive $1 billion. The Port Infrastructure Development Grant Program will receive a small boost over FY20 levels, increasing from $225 million to $230 million (the program saw an all-time high in its first year, FY19, when it received $292 million). For the second consecutive year, the Consolidated Rail Infrastructure and Safety Improvements program received an increase. While the program received $325 million in FY20, it will receive $375 million in FY21. The Joint Explanatory Statement encourages the Secretary to provide a Federal cost-share up to 80 percent for projects that facilitate intermodal connections.

The law also contains a handful of tax extenders, including a provision making permanent the 45G short line railroad tax credit at a rate of 40 percent (it will remain at 50 percent through the end of FY22).

Also included is a directive for FMCSA to analyze the “real world effects” of the September 29, 2020 Hours of Service rule by comparing safety data, including but not limited to: the number of crashes, crash type, number of fatalities categorized by occupant type, number of serious injuries, the rate of involvement that large trucks have accidents, and the time of day and on what type of roadway the accident occurred. FMCSA will need to compare this information to data collected prior to September 29, 2020. FMCSA must report the results of this analysis annually in the Congressional budget request and post the analysis on the agency's website.

The law also includes $45 billion in emergency transportation aid: $16 billion for passenger air carriers and air carrier contractors; $14 billion for mass transit; $10 billion for State Departments of Transportation; $2 billion for airports and airport concessionaires; $2 billion for bus companies; and $1 billion for AMTRAK.

The Water Resources Development Act of 2020 was also folded into the law. Most notably, this law includes Harbor Maintenance Trust Fund reforms and marks the first time that spending from the HMTF balance will be permitted. In FY21, $500 million is authorized to be withdrawn from the $9.3 billion HMTF balance and invested in navigation maintenance projects. The permitted drawdown will increase by roughly $100 million annually through FY30, when it tops out at $1.5 billion annually.

The COVID-19 relief measure totals $900 billion to support vaccine distribution, food assistance programs, and financial assistance for small businesses and unemployed Americans. Notably, it will include direct payments of $600 to qualifying individuals and $284 billion for the Paycheck Protection Program loans, Second Draw loans, and Minority Business Development Agency programs.

### President Vetoes Fiscal Year 2021 National Defense Authorization Act; Congress Poised to Override his Veto

In the final days of his presidency, Congress is likely to produce a veto override on the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021. This would mark President Trump's first – and only – veto override. The NDAA passed the House and Senate with veto-proof majorities, although President Trump voiced strong objections to the legislation. His concerns center on two points: first, the bill would require the military to rename bases currently named after Confederate soldiers, and second, because the proposal would not repeal legal protections for social media companies.

The Senate passed the NDAA on December 11, following passage in the House of Representatives on December 8. Both chambers passed the legislation with a veto-proof majority, meaning that President Trump's December 23 veto forced the proposal back to Congress. On December 28, the House of Representatives again passed the measure; the Senate is expected to pass the legislation a second time on January 2, 2021.

Among many other provisions, the bill reauthorizes both the Coast Guard and the Maritime Administration. It establishes an emergency grant program, to be run by MARAD, that would allow MARAD to distribute relief funding to state entities and other eligible maritime supply chain organizations impacted by the pandemic, natural disasters, or other national emergencies. Further, the NDAA amends MARAD's Port Infrastructure Development Grant program by reducing the set-aside for small projects from 25 percent to 18 percent.

The bill also authorizes the Federal Maritime Commission programming and operations in addition to creating a National Shipper Advisory Council within the FMC.

Of note, the NDAA requires the Department of Homeland Security to submit a plan for implementing the use of non-intrusive inspection systems on all commercial and passenger vehicles and freight rail entering the United States via land border.

## REGULATORY

### OCEMA Motions for Leave to Appeal IMCC Claims

In August, the Intermodal Motor Carrier Conference's filed a formal complaint with the Federal Maritime Commission alleging that Ocean Carrier Equipment Management Association denied trucking companies chassis choice and inflated prices for the use of chassis at ports across the country, resulting in $1.8 billion in overcharges within the past three years. In November, the FMC denied the respondents' motion to dismiss, and as a result, OCEMA, Consolidated Chassis Management, and 10 international ocean carriers motioned for leave to file an interlocutory appeal. On December 7, 2020, FMC's designated Administrative Law Judge granted an extension of time for respondents to appeal portions of the claims related to subject matter jurisdiction and failure to join the necessary parties.

In the appeal, respondents argue Judge Wirth inaccurately applied legal standards to prove the FMC's subject matter jurisdiction in favor of IMCC's case. Specifically, ocean carriers allege the judge cited the facial challenge of the Federal Rule of Civil Procedure to assert subject matter jurisdiction, wherein the factual challenge should have been applied. In cases where the factual challenge is applied, the Commission must examine whether subject matter exists in the case instead of determining whether it is sufficiently alleged. Further, ocean carriers argue the FMC lacks authority to regulate trade associations such as IMCC, noting FMC has engaged in only two cases related to motor carriers.

Ocean carriers appeal the complainant cannot join third parties "without whom relief cannot be granted." According to respondents' appeal, IMCC's request for relief contradicts itself by suggesting respondents are the sole proprietors of merchant haulage, then later alleging the source as the contracts between ocean carriers and chassis providers. Should the Commission find the current practices are unlawful and terminate these contracts, ocean carriers argue chassis availability and carrier haulage would be significantly undermined.

Respondents request the Administrative Law Judge stay the legal process pending the outcome of the appeal.

### President-elect Biden taps former presidential candidate Pete Buttigieg to Lead Department of Transportation

On December 16, President-elect Biden and Vice President-elect Harris announced former South Bend, Indiana Mayor Pete Buttigieg as their nominee for Secretary of

Transportation. A nod to the integral role President-elect Biden would like infrastructure to play in economic recovery, he said of the nomination, "we selected Pete for Transportation because the department is at the intersection of some of our most ambitious plans to build back better."

In remarks following his appointment, Buttigieg said he'd like infrastructure week to be "associated with results and never again to be a punchline."

As a Democratic presidential candidate, Buttigieg unveiled his own $1 trillion infrastructure proposal, which contained portions of his climate change plan, such as incentivizing clean energy deployment and achieving zero-emissions by 2035. His plan also prioritized road and bridge improvements, existing grant programs (such as BUILD/ TIGER), and moving to a new user-fee system (such as vehicle miles traveled) to achieve Highway Trust Fund solvency. Like all cabinet secretary nominations, Buttigieg will sit before the Senate for a nomination hearing when the 117th Congress convenes.