



April Legislative and Regulatory Report

LEGISLATIVE

Biden-Harris Administration, Senate Republicans Unveil Differing Visions for Infrastructure Investment

Delivering on his campaign promise, President Biden in late March announced the American Jobs Plan and Made in America Tax Plan, proposing a \$2.3 trillion investment to improve the nation's infrastructure and spur job creation. The American Jobs Plan recommends \$571 billion in funding over five years for transportation infrastructure in addition to existing federal funding and programs. This proposed investment would include: \$115 billion to improve roads and bridges; \$80 billion to support passenger and freight rail; \$17 billion for inland waterways, coastal ports, land ports of entry, and ferries; \$20 billion for highway safety improvements. It also recommends \$44 billion to accelerate "transformative projects" through research and competitive grant programs. This investment would include an additional \$5 billion for the BUILD/RAISE grant program, \$3 billion for the INFRA program, and \$25 billion for a new program to advance transportation "megaprojects."

Additionally, the plan calls on Congress to pass the Protecting the Right to Organize Act and recommends a \$48 billion investment in workforce development and worker protection, including "funding to strengthen the capacity of our labor enforcement agencies to protect against discrimination, protect wages and benefits, enforce health and safety safeguards, strengthen health care and pensions plans, and promote union organizing and collective bargaining." The Administration seeks to fund the investments outlined in the American Jobs Plan within the next 15 years through corporate tax increases included in the Made in America Tax Plan.

In response to the American Jobs Plan, Senate Republicans, led by Environment and Public Works Ranking Member Capito (R-WV), released their own \$568 billion counterproposal on April 22. The smaller, more targeted package is focused primarily on what is considered traditional transportation infrastructure and calls for funding provided by the Highway Trust Fund, rather than the tax provisions included in the Administration's plan. The proposal calls for user fees that account for electric vehicle drivers to ensure all road users contribute to HTF revenue, though further details have not yet been announced. Republicans also suggest unused funds from COVID relief legislation be repurposed for infrastructure investments. Notably, this proposal incorporates current baseline funding levels into its recommended amounts whereas the American Jobs Plan states all investments would be added to baseline spending.



Truck Parking Legislation Introduced in Congress

Rep. Bost (R-IN) reintroduced the Truck Parking Safety Improvement Act in the House of Representatives on March 5. The bill would create a grant program to fund the construction of new rest areas and truck parking facilities and convert existing weigh stations and closed rest areas into truck parking areas. The legislation directs USDOT to reserve \$755 million in transportation formula funding over the next five years for truck parking improvements, ranging from \$125 million in fiscal year 2022 to \$175 million in 2026.

The Owner Operator Independent Drivers Association assisted in developing the Truck Parking Safety Improvement Act and sent a letter to Secretary Buttigieg on April 21 emphasizing its support for the bill. The letter urged the Administration to include dedicated funding for truck parking in the American Jobs Plan, citing findings from the 2019 Jason's Law Survey demonstrating that truck parking shortages are still widespread. Other stakeholders that support the legislation include the American Trucking Associations, American Highway Users Alliance, and the National Association of Small Trucking Companies.

H.R. 2187 has five bipartisan cosponsors and was referred to the House Committee on Transportation and Infrastructure.

REGULATORY

Appeals Court Determines AB5 Applies to Trucking Industry

In 2019, the California legislature passed Assembly Bill 5, codifying the stringent ABC test for worker classification into state law. The legislation was criticized by many trucking industry groups as well as organizations representing rideshare companies and freelancers as it was widely considered to limit the ability of workers to be classified as independent contractors. Accordingly, the California Trucking Association filed a lawsuit against the state of California challenging AB 5.

CTA stated that the ABC test assumes nearly all truck drivers are employees, placing the burden of proof on carriers if they wish to dispute this classification. They further assert that the three-pronged test would dismantle the owner-operator model, forcing motor carriers in California to switch to an employee-only model or discontinue their business in the state. The lawsuit argued that the ABC test contradicts the Federal Aviation Administration Authorization Act, which prohibits states from imposing laws on motor carrier prices, routes, and services, and is therefore preempted by federal law. Shortly after AB 5's effective date in January 2020, the U.S. Southern District Court of California granted a preliminary injunction temporarily exempting motor carriers from AB 5 enforcement. The state of California and the International Brotherhood of Teamsters, acting as an intervenor on behalf of the state, appealed the decision to the U.S. Court of Appeals for the 9th Circuit.



On April 28, 2021, the appeals court – in a 2-1 decision – ruled that AB 5 is not preempted by the FAAAA and reversed the lower courts preliminary injunction. The court determined that AB 5 is a “generally applicable law” as it does not single out motor carriers but instead regulates numerous different industries. It further held that AB 5’s provisions impact the relationship between a motor carrier and its workforce but are not “significantly related” to motor carrier rates, routes, or services. Therefore, the court concluded AB 5 is not preempted by the FAAAA as applied to the trucking industry. Judge Mark Bennett disagreed, stating in his dissenting opinion that AB 5 “both affects motor carriers’ relationship with their workers and significantly impacts the services motor carriers are able to provide to their customers, and it therefore is pre-empted as applied to California Trucking Association’s members.”

According to legal experts, the preliminary injunction will not be lifted immediately. Parties will have 14 days to seek a rehearing and up to 150 days to petition the U.S. Supreme Court. CTA has indicated they are exploring further options for legal action.

Canadian Class I Railroads Vie for Acquisition of KCS

On March 23, Canadian Pacific Railway Company and the Kansas City Southern Railway Company notified the Surface Transportation Board that the two railroads had entered into a merger agreement and intend to file a formal application for acquisition. Under the \$29 billion proposed merger, which STB would consider a “major” transaction as both entities are Class I railroads, CP would acquire KCS to establish the first freight railway connecting the United State, Canada, and Mexico. The proposal marks the first major transaction to seek STB approval in over 20 years.

In 2001, STB implemented new, more stringent requirements for the review of Class I railroad mergers and subsequently granted a waiver to allow transactions involving KCS to remain subject to the previous regulations. STB reasoned that due to its comparatively smaller size and annual revenue, mergers between KCS and another Class I carrier would not have the same impact as other Class I transactions. In their pre-filing notice, CP and KCS stated their intention to proceed with an application under the accelerated timeline pursuant to this waiver.

Several stakeholders objected to the use of the waiver, arguing that KCS has grown substantially since the waiver was granted and the merger would therefore have a more significant impact on the rail industry. Six trade associations submitted a joint motion to revoke the waiver, and several Class I carriers, including Norfolk Southern Railway Company and BNSF Railway, filed comments urging STB to review the proposed transaction under current merger regulations for Class Is.

In a decision served on April 23, STB determined the KCS waiver should apply in the proposed transaction. STB noted that, if approved, the combined railroad would remain the smallest Class I based on U.S. operating revenues. STB further concluded that a merger of the CP and KCS networks would result in the fewest overlapping routes when compared to a merger between KCS and any other Class I carrier, limiting concerns regarding reduced competition. Board Member Pribus dissented, arguing the decision



was inconsistent with STB's responsibility to review major mergers and protect the public interest.

On April 20, the Canadian National Railway Company submitted a competing proposal to acquire KCS, indicating the existing merger agreement between CP and KCS permits KCS to consider and accept "superior alternative transaction proposals" prior to a shareholder vote on the proposed CP/KCS merger. In its notice of intent, CN asserted that current Class I merger regulations should apply to any transaction involving KCS. CN stated that it is prepared to submit an application under these requirements but noted that any waiver granted to the proposed CP/KCS merger should also apply to a CN/KCS transaction. In response to CN's proposal, CP submitted a letter to STB arguing that a CN/KCS merger would reduce competition and could lead to further "downstream consolidation." Should CN's proposal advance, CP urges STB to consider these concerns and thoroughly review the proceeding under post-2001 merger regulations.

USITC Makes Affirmative Final Determination in Investigation of Chassis from China

Following a petition submitted by the Coalition of American Chassis Manufacturers in 2020, the United States International Trade Commission and the Department of Commerce launched separate investigations pertaining to imported chassis from China. Last month, Commerce issued a final affirmative determination that countervailable government subsidies are being provided to Chinese chassis manufacturers. On April 13, USITC concluded its countervailing duty investigation and unanimously voted to issue a final affirmative injury determination, finding that imported chassis from China have adversely impacted U.S. chassis producers.

As a result of USITC's affirmative determination, Commerce will now issue a countervailing duty order at a rate of 39.14 percent that will remain in effect for a minimum of five years. During this time, stakeholders may request an administrative review of the duty rate once per 12-month period. After five years, Commerce will conduct a sunset review to determine whether the order should remain in place. USITC's public report will be available by May 27, 2021.

The concurrent antidumping duty investigation, assessing whether Chinese chassis are being sold in the United States at less than fair value, remains pending. In March, Commerce made a preliminary affirmative determination and recommended an antidumping duty rate of 188.05 percent. Commerce will make a final determination in May. Subsequently, USITC will finalize its investigation at which time Commerce will likely issue an antidumping duty order.

USDOT Solicits Applications for FY21 RAISE and PIDP Grants

On March 29, the U.S. Department of Transportation's Maritime Administration issued its fiscal year 2021 notice of funding opportunity for the Port Infrastructure Development Program. As directed by Congress, the NOFO makes \$230 million in total funding available, with \$205 million reserved for grants benefitting coastal seaports and Great Lakes ports and \$41.4 million set aside for small projects at small ports.



This year, USDOT added new selection criteria to consider how projects address climate change and racial equity. USDOT will evaluate projects based on the extent to which they: affect the movement of goods; support economic vitality at the national and regional level; address climate change and environmental justice impacts; advance racial equity and reduce barriers to opportunity; and leverage federal funding to attract non-federal sources of infrastructure investment.

Applications for PIDP grants are due July 30, 2021.

USDOT also released the FY21 NOFO for the BUILD discretionary grant program, now known as the Rebuilding American Infrastructure with Sustainability and Equity program. Eligible projects include: highway and bridge improvements; freight rail; port infrastructure investments; and intermodal projects. A total of \$1 billion in funding is available for this round of awards. A maximum of \$30 million will be awarded for planning grants – of this amount \$10 million must be allocated to projects located in or directly benefitting areas of persistent poverty. Up to \$200 million may be used for subsidy and administrative costs of projects receiving credit assistance under the TIFIA or RRIF loan programs.

The FY21 Appropriations Act required USDOT to continue using the selection criteria contained in the FY17 NOFO. USDOT has met this requirement by maintaining the same criteria but has updated some of their descriptions. As with the PIDP NOFO, most of these changes provide for increased environmental and equity considerations as well as labor provisions. According to the NOFO, USDOT will prioritize projects that allocate at least 40 percent of resources and benefits toward low-income and disadvantaged communities.

Applications are due July 12, 2021 and award recipients will be announced by November 22, 2021.