



May Legislative and Regulatory Report

LEGISLATIVE

Congress Introduces Surface Transportation Reauthorization Proposals

On May 20, Rep. Graves (R-MO) introduced a surface transportation reauthorization proposal, the STARTER Act 2.0, in the House. The bill would authorize approximately \$400 billion in funding over five years, a 32 percent increase over current FAST Act levels. The STARTER Act was first introduced in the 116th Congress. Changes to the version introduced last year include a provision to permanently authorize the RAISE (formerly known as TIGER and BUILD) grant program, which has never been authorized, at \$1 billion per year. In addition to providing extensions for existing federal surface transportation programs, the legislation also creates a set-aside from the freight formula program for truck parking grants, a pilot program to increase the volume and reliability of safety data in the CSA system by conducting remote audits and assigning safety ratings to commercial motor carriers (safety ratings under the pilot program would not be published), and an apprenticeship program for 18-20-year-old CMV drivers to operate in interstate commerce.

The Senate Environment and Public Works Committee unanimously approved a surface transportation reauthorization bill on May 26. The bipartisan legislation, titled the Surface Transportation Reauthorization Act of 2021, is modeled after the America's Transportation Infrastructure Act, a reauthorization bill that was unanimously approved by the Committee in the 116th Congress but did not advance. The five-year, \$304 billion proposal represents a 34 percent increase in funding for road, highway, and bridge programs above FAST Act levels. The EPW bill increases funding for the INFRA grant program and the freight formula program and raises the caps on non-highway/multimodal freight projects for both programs. Currently, up to 10 percent of freight formula funding may be awarded to multimodal projects and an aggregate of \$500 million over five years in INFRA funding. This legislation raises these caps to 30 percent of total program funding, making approximately \$2.15 billion available for multimodal projects under the freight formula program and \$1.44 billion under INFRA over five years. Other key provisions include a \$50 million grant program to reduce emissions at port and intermodal port transfer facilities and a national pilot program to test the use of a vehicle-miles-traveled fee.

Jurisdiction over surface transportation funding and policy is split between multiple Senate committees, which each must draft their respective titles to advance a complete reauthorization package to the Senate floor. In the House, the Transportation and Infrastructure Committee plans to mark up its forthcoming reauthorization bill on June 9. The current FAST Act extension expires on September 30, by which time either a full multi-year reauthorization or another short-term extension must be passed.



The White House and GOP lawmakers are currently engaged in negotiations over infrastructure investment. The Biden-Harris Administration unveiled the American Jobs Plan in March, calling for \$2.3 trillion in additive funding for infrastructure. Senate Republicans countered with the Republican Roadmap, a \$568 billion framework focused on traditional infrastructure that is inclusive of baseline funding. The White House proposed a smaller, \$1.7 trillion counteroffer on May 21 that was swiftly rejected by Republicans. On May 26, Senate Republicans responded with a proposed \$928 billion infrastructure package. Though Republicans and the Biden-Harris Administration have moved closer to agreement on the amount of funding in an infrastructure bill, there are still several key points of contention regarding the scope of the package and how to fund such an investment.

REGULATORY

KCS Enters Merger Agreement with CN

Kansas City Southern Railway Company accepted Canadian National Railway Company's merger proposal on May 21, terminating the merger agreement previously reached with Canadian Pacific Railway Company. The KCS board determined that CN's proposal was a "superior offer," and KCS and CN intend to file their application for merger by August 20. On May 17, STB issued a ruling that the current, more stringent merger rules for Class I railroads will apply to the CN/KCS transaction. These regulations, established in 2001, place a heavier burden on merger applicants to demonstrate that the proposed transaction is in the public interest. However, reasoning that merger impacts would be less significant due to its relative size, STB granted a waiver in 2001 allowing transactions involving KCS to proceed under the previous requirements. In its decision to revoke this waiver for the proposed CN/KCS combination, STB stated that the proposed merger raises several concerns that prompted the adoption of the current rules. STB was particularly concerned about the potential competitive impacts of a merger between two Class I railroads with overlapping routes and existing direct competition. STB also acknowledged stakeholder comments arguing that a CN/KCS transaction would have anti-competitive effects and all Class I mergers should be subject to the same review process. Furthermore, STB cited the fact that CN previously stated its intention to submit an application under the current requirements.

In the same decision, STB denied CN's April 26 motion for approval of the voting trust agreement without prejudice because the motion was incomplete. CN filed a renewed motion on May 18 requesting that STB adopt a procedural schedule for public comments on the voting trust agreement for its proposed merger with KCS. Additionally, CN addressed the stakeholder concerns outlined in STB's decision. CN emphasized that the proposed merger is pro-competitive and will yield public interest benefits. CN also pointed to stakeholder support for the proposed transaction. Moreover, the filing stated that the voting trust will allow KCS shareholders to receive the full value of their shares and protects against premature control of KCS. As part of its merger application, CN commits



to divesting KCS' 70-mile line between New Orleans and Baton Rouge, eliminating the only area of overlap between the CN and KCS networks and making the transaction end-to-end.

After KCS officially terminated its merger agreement with CP, CP submitted a letter notifying STB that it will continue preparing its application for a merger with KCS. The letter noted that STB approval of CN's voting trust agreement is a condition to the CN/KCS merger and stated that CP anticipates CN will fail to demonstrate that the use of its proposed voting trust is consistent with the public interest. If STB denies the use of the voting trust for the CN/KCS transaction, KCS would have the option to either re-negotiate a merger agreement with CN without use of a voting trust or enter into a new agreement with CP.

Final Affirmative Determinations Issued in Investigations of Chassis from China

On May 7, the U.S. International Trade Commission formally notified the Department of Commerce of its final affirmative determination in the countervailing duty investigation into chassis from China. USITC unanimously determined on April 13 that the domestic chassis industry is materially injured by imports of chassis that are being subsidized by the Chinese government. Commerce previously issued its final affirmative countervailing duty determination on March 22, concluding that subsidies were being provided to producers and exporters of certain chassis and subassemblies thereof at a rate of 39.14 percent.

Based on these affirmative final determinations by Commerce and USITC, Commerce issued a countervailing duty order on May 10. Commerce also amended its final determination with respect to chassis from China to correct a calculation error, revising the subsidy rate from 39.14 percent to 44.32 percent. Commerce directed U.S. Customs and Border Protection to assess countervailing duties and to continue suspending liquidation on chassis from China. Additionally, Commerce instructed CBP to require cash deposits equal to the net countervailable subsidy rates, determined to be 44.32 percent. In the concurrent antidumping investigation, Commerce issued a final affirmative determination that chassis and subassemblies thereof from China are being sold in the United States at less than fair value on May 17. Commerce concluded that, for the period between January 1 and June 30, 2020, the estimated weighted average dumping margin was 188.05 percent and the estimated weighted average dumping margin adjusted for export subsidies was 182.28 percent. Commerce typically adjusts the estimated weighted average dumping margin by the amount of domestic subsidy pass-through and export subsidies determined in a concurrent countervailing duty investigation. Commerce's countervailing duty investigation found that no adjustment for domestic subsidies was warranted. However, Commerce determined that export subsidies were being provided, and deducted export subsidies from the final margin and adjusted the estimated weighted average dumping margin to 177.05 percent.



USITC must make its final determination by June 25, and, if affirmative, Commerce will issue antidumping duty orders by July 2.

DOL Formally Withdraws Trump Administration's Independent Contractor Rule

The Department of Labor's Wage and Hour Division formally withdrew the Trump Administration's final rule on independent contractor status under the Fair Labor Standards Act on May 6. The final rule, originally published in January 2021, sought to revise the economic realities test used to determine worker classification, elevating two core factors above all others: the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss. After delaying the rule's effective date, DOL issued a notice of proposed rulemaking to withdraw the rule on March 12.

DOL received over 1,000 comments in response to its NPRM. Stakeholders in support of withdrawing the proposed rule filed comments asserting that the rule "would have facilitated the exploitation of workers reclassified or misclassified as independent contractors" if it took effect. Opponents of revoking the rule, including the Owner-Operator Independent Drivers Association and American Trucking Associations, expressed support for the elevation of two core factors in determining worker classification and noted the rule would have provided clarity and consistency by setting new standards that support the flexibility of independent contractors.

In its notice of withdrawal, DOL reasoned that the rule conflicted with the FLSA's text and purpose and could therefore cause confusion because it represents a departure from agency and judicial precedent. Specifically, DOL argued the rule's prioritization of two core factors contradicts previous court positions, which held that no single factor should determine worker status. Furthermore, DOL asserted that the FLSA defines "employ" to include "to suffer or permit to work." The Supreme Court has previously ruled that this definition intentionally rejects the common law control standard for determining employee status under the FLSA in favor of a broader scope of coverage. DOL argued that the independent contractor rule's elevation of control is contrary to the FLSA because it is too similar to the common law test, which the FLSA explicitly rejects. Additionally, DOL noted a narrower scope of coverage would result in some workers losing FLSA protections.

DOL concluded its decision by noting that it did not propose regulatory guidance to replace the independent contractor rule.