



June Legislative and Regulatory Report

LEGISLATIVE

Congress Considers Reauthorization Legislation

On June 10, the House Committee on Transportation and Infrastructure approved a five-year, \$547 billion surface transportation reauthorization bill by a vote of 38-26. The legislation, the INVEST in America Act, was first introduced in 2020. The bill includes \$343 billion for roads, bridges, and safety; \$109 billion for transit; and \$95 billion for passenger and freight rail. Key provisions include: a new grant program to improve truck parking; stronger rear underride guard standards and requires a study on side underride guards allowing USDOT to subsequently develop performance standards for such guards; safety standards for newly manufactured heavy-duty commercial motor vehicles equipped with automatic emergency braking systems; and a requirement that the Federal Motor Carrier Safety Administration conduct a review of hours of service requirements. Additionally, the package includes \$5.7 billion in earmarks. Since it was approved by the T&I Committee, the legislation has been updated to include provisions added by other House Committees with jurisdiction over surface transportation funding and policy. The INVEST in America Act passed the House on July 1 by a vote of 221-201, almost entirely along party lines.

Following the Senate Committee on Environment and Public Works' bipartisan approval of a reauthorization bill in May, the Senate Committee on Commerce, Science, and Transportation also approved its portion, the Surface Transportation Investment Act, on June 16. The legislation provides \$78 billion over five years for multimodal surface transportation, rail, freight, and safety programs and was approved by the Commerce Committee with broad bipartisan support by a vote of 25 to 3. The Surface Transportation Investment Act provides an average of \$1.2 billion annually for the INFRA grant program (in addition to funding already included in the EPW bill), \$1.5 billion annually for USDOT's BUILD/TIGER/RAISE grant program, and \$2 billion annually for the National Infrastructure Project Assistance Program – a new program focused on highway, rail, and intermodal freight megaprojects. The bill would also establish a new office of Multimodal Freight Infrastructure and Policy within USDOT and calls for updates to the National Freight Strategic Plan.

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.



Infrastructure Negotiations Yield a Compromise

Since the Biden-Harris Administration unveiled its \$2.3 trillion American Jobs Plan in March, the White House and bipartisan lawmakers have engaged in months-long negotiations to reach a compromise on infrastructure investment.

President Biden announced on June 24 that the White House and a bipartisan group of Senators struck a deal on an infrastructure framework. The agreed-upon investment provides \$579 billion in new spending above baseline, including \$109 billion for roads and bridges; \$66 billion for passenger and freight rail; \$49 billion for public transit; and \$15 billion for electric vehicle infrastructure.

This proposed investment will likely be paid for through heightened efforts by the Internal Revenue Service to reduce tax evasion by corporations and the wealthy, unused COVID-19 relief funds, and public-private partnerships and bonds. The framework is not expected to include an increase in the corporate tax rate or user fees, funding sources previously proposed by the Biden-Harris Administration and Republicans, respectively.

Senate Majority Leader Schumer (D-NY) and House Speaker Pelosi (D-CA) have indicated that they support the proposed investment but intend to pass it in conjunction with a larger package containing broader Democratic priorities included in the American Jobs Plan, such as social programs and environmental provisions. Both leaders and President Biden have stated they aim to pass this additional legislation through reconciliation to bypass the filibuster. Several Republicans spoke out in opposition, arguing the passage of these two separate pieces of legislation should not be dependent on one another. While President Biden initially stated he would not sign the bipartisan infrastructure bill unless it advanced along with the budget reconciliation bill, he later walked back these comments in response to Republican backlash.

REGULATORY

Ninth Circuit Upholds Enforcement of AB 5, CTA to Petition SCOTUS

In 2019, the California Trucking Association filed a lawsuit challenging the California state legislature's Assembly Bill 5, which codifies the ABC test for worker classification into state law. CTA asserted the ABC test assumes nearly all truck drivers are employees and would force motor carriers in California to switch from an owner-operator model to an employee-only model. CTA's lawsuit argued that the AB 5 is preempted by the Federal Aviation Administration Authorization Act, which prohibits states from imposing laws on motor carrier prices, routes, and services.

The U.S. Southern District Court of California granted a preliminary injunction temporarily exempting motor carriers from AB 5 enforcement in January 2020. The state of California



and the International Brotherhood of Teamsters, acting as intervenors in the case on behalf of the state, appealed the decision to the U.S. Court of Appeals for the Ninth Circuit, which ruled in a 2-1 decision on April 28 that AB 5 is not preempted by federal law. The court reversed the preliminary injunction, concluding that the ABC test is “generally applicable” and the law “does not bind, compel, or otherwise freeze into place the prices, routes, or services of motor carriers.”

CTA subsequently filed a petition with the Ninth Circuit Court of Appeals for an en banc hearing before a larger panel of judges, which was denied. After announcing its plans to appeal the decision to the U.S. Supreme Court, CTA filed a motion with the Ninth Circuit to keep the preliminary injunction on AB 5 enforcement in place. The court granted CTA’s request for a stay, and the injunction against enforcement of AB 5 for motor carriers will remain in place as CTA petitions the Supreme Court. CTA has 150 days to file its petition with the Supreme Court for a writ of certiorari. If the Supreme Court chooses not to hear the case, the injunction will be lifted immediately and AB 5 will be applied to motor carriers in the state of California. According to reports, CTA’s Supreme Court review is due on or before November 18, 2021.

USDOT to Award \$905 Million in FY21 INFRA Funds

The U.S. Department of Transportation announced the proposed award recipients for the fiscal year 2021 round of the INFRA grant program. For this round of INFRA, USDOT reviewed 157 eligible applications from 42 states totaling approximately \$6.8 billion in funding requests. Of these applicants, USDOT awarded INFRA grants to 24 projects across 18 states.

The FAST Act and its subsequent extension enacted by Congress last year set an aggregate limit of \$600 million for grants awarded to non-highway projects for fiscal years 2016-2021. Approximately \$146 million remained available before the latest awards were announced. Among the selected projects, USDOT provided grants to six multimodal freight projects for a total of nearly \$140 million. These awards include: \$46.8 million for the Georgia Ports Authority to construct a new inland container port along the I-85/I-985 corridor, which will be linked with the Port of Savannah by direct intermodal freight rail service; \$49 million awarded to the Philadelphia Regional Port Authority to construct a new multi-use berth that will be used to accommodate roll-on/roll-off vessels; and Palmetto Railways will be awarded \$25 million to build new track and related facilities to connect the Camp Hall Commerce Park in South Carolina to the CSX rail network.

The INFRA awards are subject to a 60-day review period by Congress before the funds can be obligated.



IMCC Seeks Documents from IEPs in Case Against Ocean Carriers

In August 2020, the Intermodal Motor Carriers Conference filed a formal complaint with the Federal Maritime Commission alleging that Ocean Carrier Equipment Management Association, Consolidated Chassis Management, and 10 international ocean carriers 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.

On May 14, IMCC filed a motion to compel several Intermodal Equipment Providers to produce documents in response to subpoenas. The IEPs responded with a joint filing of opposition and counterstatements to IMCC's arguments. The IEPs asserted that they are not parties to the complaint and that the motion seeks to obtain confidential business information. On June 1, FMC ruled that IMCC's motion to compel discovery was granted in part and denied in part. FMC granted IMCC's requests for: IEPs' historical factual data; discoverable factual data as maintained in the ordinary course of business; IEPs' submissions to the Department of Justice; and documents regarding the Pool-of-Pools box rules and participation rules. FMC denied IMCC's requests for: IEPs' responses to requests for proposals from ocean carriers; IEP proposals to ocean carriers regarding those ocean carriers' withdrawal from CCM-managed chassis pools; IEP analyses of chassis pricing for carrier haulage movements and the effect of such pricing for merchant haulage movements; and confidential strategy memoranda, presentations, business plans, and analysis.

After the IEPs filed a May 27 motion requesting changes to the amended confidentiality order, IMCC and the IEPs met and jointly agreed to request the entry of a Second Amended Order of Confidentiality. FMC granted this joint request on June 9, determining that the amended schedule proposed by the parties was reasonable. Per the accepted schedule, parties must complete document production by August 2, 2021, and must complete fact depositions and file a joint stipulation of facts by September 17, 2021.

In the same ruling, FMC stated that the ocean carriers will file a motion to compel if the parties are unable to resolve a dispute regarding whether they had agreed to phased discovery with a geographic limitation of four areas. IMCC limited the scope of its requested initial discovery from the IEPs to four geographic areas, but the ocean carriers objected to IMCC's interpretation of the geographic areas. The ocean carriers asserted that the limitation applied to the priority document production served on April 2 but does not apply to all discovery in the proceeding. Furthermore, the ocean carriers argue that: this limitation should not apply to non-party discovery; geography is not a mutually useful limitation on the scope of discovery; and this restriction to four geographic areas "would constitute a material limitation on Respondents' right to discoverable information pertaining to other relevant ports and terminals beyond the four which have been



selected” by IMCC. The motion to compel has not yet been filed, so FMC will not issue a binding order on this issue.

CP Requests Access to KCS Information, STB Adopts Procedural Schedule to Review Voting Trust

On May 21, Kansas City Southern Railway Company terminated its merger agreement with Canadian Pacific Railway Company in favor of Canadian National Railway Company’s merger proposal. CP subsequently announced that it will nonetheless prepare an application to acquire KCS and filed a petition for expedited declaratory relief on May 28. CP requested that the Surface Transportation Board affirm that KCS has a continuing obligation to provide CP with the information needed to prepare, file, and defend its forthcoming application and that CP has a continuing right to access the information KCS provided to CP under the protective order established between the parties in April. STB denied CP’s request for an expedited reply deadline, concluding that CP did not provide a “persuasive reason” for an accelerated timeline.

KCS replied to CP’s petition on June 16, asserting that CP no longer has a right to access confidential information under the April merger agreement. On June 21, CP filed a reply, arguing that: KCS and CN seek to “handicap” any competing applications by requiring CP to use only publicly available information for its merger application; CP’s continued access to information would not pose an undue burden on KCS; and requiring CP to start over and file an “inconsistent application” would be burdensome to CP and would not be in the public interest. CP concluded its response by urging STB to grant its request for a declaratory order confirming that CP may have continued access to information from KCS as it prepares its merger application. KCS filed a motion two days later to strike CP’s reply. KCS noted that STB rules prohibit replies to a reply and the arguments in CP’s response should have been presented to STB earlier. Additionally, KCS cited several prior cases in which STB struck replies to a reply. Finally, KCS requested that if STB does not strike CP’s filing, STB issue a procedural order allowing KCS to file an additional response within five days.

On June 8, STB issued a decision directing KCS and CN to file specified documents for review. Under current merger rules, applicants are required to submit the written opinions of financial advisors, the debt commitment letters referenced in the merger agreement, and certain sections of the company disclosure schedules. In the same decision, STB granted CN’s May 18 motion to adopt a procedural schedule and established a comment period for the motion to approve the proposed voting trust agreement. STB had previously denied CN’s April 26 motion for approval of the voting trust agreement without prejudice because the motion was incomplete. Comments on the proposed use of a voting trust in the CN/KCS transaction were due June 28 and replies to the comments are due July 6.