July Legislative and Regulatory Report

LEGISLATIVE

Senate Considers Bipartisan Reauthorization & Infrastructure Legislation

After weeks of negotiations, the Senate is expected to soon vote on an infrastructure bill produced by a bipartisan group of 21 Senators and the White House. On July 28, the Senate held a procedural cloture vote to move forward with consideration of the legislation. In a 67-32 vote, 17 Republicans joined all 48 Democrats and two Independents to approve the motion. The first official draft of the legislative text, titled the Infrastructure Investment and Jobs Act, was released on August 1. The IIJA was introduced as a substitute amendment to the House INVEST in America Act, which passed the House, mostly along party lines, in July.

The package incorporates a complete surface transportation reauthorization and includes $550 billion in new spending above baseline over five years, paid for by unspent COVID-19 relief funds, $ revenue generated from projected economic growth, and unused unemployment benefits, among other revenue sources. The five-year package includes: $66 billion for passenger and freight rail, including $5 billion for the CRISI grant program and $3 billion for grade crossing safety improvements; $17 billion for ports and waterways, including $2.25 billion for PIDP grants and $50 million for a new program to reduce truck emissions at ports. The Infrastructure Investment and Jobs Act also provides funding for key programs with multimodal freight eligibility, allocating $7.15 billion in freight formula funding, $8 billion for the INFRA discretionary grant program, and $7.5 billion for RAISE/TIGER/BUILD.

The legislation contains several sections related to the trucking and intermodal industries. Among these are provisions: to establish a Truck Leasing Task Force to study truck leasing agreements, including those specific to drayage drivers, and their impacts on compensation, the trucking workforce, and safety; require that newly manufactured trailers and semitrailers be equipped with rear underride guards and require additional studies into side underride guards, including consideration of the “unique structural and operational aspects” of intermodal chassis, and if warranted, develop side underride guard standards; establish an apprenticeship pilot program for commercial driver’s license holders under 21 years old to participate in interstate commerce; and automatic emergency braking systems requirements.

Other key provisions include the creation of a new National Infrastructure Project Assistance grant program focused on transportation megaprojects. The program, funded at $5 billion over five years, is fully multimodal and provides broad eligibility for various large infrastructure investment projects. The IIJA also establishes a new Office of Multimodal Freight and Infrastructure Policy within USDOT to oversee national and state freight policy and administer multimodal funding programs.

The Senate will soon hold a cloture vote on the substitute amendment, setting up a final vote on the bill. If the bill garners the required 60 votes to pass in the Senate, the legislation will be sent back to the House as amended. The House could then hold a vote on the bill as amended, submit its own amendment(s) back to the Senate, or request a conference committee. House Transportation and Infrastructure Chair DeFazio (D-OR) has called for the House to facilitate continued negotiations to incorporate House Democratic priorities, such as increased environmental provisions, within the final package. House Majority Leader Hoyer (D-MD) has similarly advocated for a conference between the House and Senate to resolve differences between the House-passed INVEST in America Act and the Senate's Infrastructure Investment and Jobs Act. Moreover, the bill represents the first phase of President Biden's sweeping infrastructure agenda, to be followed by a broader $3.5 trillion Democrat-only "human infrastructure" measure that will advance through reconciliation containing investments in childcare, education, health care, and climate change mitigation. House Speaker Pelosi has indicated she does not intend to bring the bipartisan bill to the House floor for a vote until the Senate advances the second, larger bill.

FY22 THUD Appropriations Bill Passed by House

On July 29, the House passed a minibus comprised of seven fiscal year 2022 appropriations bills by a 219-208 vote along party lines. Among these was the House Appropriations Subcommittee on Transportation, Housing, and Urban Development's fiscal year 2022 appropriations bill, introduced on July 11. The legislation provides $105.7 billion in total budgetary resources for USDOT, a $19 billion increase over FY21 levels.

Along with annual funding for various programs, the Appropriations Committee's report provided several recommendations to USDOT and independent transportation agencies. Among other provisions, the Appropriations Committee directs the Federal Maritime Commission to brief the House and Senate Committees on Appropriations, the House Transportation and Infrastructure Committee, and the Senate Committee on Commerce, Science, and Transportation on the progress of Fact Finding 29, FMC's investigation to identify operational solutions to supply chain challenges caused by the coronavirus pandemic. The Committee also advises the National Highway Traffic Safety Administration to work with relevant experts and stakeholders to facilitate the deployment and adoption of rear and side underride guards. It directs NHTSA to implement GAO recommendations on truck underrides and complete a rulemaking to improve rear guards, as well as provide quarterly briefings for the House and Senate Committees on Appropriations on its progress to respond to the grant of petition for rulemaking. Furthermore, the Committee encourages USDOT to form an advisory committee on truck underrides. Finally, the Committee repeats its previous direction that FMCSA annually analyze hours of service regulations and report on the results.

The bill will now proceed to the Senate for consideration. The legislation is intended to correspond with the INVEST in America Act passed by the House earlier this month. If Congress passes a surface transportation bill, the appropriations legislation may require changes to correspond with the final law.

REGULATORY

White House Issues Executive Order to Boost Competition

On July 9, President Biden signed an Executive Order on Promoting Competition in the American Economy. The directive includes 72 actions and recommendations for more than a dozen federal agencies and is intended to target corporate consolidation and anticompetitive practices in a variety of American industries. For example, the EO seeks to tackle consolidation within the freight rail sector by encouraging the Surface Transportation Board to consider rulemakings to strengthen regulations pertaining to reciprocal switching agreements and address other relevant matters of competitive access, such as bottleneck rates and interchange commitments. Furthermore, the White House recommends that STB vigorously enforce new on-time performance requirements to prevent passenger rail service delays. The directive further instructs STB to review railroad mergers with increased scrutiny and work closely with the Department of Justice on these matters, a provision that could have implications for Canadian National's proposed acquisition of Kansas City Southern.

In response to the EO, STB Chairman Oberman released a statement echoing the Administration's concerns about consolidation in the rail industry and pledging to cooperate with the Administration's efforts to spur competition. Additionally, Chairman Oberman sent letters to all Class I railroads expressing concern about congestion in the international intermodal supply chain and container storage fees on July 22. The letter requests that Class I carriers provide STB with information about congestion at key container terminals and their policies and practices for assessing storage charges. STB hopes that this data will help the agency better understand the magnitude of container congestion, the purpose and impact of storage fees, and whether receivers that lack the ability to facilitate the release of their containers are afforded relief.

The EO also aims to target market concentration in the maritime shipping industry, which has consolidated into a small number of foreign-owned lines and alliances. The Biden-Harris Administration encourages the Federal Maritime Commission to heighten enforcement of the Shipping Act against unreasonable detention and demurrage practices. Moreover, the directive calls on FMC to seek recommendations on rulemakings to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions. FMC Chairman Maffei applauded President Biden's efforts ensure fair competition across the supply chain and reiterated the FMC's commitment to enforcing the interpretive rule on reasonable detention and demurrage regulations and practices.

Shortly after the White House published the EO, FMC and the Department of Justice Antitrust Division signed an interagency Memorandum of Understanding to promote increased cooperation and communication between the two agencies as they carry out the Administration's recommendations. The MOU establishes a framework for FMC and the Antitrust Division to engage in regular discussion and share relevant information as they carry out their respective oversight and responsibilities with the goal of promoting competition in the ocean liner shipping industry.

FMC Commissioner Issues Interim Recommendations for Fact Finding 29

In March 2020, the Federal Maritime Commission voted to establish Fact Finding 29, an investigation to identify operational solutions to cargo delivery system challenges related to COVID-19. In the first phase of Fact Finding 29, FMC established innovation teams comprised of various stakeholders in the ocean freight delivery system, including ocean carriers, railroads, public port authorities, marine terminal operators, beneficial cargo owners, ocean transportation intermediaries, drayage trucking companies, longshore labor representatives, and chassis providers. During the second phase, the investigation created regional innovation teams to discuss challenges pertaining to specific port ranges or major ports. Due to the rapid increase in trade volumes in the fall of 2020, FMC paid particular attention to container return practices, demurrage and detention practices, and practices related to container availability for U.S. exports in the investigation's third phase.

In her role as the Fact Finding Officer for Fact Finding 29, FMC Commissioner Dye on July 29 presented interim recommendations to address inefficiencies and congestion in the freight delivery system caused by COVID-19. The eight interim recommendations are aimed at minimizing barriers to private party enforcement of the Shipping Act, clarifying FMC and industry processes, encouraging shippers, truckers, and other stakeholders to assist FMC enforcement efforts, and bolstering the Office of Consumer Affairs & Dispute Resolution Services' ability to facilitate fair and fast dispute resolution.

Commissioner Dye recommends that FMC broaden the anti-retaliation provision within the Shipping Act to apply to all regulated entities to minimize barriers to private party efforts to deter unlawful conduct. Currently, the provision only applies to shippers. Additionally, she suggests that Congress authorize FMC to order double reparations for certain detention and demurrage violations and to order refund relief in addition to or instead of civil penalties in enforcement proceedings. Commissioner Dye also encourages FMC to issue a policy statement on retaliation, attorney fees, and representational complaints; revise its website to improve website visitors' experience and make clearer distinctions between the processes for providing information to the Bureau of Enforcement, requesting assistance from CADRS, and filing a small claims or non-small-claims complaint; hold a webinar detailing FMC processes for private party complaints; and designate an Export Expert in CADRS to better address export-related challenges. Finally, Commissioner Dye recommends that FMC issue an advance notice of proposed rulemaking seeking industry views on whether FMC should require common carriers and marine terminal operators to include certain minimum information on demurrage and detention billings and adhere to certain practices regarding the timing of demurrage and detention billings. This ANPRM would be similar to the final rule issued by FMC in April 2021 on requirements for Class I demurrage invoices.

Final Affirmative Determinations Issued in Investigations of Chassis from China

On July 1, the International Trade Commission notified the Department of Commerce of its affirmative final determination that the U.S. industry is materially injured by imports of chassis from China being sold in the United States at less than fair value. Commerce issued its final affirmative determination in its concurrent investigation on May 17.

In response to USITC's affirmative final determination, Commerce issued an antidumping duty order on chassis and subassemblies thereof from China on July 8. Commerce will direct U.S. Customs and Border Patrol to assess antidumping duties equal to the amount by which the normal value of the merchandise exceeds the export price on unliquidated entries of chassis from China. CBP will also require cash deposits equal to the estimated weighted-average dumping margins, adjusted for export subsidy offsets. Commerce's investigation 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. Additionally, 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. CBP will therefore collect cash deposits at this rate.