Partial Government Shutdown

At midnight on December 21, 2018 the continuing resolution funding several federal agencies, including the U.S. Department of Transportation, expired, resulting in a partial government shutdown. Lawmakers were unable to reach an agreement on either a full year appropriations package or another extension, with funding for the Department of Homeland Security serving as the main point of contention. Employees considered “essential” and those funded through multi-year or indefinite appropriations continue working through the shutdown but those employees that do not fall under those categories are either called in to work without pay or furloughed altogether. Because both the Federal Highway Administration and the Federal Motor Carrier Safety Administration are funded through multi-year appropriations, indefinite appropriations, or contract authority, they remain open. The Federal Railroad Administration, the USDOT Office of the Secretary and the Maritime Administration will each see between one fourth to three fourths of their employees furloughed. Both the Surface Transportation Board and the Federal Maritime Commission have suspended all activities.

Democrats, who will control the House of Representatives in the 116th Congress, have indicated they will introduce and vote on spending bills on the same day they are sworn in, January 3. One bill will likely be an omnibus containing six of the remaining spending bills, with their text almost identical to the text of the Senate’s versions from 2018. The second bill will likely be a continuing resolution for the Department of Homeland Security, funding it at fiscal year 2018 levels until sometime in early February. The Democrats indicated that this will allow them to address funding for the non-Homeland Security departments separately from any debate over border security. However, it remains unclear if they will have the votes to pass those bills, especially in the Republican controlled Senate, or if the President would agree to such a deal.

President Trump Signs Coast Guard Authorization Act

The Frank LoBiondo Coast Guard Authorization Act of 2018 was signed into law on December 4, 2018. The Federal Maritime Commission Authorization Act of 2017, originally introduced in May 2017, was added to the bill as an amendment in October 2018. The bill grants the Federal Maritime Commission the ability to investigate ocean carrier alliances that appear to be engaging in anti-competitive behavior during negotiations. It does however state that the Department of Justice retains its authority to prosecute antitrust matters. President Trump emphasized this point while signing the bill,
saying he interprets this section “to indicate that the FMC should defer to the Department of Justice regarding interpretations of the federal antitrust laws.”

The bill also requires FMC to annually review all alliances and report to Congress on their effects. Additionally, it bans carriers from participating in both rate discussions and vessel sharing agreements in the same trade if their participation in both would increase costs or reduce service options. S.140 passed the House by a vote of 239 to 173, and the Senate by 94 to 6.

REGULATORY

FMC Issues Detention and Demurrage Investigation Report

The Federal Maritime Commission published and approved the final report on its fact finding investigation into detention, demurrage and per diem practices of vessel operating common carriers and marine terminal operators on December 7, 2018. In December 2016, the Coalition for Fair Port Practices submitted a petition to FMC, requesting the Commission clarify the meaning of “just and reasonable rules and practices” in the assessment of detention and demurrage fees. FMC received hundreds of comments in response to the petition and held a series of hearings in early 2018 to listen to stakeholders. While the hearings led the Commissioners to believe there could be concerning detention and demurrage practices, they found there to be too little available information or evidence. In response, the FMC launched this fact finding investigation in March 2018 to collect real world data on the industry’s detention and demurrage practices. During the investigation, FMC Commissioner Dye met and consulted with various stakeholders, including ports and MTOs, as well as representatives of the shipper, carrier, ocean transportation intermediary, and drayage trucking industries.

The final report recommended: establishing a Shipper Advisory Board that could provide FMC with information on emerging maritime issues; and convening Innovation Teams, to begin in early 2019, that would meet on a limited basis to refine demurrage and detention approaches by: 1) developing transparent and standard language for the practices; 2) creating clear, accessible and simple demurrage and detention billing practices and dispute resolution processes; 3) drafting guidance outlining the evidence relevant to resolving demurrage and detention disputes; and 4) establishing consistent notice to parties of container availability. These Innovation Teams will likely be stood up in early 2019.
Tariff Increase on Chinese Goods, Including Chassis, Postponed

In August 2017, President Trump directed the Office of the United States Trade Representative to determine whether China engaged in unreasonable or discriminatory actions relating to American intellectual property rights, innovation, or technological development. The USTR initiated an investigation under Section 301 of the Trade Act of 1974. In March 2018, USTR published the results of its Section 301 investigation, finding that "China’s acts, policies and practices related to technology transfer, intellectual property and innovation are unreasonable and discriminatory and a burden to U.S. commerce."

As one part of its response to these findings, USTR released a list of goods from China that would be subject to a 10 percent tariff in September 2018. The list contained over 5,000 tariff lines with an estimated value of $200 billion and included chassis produced in China. Additionally, USTR announced that the tariff rate for these goods would increase from 10 percent to 25 percent on January 1, 2019.

Following a successful meeting at the G-20 Summit in December 2018 between President Trump and China’s President Xi Jinping, USTR postponed the tariff increase until March 2, 2019. President Trump stated trade negotiations between the two countries would continue "immediately," and that he hoped an agreement could be reached prior to the new deadline.

USDOT Announces BUILD Award Recipients

On December 11, 2018, the U.S. Department of Transportation announced the recipients of awards under the Better Utilizing Investments to Leverage Development discretionary grant program. BUILD, formerly referred to as TIGER by the Obama Administration, is a competitive grant program intended to fund capital investments in infrastructure projects across all modes of transportation, including rail, highway, port, and transit projects, among others. The fiscal year 2018 round of funding saw the a tripling of the average size of the program due to a two year budget deal signed into law in early 2018 that increased the budgetary spending caps for fiscal years 2018 and 2019. Instead of the typical $500 million in available funds, this round of BUILD had $1.5 billion available – the highest amount of funding for the program since its inception in the 2009 American Recovery and Reinvestment Act. The $1.5 billion was awarded to 91 infrastructure projects, with at least one project in every state except Hawaii.

A record amount of this round’s funding went toward goods movement infrastructure, with 66 percent of total funds awarded to freight projects or projects with a freight component and 20 percent of the total amount to non-highway freight investments. As
USDOT indicated it would be in their notice of funding opportunity, a majority of BUILD I funding was awarded to projects classified as rural.

**USDOT Issues INFRA NOFO**

On December 20, 2018, the U.S. Department of Transportation issued a NOFO for the fiscal year 2019 round of the INFRA grant program. INFRA, formerly referred to as FASTLANE, is a competitive grant program created by the Fixing America’s Surface Transportation Act in 2015 to provide Federal funds to nationally or regionally significant freight and highway projects. Because Congress has yet to pass a fiscal year 2019 appropriations bill for USDOT, the Department was unable to say exactly how much money will be available under this round of INFRA. The FAST Act authorized $950 million for the program but the NOFO estimates that between “$855-$902.5 million will be available for award, subject to appropriations.” The FAST Act allowed for around 11 percent of total available funds for the program over its five year duration, or around $500 million, to be available for non-highway projects. After the first three rounds of the program, only around $200 million of that cap remains available.

This NOFO builds upon the themes of the first round of the INFRA program under the Trump Administration, adding additional specificity to some of its considerations. The NOFO calls on project applications to support economic vitality at the national and regional level, as did the fiscal year 2017/2018 NOFO. While this NOFO again calls on applicants to leverage Federal funding to attract non-Federal sources of infrastructure investment, it adds that USDOT will “assign a rating to each project based on how the calculated non-federal share of the project’s future eligible project costs compares with other projects.” The previous NOFO encouraged innovation in “environmental review and permitting; use of experimental project deliveries; and safety and technology.” This NOFO expands upon that by specifying that projects could aid in “the accelerated deployment of innovative technology and expanded access to broadband; use of innovative permitting contracting and other project delivery practices; and innovative financing.” Applicants meeting at least two of these areas will have a higher rating. This NOFO also aims to hold award recipients accountable for their performances by suggesting that they be subject to forfeit the lesser of 10 percent of awarded funds or $10 million if they fail to meeting specific dates or fail to prove they have met a specific indicator of project success.

The apply function for the INFRA grants will open on grants.gov on January 7, 2019 and applications are due by March 4, 2019.