

## Transportation Regulation To Watch In 2nd Half Of 2022

By **Linda Chiem**

*Law360 (July 22, 2022, 3:27 PM EDT)* -- Electric and autonomous vehicle rules, ocean shipping and rail industry reforms, and initiatives tackling the supply-chain crunch are just some of the transportation industry's top regulatory priorities to watch in the latter half of 2022.

The Biden administration has floated various climate-focused and clean energy priorities, including a new spate of emissions-curbing measures for cars and trucks. Additionally, carmakers and technology developers are anticipating further regulatory clarity on autonomous vehicles, while momentum builds for more widespread development of electric vehicles.

Here, Law360 highlights transportation legislation, regulation and policy developments to watch during the latter half of 2022.

### **Ocean Shipping Reform**

The newly enacted Ocean Shipping Reform Act of 2022, the first major overhaul of U.S. shipping law in over two decades, places ocean container carriers under tougher regulatory scrutiny. The law is an attempt to offer relief to U.S. importers, exporters, freight carriers, port operators and other businesses contending with skyrocketing costs to move cargo amid pandemic-related supply-chain logjams.

The OSRA empowers the Federal Maritime Commission to more aggressively go after ocean container carriers suspected of unscrupulous business practices, such as charging unreasonably high fees for delays or refusing to accept loads that might be deemed less profitable. Following the law's passage in June, legal experts said the OSRA is a positive step, but it remains to be seen how impactful more robust enforcement efforts will be on inland congestion at ports, rail yards and warehouses that are also contributing to backlogs.

The OSRA is "a thoughtful and deliberate beginning, which recognized several, but not all, of the causes of congestion and price increases," according to Grady Hurley, co-leader of Jones Walker LLP's maritime litigation, arbitration and dispute resolution team and co-chair of its energy, environmental and natural resources industry team.

"The work of the FMC will ultimately determine whether the OSRA is a significant overhaul of shipping regulations or a legislative speed bump," Hurley said.

The law sharpens the commission's cadre of enforcement tools, while also giving the manufacturers,

suppliers, retailers and other companies seeking to ship their goods — known as shippers — a broader avenue to bring disputes against the mostly foreign-owned ocean container carriers that transport their goods.

"U.S. companies that rely on ocean transport to get their goods into the global chain will benefit from these changes as the FMC works to rebalance the playing field and bring costs back down," Barnes & Thornburg LLP partner Tiffany Presley said. "Consumers will ultimately benefit also as U.S. companies have had to flow these exorbitant shipping costs down to their consumers. Relief will not come overnight. However, thanks to these changes, the FMC now has the necessary oversight and authority to address this pressing issue."

The commission still needs to draft new rules and regulations before it wields the powers it's been granted under the OSRA. The rulemaking process can take up to a year or longer.

"OSRA won't solve all of our current supply-chain issues by itself, and it's going to take some time for the FMC to implement it, but it's a step in the right direction and the changes will be beneficial in the long run," said Jeffrey Weiss, partner and co-lead of Steptoe & Johnson LLP's international trade policy and negotiations group. "It's important to note that government action is insufficient to address these issues, many of which predate the pandemic. Market players also need to step up and work together with others in the supply chain to identify win-win solutions to help solve these problems."

## **Autonomous Vehicles**

The National Highway Traffic Safety Administration has been working on new rules for cars with autonomous driving capabilities, after years of issuing mostly voluntary guidelines and best practices.

The agency in March issued a first-of-its-kind final rule updating the Federal Motor Vehicle Safety Standards governing occupant safety in cars with automated driving systems, or ADS.

The March final rule came nearly two years after NHTSA initially proposed easing federal safety standards to allow autonomous vehicles to be built without manual controls or protective features such as steering wheels or airbags. NHTSA said the new crashworthiness regulation might be necessary to facilitate the certification of new vehicle designs without driver controls.

Allison In, a senior managing associate in Sidley Austin LLP's environmental practice group, told Law360 that NHTSA's recent rulemaking efforts demonstrate that the agency is being diligent because it can be risky to arbitrarily set a "floor or ceiling" on design or performance standards amid a plethora of ADS technology.

"There has been lots of confusion in the industry as to how the NHTSA is going to address these technologies that are still developing — in terms of the variety or diversity of the technology, there's just [so] many out there," she said. "What those [recent rulemakings] signal is that they're still on the pathway of being careful and being cautious about taking any definitive actions."

To that end, NHTSA has been compiling a lot of data from ADS developers under a June 2021 standing order requiring them to report all crashes involving cars with autonomous driving capabilities. In June, it released two batches of crash data for cars with advanced driver assistance systems, or ADAS, and cars with higher levels of ADS.

Legal experts told Law360 that the crash data is just one piece of the regulatory puzzle.

"Will NHTSA use this data to inform future regulatory policies and rulemakings?" said Paul Hemmersbaugh, chair of DLA Piper's transportation regulatory and litigation group. "Likely yes, but this data is just a small start and complement to other ongoing public and private research. Far more research and study will be needed to support development of safety standards, should the agency decide that is appropriate."

### **Electric Vehicle Infrastructure**

With accelerating momentum for electric vehicles, the U.S. Department of Transportation has turned its attention to beefing up electric vehicle charging infrastructure nationwide.

The DOT in June proposed minimum standards for installing, operating and maintaining electric vehicle, or EV, charging stations that receive federal funding from a new \$5 billion program created by the bipartisan Infrastructure Investment and Jobs Act, which became law in November.

The administration's goal is to build the first national network of 500,000 EV charging stations along America's highways — roughly five times the number of stations that are currently available nationwide — and bring uniformity to what so far has been a hodgepodge of charging options that are often proprietary and not easily accessible. The proposed minimum standards are a baseline for what could be the eventual rules of the road, encouraging state and local entities to start charting out what they will need to kickstart their EV infrastructure-building efforts.

"The administration wants a national network of chargers in the truest sense of the term, meaning they want chargers located in every state, equidistant from one another, and available to all," Morgan Lewis & Bockius LLP partner Levi McAllister, head of the firm's electric vehicles working group and energy commodity trading and compliance working group, said in June. "[So] people can feel comfortable that if they have an electric vehicle, they can charge it at any charger, that they don't have to find a particular charger that has a certain speed or a certain connector."

Experts have said there are still obstacles posed by different charging technologies and still-developing state and local regulations governing rates, project development and grid management. And there's still the matter of matching public fast-charging capabilities with private infrastructure incentives and tax credits, for example.

### **Rail Service**

The Surface Transportation Board, which has regulatory jurisdiction over railroad rates, service disputes, mergers and other nonsafety rail issues, is contending with a 2022 docket loaded with monetary and operational policy issues. They include addressing requests from rail shippers to get railroad giants to open some of their lines to competitors and considering whether to rejigger how the board determines the fairness of rates charged by freight railroads. Many of the petitions have been pending for years, so all eyes will be on whether the STB will embrace policies that are flexible enough to address fluctuating freight shipping demands and supply-chain woes.

A long-simmering item before the board is a July 2016 proposal to establish regulations that would allow customers and shippers served by only one major railroad in their region to get access to another railroad. In other words, the STB is considering rules that would compel a railroad to pass off customers'

shipments to a rival railroad at interchanges under certain conditions and on a case-by-case basis.

It's called reciprocal switching, or competitive switching, but the freight railroads call it a "forced access" issue. The STB is considering adopting complex rules that would force a railroad that owns the only line leading into a customer facility to provide a short-haul connection to a competing railroad.

Rail shippers in the manufacturing, agriculture and energy-producing sectors have pushed hard for the regulations, saying they'll boost competitive access to rail service and, in theory, better rates.

Additionally, the STB is reviewing what's potentially the first major railroad merger in two decades. Canadian Pacific Railway Ltd. is seeking to combine with Kansas City Southern Railway Co. to create what would be the first rail network connecting Mexico, the U.S. and Canada.

But rail labor issues remain front and center. President Joe Biden on July 15 moved to avert a potential strike by more than 100,000 freight rail workers by empaneling a three-member board to help broker a deal between rail unions and carriers following over two years of bargaining. Biden issued an executive order creating a so-called presidential emergency board after members of a nationwide union coalition representing rail workers took steps toward a strike that could devastate the country's supply chain. Forming a PEB is a last-ditch tactic for averting strikes under the Railway Labor Act, the federal law governing union relations in the railroad and airline industries.

The PEB is expected to hold hearings in the coming weeks and issue a report, including settlement recommendations, in mid-August, according to the National Carriers' Conference Committee, which represents the nation's freight railroads in national collective bargaining. Although PEB recommendations are not binding, they've historically helped parties reach voluntary agreements during a 30-day cooling-off period that begins when the PEB issues its report. Strikes and other work stoppages are prohibited while the PEB completes its work and during the following 30-day cooling-off period, the NCCC said.

--Additional reporting by Braden Campbell. Editing by Marygrace Anderson and Daniel King.

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