

Transportation Policy Developments To Watch: Midyear Report

By **Linda Chiem**

Law360 (July 22, 2021, 6:01 PM EDT) -- Infrastructure funding legislation, air travel regulations, and electric and autonomous vehicle initiatives are some of the transportation industry's top priorities to watch in the latter half of 2021.

President Joe Biden and congressional Democrats are focused on passing a sweeping bill to fund highway, bridge and railway projects along with clean water, broadband and other infrastructure needs. But stiff Republican opposition to climate-focused and clean energy provisions and still undefined revenue streams has hampered efforts to reach compromise legislation swiftly, experts say.

Additionally, face mask mandates for airlines and other public transportation, as well as growing uncertainty over the spread of the delta variant of the novel coronavirus, are still a compliance and consumer protection concern. At the same time, carmakers and technology developers are anticipating further regulatory clarity on autonomous or self-driving vehicles, while momentum builds for more widespread development of electric vehicles.

Here, Law360 highlights transportation legislation, regulation and policies to watch for the rest of 2021.

Infrastructure Investment

Infrastructure investment legislation continues to be a moving target. The tentative \$1.2 trillion deal that Biden reached in June with a bipartisan group of senators on a once-in-a-generation infrastructure investment proposal is still mired in fraught negotiations.

U.S. Senate Republicans on Wednesday blocked a procedural vote put forth by Senate Majority Leader Chuck Schumer, D-N.Y., to start debate on the still-in-the-works and as-yet-unseen bill, but lawmakers spearheading the talks say they'll iron out the finer points of the so-called Bipartisan Infrastructure Framework by early next week.

A major hangup is how to pay for the approximately \$579 billion in new investments in roads, bridges and other major surface transportation projects, passenger and freight rail, public transit, electric vehicles, airports, ports, waterways, clean water, environmental remediation and other infrastructure.

The administration is pushing for the bipartisan \$1.2 trillion infrastructure bill to advance in tandem with a separate \$3.5 trillion budget bill that would move through a special filibuster-proof process called reconciliation, allowing it to clear the Senate with a simple majority. The budget package would address

Biden's other key priorities such as child care, education, health care and climate change.

At the same time, the U.S. House of Representatives forged ahead on a regular-order bill reauthorizing highway, transit, rail and vehicle safety programs ahead of an upcoming fall deadline to replace the expiring Fixing America's Surface Transportation Act following a one-year extension last year.

Earlier this month, the House passed the Investing in a New Vision for the Environment and Surface Transportation in America Act — or Invest in America Act — a \$715 billion funding package for roads, bridges, transit, rail and water infrastructure. House Democrats spearheading that bill have already expressed frustration that the Senate's bipartisan proposal falls woefully short on items like safety programs and transit funding.

"This is a totally unprecedented approach to this matter. It's a function of the 50-50 Senate split and the slim majority in the House, and a clever way for the White House to get everything it wants in the infrastructure space," said Mayer Brown LLP partner Philip Recht, a former chief counsel and deputy administrator for the National Highway Traffic Safety Administration during the Clinton administration.

"Everything is an 'if' right now. But if they can get the bipartisan bill covering conventional highway, bridge and road infrastructure, that gives them something to rally around. That's a win," Recht told Law360. "They're now negotiating over concept and framework. Once that gets done, they will have to get down to the drafting details, which creates all kinds of new areas for potential dispute."

Overall, the buzz around the House surface transportation and Senate infrastructure investment bills shows that there have been good faith efforts by both Republicans and Democrats to try to move forward with negotiations, but "all sides are punting somewhat on how these bills are going to be paid for — pushing that question down the road," according to Venable LLP partner Fred R. Wagner, a former chief counsel of the Federal Highway Administration.

The railroad, trucking, ports, logistics, airline and other transportation sectors are all eager to see renewed federal investment. But the uncertainties regarding infrastructure legislation are an issue and could potentially present a serious missed opportunity, according to Stinson LLP aviation partner Roy Goldberg.

"It is in the interest of airlines and their customers that the federal government help rebuild infrastructure throughout the transportation network, including airports, without requiring airlines and their passengers to pay," Goldberg said. "The need for up-to-date airports and technology is the responsibility of all citizens, and it would be a shame if the opportunity to rebuild airports and provide good high-paying construction and development jobs was lost to political infighting and the elements in Congress who somehow think that doing nothing while blocking the party in power is doing something."

Transportation Equity

In January, Biden issued an executive order addressing racial equity, and the Bipartisan Infrastructure Framework also aims to tackle what the administration has described as decades of misguided policies and disinvestment in America's infrastructure that have fallen most heavily on communities of color.

The U.S. Department of Transportation in May issued a request for information to help it figure out which programs might need shoring up to further the administration's goals of ensuring that all Americans have equitable access to safe, affordable and sensible transportation options.

"Realizing true benefits equitably for all users of the transportation system will involve a fundamental adjustment to the state of the practice," the advocacy group Transportation for America said in its public comments. "From purpose and needs statements, scoping guidance, design measures and standards, project prioritization, to performance indicators, there needs to be a focus of people underpinning the transportation program. We want to emphasize that none of these steps require authorization from Congress. They simply require the department to update its own approach and directives."

Along with that, the Biden administration is prioritizing environmental justice, or ensuring that environmental and health impacts are reduced on low-income communities and communities of color that have traditionally been overburdened. The newly created White House Environmental Justice Advisory Council offered broad recommendations on how to advance those goals in May, but there are still plenty of implementation hurdles.

"The environmental justice goals being pursued by the Biden administration are truly transformative because they go to the very question of what we should be doing, not just how we should be doing it," Venable's Wagner said. "For years, it's been a matter of how. It's been a check on demographic data, like where are we building this thing and who lives there? What the administration is trying to promote here is to not just be aware, but let's pick the projects — based on some set of criteria — where the overall effect is to benefit those communities. That's a transformative way of looking at this whole issue."

Air Travel Regulations

While most face mask mandates implemented at the height of the coronavirus pandemic have since been relaxed for fully vaccinated individuals in the U.S., they're still in effect for public transportation. The U.S. Centers for Disease Control and Prevention still recommends that all travelers, regardless of vaccination status, continue to wear a face mask on planes, buses, trains and other forms of public transportation throughout the U.S. The Transportation Security Administration's face mask mandate remains in place through September, and most airlines and other public transportation operators still follow the requirement.

Experts say an alarming trend in air travel has been the recent spike in unruly passenger behavior and in-flight disturbances. Of the 3,000 reports of unruly passenger behavior and in-flight disturbances the Federal Aviation Administration has recorded this year alone, more than 2,000 of those involved passengers refusing to comply with flight crew instructions to wear face masks, according to the agency. In recent months, the FAA has issued several rounds of fines, generally ranging from \$7,000 to more than \$31,000 apiece, to passengers accused of being unruly aboard flights.

"Additional cases will likely be filed because the situation remains volatile, and there are still lots of unknowns when it comes to COVID-19 and effective safety measures," said Lane Powell PC attorney Qingqing Miao. "Being consistent with enforcing clear CDC guidelines on mask-wearing and adhering to coherent TSA policies will likely help the airlines."

Additionally, Biden issued a July 9 executive order aimed at making it easier for travelers to get refunds from airlines and to comparison shop for flights by requiring airlines to clearly disclose add-on fees upfront. The order directs the DOT to consider drafting clearer rules requiring airlines to refund passengers for fees when baggage is delayed or when a service isn't actually provided, like when a plane's Wi-Fi or in-flight entertainment system is broken. It also directs the DOT to consider issuing rules that require baggage, change and cancellation fees to be clearly disclosed to the customer.

Autonomous Vehicles

While Biden's clean energy push calls for accelerating the rollout of electric vehicles and electric vehicle-charging infrastructure, the transportation industry is also seeking additional regulatory clarity from the federal government for autonomous or self-driving vehicles. NHTSA, which is in charge of regulating vehicle safety, in recent years has issued mostly voluntary guidelines laying out best practices for the industry to follow, but not necessarily any hard-line regulations. At the same time, state and local governments have implemented a mix of regulations related to testing and operating autonomous vehicles.

But following several high-profile crashes involving cars operating in semi-autonomous mode, NHTSA in June issued a standing general order requiring autonomous vehicle makers to report any crashes. NHTSA acting Administrator Steven Cliff said in a June 29 statement that mandating crash reporting gives the agency access to critical data that will help quickly identify safety issues that could emerge in these automated systems.

"In fact, gathering data will help instill public confidence that the federal government is closely overseeing the safety of automated vehicles," Cliff said in the statement.

"It's a sign that this NHTSA intends to be more aggressive in regulating autonomous vehicles than the prior NHTSA regime," said Mayer Brown's Recht. "The order is something that NHTSA can issue under its existing authority; it does not have to go through rulemaking. The order allows the agency to gather the information it needs to more closely monitor the autonomous vehicle testing that's taking place."

NHTSA signaled last November that it may eventually adopt new safety standards for vehicles with automated driving systems, or ADS, a big step that could boost development of passenger-carrying autonomous vehicles while ensuring that new technologies still undergo significant scrutiny.

NHTSA's Nov. 19 advance notice of proposed rulemaking opens the door for automakers, artificial intelligence and technology developers to weigh in on how the agency should go about crafting a regulatory framework that addresses safety standards governing ADS performance. Such a framework would go beyond just spelling out ADS design standards like whether self-driving cars should still be built with traditional car features such as a steering wheel, brake pedal or manual controls.

Ultimately, experts say Congress and NHTSA have the challenging task of drafting new legislation or regulations that balance the myriad safety, data security and privacy, technology and other concerns associated with autonomous vehicles. Such regulatory gaps are ripe for litigation to dispute liability, for example.

The plaintiffs lawyers advocacy group American Association for Justice said that whatever framework NHTSA comes up with for automated driving systems should clearly spell out that an ADS manufacturer be held accountable for the performance of the ADS.

"Regulatory oversight of ADS deployment is necessary to ensure motor vehicle safety and public acceptance. While we recognize that premature or overly prescriptive FMVSS [Federal Motor Vehicle Safety Standards] rulemaking could lock in inferior approaches or technologies that ultimately inhibit the safety capacity of automated vehicles, there are many steps that NHTSA can take today that will put

ADS deployment on a safety reinforcing pathway," the group said in its public comments. "The key to promoting the safe and equitable development of safe ADS equipped vehicles is accountability."

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