

THE LEGISLATIVE SERVICES GROUP'S

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MONITORING AND ANALYZING DEVELOPMENTS IN FEDERAL TRANSPORTATION AND PUBLIC WORKS POLICY

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Legislative Schedules

Week of November 2, 2009

House

Tuesday — meets at 10 a.m. for a joint meeting with the Senate to hear the German Chancellor, after which there will be 15 measures under suspension of the rules.

Wednesday and the balance of the week — meets at 10 a.m. (9 a.m. Friday and possibly into the weekend) — H.R. 3639, credit card reform expedition; H.R. 2898, chemical facility anti-terrorism; and H.R. 3962, health care reform (all subject to rules).

Senate

After the joint session, at 11:30 a.m. the Senate will resume consideration of H.R. 3548, unemployment benefits extension. Cloture has been invoked on the substitute amendment and cloture is pending on the bill itself.

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Appropriators Could Wrap Up By Thanksgiving

Late last week, House and Senate Appropriations Committee leaders decided to set deadlines and accelerate the conclusion of the House-Senate negotiations on the seven remaining general appropriations bills for fiscal year 2010.

Under the tentative schedule, all remaining differences between the House and Senate in the remaining bills would be resolved in the next two weeks, and the final text of all seven conference reports would be finalized and proofread by the close of business on Monday, November 16.

At that point, the schedule becomes unclear. Currently, only two of the seven remaining bills

(Defense and Transportation-HUD) have passed both the House and Senate and are technically able to be sent to House-Senate conference committees.

Unless the Senate passes one or more of the other five bills, this means that either the Defense bill or the "THUD" bill will have to be the legislative vehicle that carries the rest of the bills (the ones that have not passed the Senate) into law.

Alternatively, the remaining nonconferenceable bills could be split between the Defense and THUD vehicles (with the Military Construction/VA bill being a more logical fit to ride on Defense, but anything is possible).

However, rumors persist that the Defense conference report will be used to carry an increase in the public debt ceiling, which probably needs to move to the floor in the next two weeks.

This would require the Defense conference report to get at least 60 votes in the Senate (necessary under new rules to add material to a conference report that was not in the House or Senate bill, like an unrelated debt ceiling increase).

Slam-dunking a Defense bill quickly with 60 Senate votes got harder last Friday with the *Washington Post* revealing that several additional House members are under preliminary

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6-Month Surface Extension On Senate Floor This Week?

The office of Senate Majority Leader Harry Reid (D-NV) has told the Senate Environment and Public Works Committee that legislation extending funding authorizations for federal surface transportation programs could be the next item brought to the Senate floor under regular order this week once the pending unemployment insurance extension bill is disposed of.

The unemployment bill (H.R. 3548) could pass the Senate anytime between today and Thursday, depending on how cooperative Senate Republicans are willing to be. Cloture was invoked on the substitute amendment to the bill yesterday afternoon, but the lack of any subsequent unanimous consent agreement on how to handle the post-cloture debate time indicates that

the bill will probably take the maximum amount of time.

(After a cloture vote on a bill, amendment or motion, there can be up to 30 hours of post-cloture debate. When you invoke cloture on a substitute amendment, there can be up to 30 hours before the passage of the amendment and then the cloture vote on the bill itself, then

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investigation by the Ethics Committee for putting earmarks in the Defense appropriations bill for a particular lobbying firm. It is likely that many rank-and-file members will now be extra-cautious about voting for a Defense conference report with some of those earmarks in it, which would necessitate some kind of leadership-driven earmark scrubbing process.

The box at right lists the remaining general appropriations bills for FY 2010 that have not yet been signed into law and their status. It also lays out the tentative schedule for finalization of the remaining negotiations, as we now understand it.

It is important to note that the tentative schedule ends with the final proofreading of all the unfinished bills in their conference report form and the submission of that paperwork to the Appropriations Committee front office. There is still no word on when the final omnibus (or "minibus") appropriations conference report would go to the floor.

The schedule laid out at right would allow the omnibus to go to the House floor for a final vote as

STATUS OF UNFINISHED GENERAL APPROPRIATIONS BILLS

Commerce-Justice-Science — passed House; debated on Senate floor but fell three votes short of the needed 60 for cloture due to three Democratic absentees. Would need another cloture vote and six or seven additional roll call votes over a day or two for completion.

Defense — passed House and Senate, technically ready to go to conference.

Financial Services — passed House but never brought up in Senate.

Labor-HHS-Education — passed House but never brought up in Senate.

MilCon/VA — passed House but never brought up in Senate.

State/Foreign Ops — passed House but never brought up in Senate.

Transportation-HUD passed House and Senate, technically ready to go to conference.

TENTATIVE SCHEDULE FOR COMPLETION OF THOSE BILLS

- By Monday, November 9, all issues that can be resolved at the subcommittee chairmen/ranking members level must be resolved, and any remaining disputes are then kicked upstairs to the full committee chairmen (Obey-Inouye) level. Some may get kicked further upstairs to the Pelosi-Reid pay grade.
- By Friday, November 13, all remaining House-Senate issues must be resolved.
- By the close of business on Monday, November 16, each subcommittee must have its final conference report legislative text and statement of managers text completed and fully proofread and turned in to the full committee front office.

In theory, this schedule could allow the final omnibus appropriations conference report to be filed in the House as early as Tuesday the 17th, go to the Rules Committee later that day, and be passed by the House as early as Wednesday the 18th. No decision as to which bill (Defense or Transportation-HUD) will carry the omnibus measure has been announced, and there is a slim chance that the Senate could finish the Commerce-Justice-Science bill (or pass MilCon/VA) and create a third legislative vehicle to choose from.

WRAPPING UP APPROPRIATIONS IS USUALLY A SIGN THAT THE END OF THE SESSION IS CLOSE AT HAND

	House passes last approps. measure	Last House vote of the session	
FY 1999	10/20/1998	12/19/1998	Note A
FY 2000	11/18/1999	11/18/2009	
FY 2001	12/15/2000	12/15/2000	
FY 2002	12/20/2001	12/20/2001	
FY 2003	11/13/2002	11/15/2002	
FY 2004	12/8/2003	12/8/2003	
FY 2005	11/20/2004	12/7/2004	Note B
FY 2006	12/18/2005	12/19/2005	
FY 2007	12/8/2006	12/9/2006	
FY 2008	12/19/2007	12/19/2007	
FY 2009	9/24/2008	12/10/2008	Note C

A. The last pre-election vote was on October 20 but the House came back after the elections to impeach Bill Clinton.
 B. The House finished voting on November 20 but came back for 24 hours in December to vote on the intelligence reform conference report.
 C. The last pre-election vote was October 3 but the House came back after the election for one day to vote on the Detroit automaker bailout.

early as Wednesday, November 18 — but it would not require such an early vote. No ill effects will be felt by federal agencies due to lack of appropriations bill coverage until after Friday, December 18, when the latest continuing resolution (CR) expires.

Traditionally, the decision by the Congressional majority leadership to pass the last appropriations measure of the year is the telltale sign that the House of Representatives is ready to head home for the year. As the table at left shows, for the past eleven years (which is as far back as the handy reference tables on the THOMAS website go), House passage of the final appropriations measure of the year (whether an omnibus appropriations bill or else a CR extending unfinished measures into the following calendar year) has meant the speedy end to the House's busi-

ness unless something truly unusual was going on.

In this instance, if the House actually passes the omnibus by November 20 (the Friday before Thanksgiving), it is hard to see what else the House would have to do on the floor for the month between Thanksgiving and Christmas (except for perhaps one week's worth of financial industry reforms, which could still possibly be fast-tracked and completed before Thanksgiving).

(Spending a full month in session waiting for the Senate to pass bills and send them to conference is not any House member's idea of how to spend the holiday season.)

Alternatively, if the omnibus is proofread and finalized by November 16 but is then held captive in the Appropriations front office and

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not brought to the House floor for another month, that leaves plenty of time for deals that have been struck to come undone due to outside pressure. The whole point of finishing a House-Senate conference negotiation quickly is to get the conference report passed by at least one chamber, at which point it becomes too late to amend the contents of the conference report.

The staffs of the House and Senate Transportation-HUD subcommittees have by this point agreed to all of the minor details of their conference report, but large outstanding

issues remain that must be decided at the “member level.” We have outlined some of what we believe to be those issues as best we can in the table below.

Some of those issues may get bumped up to the Obey-Inouye level, as mentioned above, or perhaps even to the Pelosi-Reid level. (In particular, the guns-in-Amtrak-baggage issue has the potential to draw a National Rifle Association backlash that could endanger passage of the bill if handled improperly, and the Maine truck size and weight exemption was put in the Senate bill at the personal behest of Majority Leader Harry Reid (D-NV) in exchange for Sen. Susan Collins (R-ME) allowing passage of the ex-

tra \$2 billion for the cash-for-clunkers program, even though none of the leaders of either THUD subcommittee appear to favor the provision.)

As usual, when the final conference report is filed (particularly if the THUD bill is the vehicle for the omnibus), the key will be to look for new provisions not in either House or Senate bill which were “airdropped” into the conference report. The advantage to being an omnibus bill is that since you have to get 60 votes in the Senate anyway to add other bills, your latitude to add other airdropped provisions to your bill increases significantly if you carry the omnibus and already have to get 60 votes.

MAJOR HOUSE-SENATE DISPUTES IN H.R. 3288, TRANSPORTATION-HUD APPROPRIATIONS (USDOT ONLY)

<u>Issue</u>	<u>President’s Request</u>	<u>House Bill</u>	<u>Senate Amendment</u>
National Infrastructure Bank	\$5 billion (later informally downsized to \$2 billion)	\$2 billion if later authorized and left unspent from HSR*	No funding
FRA High-Speed and Intercity Passenger Rail	\$1 billion	\$4 billion (but up to \$2 billion can be transferred to NIB if still unspent by 9/30/2010)*	\$1.2 billion
OST Multi-modal Infrastructure Discretionary Grants	Zero	Zero	\$1.1 billion
Extra General Fund Approp. for Federal-Aid Highways	Zero	Zero	\$1.4 billion
FTA Capital Investment Grants (a.k.a. New & Small Starts)	\$1.827 billion	\$1.827 billion	\$2.307 billion
FTA Formula Grants for Greenhouse Gas Reduction	Zero	Zero	\$100 million
FRA Positive Train Control grants	Zero	Zero	\$50 million
MARAD Additional Funding for Title XI Shipbuilding Loans	Zero	Zero	\$10 million
Require Amtrak to allow guns & ammo in checked baggage	No provision	No provision	Amendment added on Senate floor, 68 to 30
Banning funds provided by the bill from going to ACORN	No provision	No provision	Amendment added on Senate floor, 83 to 7
State of Maine exemption from truck size/weight rules	No provision	No provision	In Senate bill per Majority Leader Reid (For Sen. Collins)
State of Washington exemption from charter bus rules	No provision	No provision	In Senate bill per T-HUD Chairman Patty Murray
Increasing FTA contingent commitment authority	No provision	No provision	In Senate bill (sec. 169)

Surface Extension

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another 30 hours before final passage. The minority party often sees the writing on the wall and agrees to hurry up post-cloture debate, particularly when the first cloture vote is as lopsided as yesterday's 85 to 2 vote, but there is no sign of that happening yet).

Obviously, health care reform is the top priority in the Senate, and if a health care bill were ready to go to the Senate floor this week, it would immediately supersede anything following the unemployment extension. But as long as that bill is stalled due to drafting and budget scoring issues (and since the climate change bill and financial industry reform bills are even farther away from the floor), there is a brief opening for the surface transportation extension.

The bipartisan leaders of the EPW Committee have tried for the last two weeks to "hotline" a six-month extension of surface programs (from November 1, 2009 through April 30, 2010) by unanimous consent. This was objected to by multiple Republican Senators.

As an alternative, Reid appears to be prepared to move the Senate bill on the floor through the cloture process. This would involve as many as three cloture votes (if the Republican objectors to the bill are truly determined to draw things out as long as possible), each of which requires no less than 60 votes and which entails up to 30 hours of post-cloture debate:

1. cloture on the motion to proceed to the House-passed three-month extension bill (H.R. 3617);
2. cloture on the EPW amendment in the nature of a substitute to H.R. 3617; and
3. cloture on H.R. 3617 itself.

Obviously, this could turn out to be very time-consuming, and if the process drags on, the health care bill could bump it.

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SENATE BUDGET G.O.P. GETS A FEW NUMBERS WRONG

The Republican staff of the Senate Budget Committee under ranking member Judd Gregg (R-NH) released a four-page newsletter last week outlining their opposition to levels of highway spending that cannot be supported by projected future fuel tax revenues credited to the Highway Trust Fund, such as the spending levels made possible by the six-month extension being proposed by the Environment and Public Works Committee (assuming those spending levels are perpetuated after six months). That document is here:

<http://budget.senate.gov/republican/analysis/2009/bb07-2009.pdf>

The first two pages of the four-page PDF document are factually accurate (though they do ascribe motives to Congress that are unverifiable). But the table of numbers at the top of the third page, and the conclusions drawn from those numbers, have some problems.

The table consists of nine numbered lines. Lines 1, 2 and 3 show the projected end-of-year balances of the Highway Account of the Highway Trust Fund under the September 1, 2009 Congressional Budget Office baseline. These numbers are indeed what CBO projected. A fuller summary of this latest CBO projection is below:

CONGRESSIONAL BUDGET OFFICE HIGHWAY TRUST FUND - HIGHWAY ACCOUNT BASELINE
(September 2009 Baseline - Billions of Dollars)

	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
Highways (Ob Limit)	41.2	41.5	41.7	41.9	42.3	42.9	43.6	44.3	45.0	45.8
Highways (Exempt)	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7	0.7
Safety Obligations	1.3	1.3	1.3	1.3	1.3	1.4	1.4	1.4	1.4	1.5
Total HTF-HA Oblig.	43.2	43.5	43.7	44.0	44.4	45.0	45.7	46.4	47.2	48.0
Outlays From Those & Prior Obligations:	36.9	37.6	43.4	44.1	45.5	45.7	44.9	44.8	44.8	45.5
<small>(Treats "flex" transfers from the Highway Account to the Mass Transit Account as outlays for cash flow purposes.)</small>										
EOY HTF-HA Balance	2.1	-4.4	-15.5	-26.4	-37.9	-49.1	-59.0	-68.4	-77.6	-87.1

Lines 4, 5 and 6 of the SBC-R table purport to show how the increase in the budget resolution's allocation to the EPW Committee (\$12.9 billion in extra contract authority per year above the contract authority level assumed in the CBO baseline, to counter the effects of the FY 2009 contract authority rescissions and to allow program growth) would increase outlays from the Trust Fund. However, these numbers are based on a misconception.

Under budget scorekeeping rules, CBO must base its projections of future HTF outlays based on annual obligation limitations, not contract authority levels. This requires CBO to assume something that is completely impossible — that obligation limitations can exceed contract authority levels by large margins indefinitely and still be meaningful. Compare the ob limit levels in the CBO baseline with the contract authority levels in the baseline:

CBO Sept. 2009 Baseline Assumptions for the Fed.-Aid Highway Program (Subject to Limit)

	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>	<u>2018</u>	<u>2019</u>
Obligation Limitation	41.2	41.5	41.7	41.9	42.3	42.9	43.6	44.3	45.0	45.8
New Contract Author.	28.2	28.2	28.2	28.2	28.2	28.2	28.2	28.2	28.2	28.2

Obviously, if the ob limit levels are \$13+ billion per year higher than new contract authority, then once pre-FY2010 balances of carryover contract authority are exhausted (and those only totaled \$7.5 billion as of September 30, 2009), then actual obligations would be significantly lower than the limitation level (since a limitation is, fundamentally, a ceiling and not a floor). But CBO is required to assume these two mutually contradictory things under the rules. (Where budget scorekeeping is concerned, it is more important that the rules avoid double-counting than that the rules actually make sense.) The SBC-R table counts the outlays from the extra \$12.9 billion per year in contract authority provided by the budget resolution twice, since those outlays are already built into the CBO baseline. And since the extra \$12.9 billion per year in contract authority added to the EPW allocation would still leave them several billion dollars below the obligation limitation over the FY 2011-2019 period, the extra contract authority in the budget resolution's allocation cannot make the Highway Account balances significantly worse than the baseline.

Lines 7, 8 and 9 of the SBC-R table note that because the EPW six-month extension would add \$8.7 billion in extra contract authority in 2010 (above and beyond the allocation in the budget resolution) to counteract the effect of the September 30, 2009 rescission, CBO would be required to adjust its baseline to assume that extra CA reoccurs in every subsequent year. The SBC-R table assumes that this would cause an extra \$62 billion outlays from the Highway Account over ten years. But in order for the extra \$8.7 billion per year to cause these extra outlays, the obligation limitation on highways would have to go to \$49.9 billion in FY 2010 and rise to \$58.5 billion in 2019 (add 8.7 to each year's ob limit number). These higher obligation levels are not assumed in the CBO baseline. However, under the Budget Act, the only opportunity to object to the higher spending is at the point when the new contract authority is created—and once the higher contract authority levels are created, there would be great political pressure to raise obligation levels to match.

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The Senate substitute to H.R. 3617 would provide contract authority for Highway Trust Fund programs in the amounts outlined below and would also extend authority for the Trust Fund to expend funds through April 30.

The Senate substitute has three principal differences from the House-passed bill:

- **Duration/amount.** The House bill provides one-fourth of FY 2009 contract authority levels for Trust Fund programs through December 31, 2009; the Senate amendment would provide 7/12 of the FY 2009 contract authority levels through April 30, 2009.
- **Rescission.** In addition, the Senate amendment adds an extra \$8.708 billion in contract authority for FY 2010 only to restore amounts rescinded on September 30, 2009 (though without any extra obligation authority). The House-passed bill has no such provision.
- **Earmarks.** The House bill would treat pro-rated amounts of FY 2009 funding levels by state in the major earmarked SAFETEA-LU accounts as formula money for those states, ex-

cept for the PNRs and Corridor programs, which the House bill would turn into discretionary programs. The Senate amendment would treat all of the earmarked accounts equally, as formula money. This makes a large difference to California and Illinois, who stand to lose significant amounts of money under the House proposal.

A fourth issue separated an earlier version of the Senate amendment from the House bill. In the version hotlined last week, the EPW substitute would not have extended the budget “firewalls” in section 8003 of SAFETEA-LU in a pro-rated amount for the duration of the bill, whereas H.R. 3617 did. In the version of their amendment that the EPW panel now hopes to bring forward, the “firewalls” are extended by a pro-rated amount based on the duration of the bill, like the House.

If the Senate can pass the amended bill (and this is still a big “if” — not because 60+ votes are lacking but simply due to the potential time demands involved), then the House must respond. Contract authority for Trust Fund programs will be provided through December 18 through the continuing resolution (albeit at levels for highways that are one-third lower than the levels apportioned in October 2008).

House Transportation and Infrastructure chairman James Oberstar (D-MN) has several options. He could insist on his original duration to December 31 (though the increasing uncertainty as to whether and for how long the House will be in session between Thanksgiving and New Years makes this less likely). He could respond with some kind of counter-offer of a duration to between December 31 and April 30. Or he could up the ante.

A persistent rumor over the last two weeks (a rumor which the T&I staff will not come close to commenting on, even way off the record) holds that Oberstar is preparing a two-year surface transportation bill designed to (a.) create as many jobs as possible between now and the 2010 elections, (b.) get as many of the policy changes in his six-year bill as possible enacted in the two-year bill, and (c.) postpone the hard revenue decisions until after the elections. Under all rumor scenarios, Oberstar’s plan would be paid for primarily (if not exclusively) through short-term deficit financing, whether through general fund appropriations or more general fund bailouts of the Highway Trust Fund (both of which would require normal Treasury bond sales to finance the unified deficit) or special bond sales dedicated to the Trust Fund.

A two-year response to a Senate extension would make much more sense as a response to a Senate-passed eighteen-month extension, as once seemed likely. But a two-year response to a six-month extension would seem like overkill. (And since DOT and the Senate committees have not yet begun make new policy proposals, making significant policy changes before December 18 would be very difficult).

More likely would be an extension through sometime next spring, at which point either a short-term bill or a “front-loaded” deficit-financed four- or six-year surface bill as discussed recently by Senate Majority Whip Richard Durbin (D-IL) and Pennsylvania Governor Ed Rendell (D) could be debated more fully.

CONTRACT AUTHORITY PROVIDED BY THE SENATE BILL

<u>Mode/Purpose</u>	<u>Total CA Provided</u>
FAHP CA Subject to Limitation	\$ 24,760,273,943
Equity Bonus (exempt)	\$ 372,750,000
Restoration of 9-30-09 Rescission	\$ 8,708,000,000
Total, FHWA	\$ 33,841,023,943
Total NHTSA	\$ 428,329,507
Total FMCSA	\$ 317,609,690
Total FTA	\$ 4,876,996,250
Seven-Month Total, Senate Bill	\$ 39,463,959,390
Minus Funds From CR to Oct. 31	\$ (3,447,292,946)
Net Total, Senate Bill	\$ 36,016,666,444

How the House of Representatives Used To Consider Major Legislation

(Ed. Note: The following is not really relevant to transportation, but it stems from interesting information uncovered during recent research for a future article on the history of the federal excise tax on gasoline, which was first enacted in the Revenue Act of 1932).

As the House of Representatives prepares to consider the health care reform bill, it has become obvious that floor debate on the bill will be somewhat truncated and that opportunities for amendment on the floor will be almost nonexistent (see Majority Leader Hoyer's remarks on the House floor in the *Congressional Record* of last Thursday).

Hoyer cited as a justification the restrictive procedures by which the Republican majority considered the Medicare drug benefit bill in 2003. Indeed, number of hours that the House spends debating major legislation, and the opportunities for amendment during that time, have dropped steadily for many years under both parties (though things did get better for the first two years of the GOP majority in 1995-1996).

However, things were not always thus. In 1932, at the height of the Depression, federal income tax receipts had dropped to nothingness, and the Treasury Department worked with the Ways and Means Committee to produce a radical restructuring of the federal tax code.

Ways and Means reported its bill (H.R. 10236, 72nd Congress) and brought it to the floor. But the bill did not go through the House Rules Committee. On the contrary — using a privileged status accorded to tax bills prior to 1975 (and which still applies today to general appropriations bills, which need not go to Rules before the floor), the acting Ways and Means chairman simply moved that the House resolve into the Committee of the Whole for general debate on the bill.

For seven full days.

From Thursday March 10, 1932 through Thursday March 17, every

day (excluding Sunday, but the House routinely sat six days a week in those days), the House conducted general debate on the bill until all Members had had their say.

Then the entire bill was read for amendment under the five-minute rule in Committee of the Whole. At any point during the reading, any House member could offer any germane amendment to the section under discussion, and all amendments were subject to germane second-degree amendments as well.

The House continued this open amendment process for all or most of the next eleven legislative days. Once the clerk finished reading the last section, the Committee of the Whole rose, and after some final business, the House passed the bill (which had been significantly amended on the floor) by a wide 327 to 64 margin.

Why have things changed so much between the old school completely open debate and amendment process and the present-day almost-completely-closed process? We can think of several reasons offhand.

1. *Not enough days in the week.*

Prior to the ratification of the Twentieth Amendment in 1933, Congress would start its session in early December, take two or three weeks off for Christmas and New Years, and return in January for more or less constant session until around the end of the fiscal year on June 30. Before easy airline travel, legislators rarely went home for the week-end, so five-day work weeks (and often six-day work weeks) were common. Now the House can barely keep its members in town for 72 straight hours in a week.

2. *A recently invented "tradition".*

The "tradition" of tax bills receiving closed rules because of their complexity is not a Madisonian tradition. It got started as a measure of expediency during the consideration of the four major revenue bills during World War II and was carried

on after the war due to the intense stubbornness of the two major Ways and Means chairmen of that period, Robert Doughton (D-NC) (who was nicknamed "Muley" for his mule-like stubbornness in negotiations and who was the grandfather of the late legendary DC-area blues musician Root Boy Slim) and Wilbur Mills (D-AR). By the time the Medicare Act of 1965 came around, the "tradition" was firmly rooted and since the heart of the bill came from Ways and Means, Medicare was considered under a completely closed rule. A more open amendment process with a requirement that all amendments to tax bills be scored in advance by the Joint Tax Committee would easily satisfy the "complexity" and "unintended consequences" arguments that Ways and Means uses to justify its closed rule demands.

3. *Too much accountability.* The House has always amended major bills in the Committee of the Whole House on the State of the Union for a variety of reasons. Prior to a rule change in 1971, voting in the Committee of the Whole was anonymous — only the total number of yeas and nays was recorded. Therefore, there was little motivation for anyone to offer a "gotcha" amendment to a bill (an amendment that everyone knew would not pass but which was only offered to get one's political opponents to go on the record with a position that might not agree with the voters). The advent of recorded votes in the Committee of the Whole has slowly but surely made the amendment process in the House less about the merits or flaws of the particular bill and more about finding a way to call a gotcha vote on the controversial issues of the day as part of debating the bill (any bill). More individual accountability can equal less aggregate responsibility.

FMCSA Agrees To Make New Hours of Service Rule; Lawsuit On Hold

Last week, the Federal Motor Carrier Safety Administration agreed to abandon a change made in 2003 by the Bush Administration in the number of consecutive and weekly hours that can be worked by truck and bus drivers and to instead write a new rule.

The 2003 rules were repeatedly challenged in court by the Teamsters union and several safety advocacy groups. On two occasions a federal court found flaws with the process by which FMCSA arrived at the rule (not with the rule itself per se) but both times FMCSA went through the steps outlined by the court and then issued the same rule again, most recently in 2008.

Another court case is ongoing, and on the day that FMCSA's reply brief was due (October 27), FMCSA made an unusual joint filing with Public Citizen (the lead plaintiff in the lawsuit) in court to ask for fur-

ther proceedings in the lawsuit to be postponed because "FMCSA has decided to review and reconsider the 2008 rule."

The court filing makes clear that this is a settlement of the lawsuit between Public Citizen and FMCSA and that in exchange for the lawsuit going away, "FMCSA will submit the [next proposed rule] to OMB for review nine months from the date of the settlement (October 26, 2009) and...FMCSA will publish a final rule within 21 months of the date of the settlement." The filing also said that "If FMCSA promulgates a new rule that is substantially different from the 2008 Rule, that may obviate the need for judicial review of the current rule."

There is no evidence that the act of FMCSA and Public Citizen reaching a settlement on October 26 had anything to do with the Senate Commerce Committee's approval of the

long-delayed nomination of Anne Ferro to head FMCSA the following day. Some of the safety advocates who opposed the hours of service rule had voiced some opposition to Ferro's nomination because of her previous work for the trucking industry. However, this could be a logical inference.

The lead attorney for Public Citizen said that "We are pleased that the government has decided to take seriously its responsibility to protect truck drivers and the public from unsafe driving conditions instead of bending to the interests of the trucking industry."

And a representative of Parents Against Tired Truckers took the opportunity to again criticize the Obama White House for putting "the trucking industry in the driver's seat" for further safety reforms in the industry through the Ferro nomination.

NMB Proposes Rule Change To Make It Easier To Unionize Under Railway Labor Act

Yesterday, the National Mediation Board released a proposed rule to make a significant change in the way in which railroad and airline employees vote on whether or not to unionize.

The NMB exists to mediate disputes under the Railway Labor Act of 1926 and otherwise enforce that provision of the Act, which applies to railroads and airlines (as well as to hybrid air-ground carriers like Federal Express that are classified as "express carriers" that are more airline than trucking).

One of the NMB's charges under the Act is to oversee elections whereby employees of a carrier vote to determine whether to unionize and which union should represent them. In such an election, the Act says that the NMB "...the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated

and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

This definition gives a lot of wiggle room. The NMB has used the secret ballot approach, but since all the Act says is that the NMB must "insure the choice of representatives by the employees" the mechanics of the vote are up to the NMB.

Elsewhere, the Act states that a "majority of any craft or class of employees" shall determine representation. Traditionally, the NMB has interpreted this to mean that a majority of the whole number of members of that craft or class had to support a change in representation — whether or not all the members of the majority cast ballots.

Hypothetical example: assume that there are 20,000 members eligible to vote in the election. 75 percent of

them (a total of 15,000) cast votes one way or the other. Under traditional NMB rules, a total of 10,001 votes would be required to change representation. This is a simple majority of the total number of eligible voters, but it works out to be a two-thirds majority of the number who actually voted.

Under the rule issued yesterday, the NMB is going to shift to using a standard of a majority of those who voted, not the total number of eligible voters. Under the preceding example of 20,000 eligible voters and 15,000 ballots cast, the number needed to change representation would drop from 10,001 to 7,501.

The difference is the burden of apathy. Under current rules, abstaining equals a vote against representation. Under the new rules, abstaining equals having no effect on the process at all, which in turn gives an advantage to an active, vocal minority of the whole number seeking a change in representation.

Today's Senate Cap-and-Trade Markup Likely To Be Postponed By Boycott

The Senate Environment and Public Works Committee is scheduled to hold a markup of its climate change bill (S. 1733) today starting at 9 a.m. But that markup may have to be postponed because of a boycott by the Republican members of the committee.

Under committee rules, at least two minority party members must be present to begin a markup. Rule 2 (b) of the EPW Committee rules, adopted on February 12, 2009, states that "At committee business meetings, and for the purpose of approving the issuance of a subpoena or approving a committee resolution, one third of the members of the committee, at least two of whom are members of the minority party, constitute a quorum..." Once this quorum to start the business meeting comes together, the quorum is presumed present. If a bill is actually reported, the quo-

rum for that action rises to a majority of the committee, regardless of party.

Committee Republicans, led by ranking member Jim Inhofe (R-OK), say that they are opposed to the fast-tracking of the bill because they are not being given enough time to consider all of its economic impacts.

The 821-page bill introduced on September 30 by Sens. Kerry (D-MA) and Boxer (D-CA) has been superseded by a 925-page substitute version made public on October 23. Neither the Congressional Budget Office nor the Environmental Protection Agency has had time to perform a full analysis of the substitute, which could take several additional weeks. News reports indicate that the White House is pressing for Senate floor action on the bill by the Copenhagen summit on climate change on December 7.

The substitute adds actual percentage distributions of the tradable allowances for carbon emissions by year (carbon released in a year is a "vintage" under the bill, just like a fine wine).

Under the substitute, 2.21 percent of the distributable allowances for vintage years 2012 and 2013 will be sold at auction with the proceeds going towards transportation greenhouse gas reduction (principally mass transit). This percentage drops to 1.35 percent the next year and will drop as low as 0.94 percent before rising back to 2.52 percent in vintage year 2029.

("Distributable allowances" differ from total carbon emission allowances in a hard-to-understand way that is not spelled out particularly well in any of the explanatory materials on the committee website.)

House, Senate Hold Hearings On Distracted Driving Dangers

Last week, both the House and Senate held hearings on the dangers posed by drivers who are distracted by wireless telephones, email and text message devices, and other electronics while driving.

Transportation Secretary Ray LaHood, who recently held a high-profile Distracted Driving Summit and who requested to testify personally at both the House and Senate hearings on this issue, told the Senate Commerce, Science and Transportation Committee that:

Experts agree that there are three types of distraction: (1) visual – taking your eyes off the road; (2) manual – taking your hands off the wheel; and (3) cognitive – taking your mind off the road. While all distractions can adversely impact safety, texting is the most egregious because it involves all three types of distraction.

LaHood emphasized President Obama's recent executive order banning texting, emailing and hand-on-phone talking for federal em-

ployees while on official business or while driving government vehicles. And LaHood also mentioned other steps that can be taken unilaterally by DOT, including bans on electronic device usage by train, truck and bus drivers.

Senators Jay Rockefeller (D-WV) and Frank Lautenberg (D-NJ) introduced legislation (S. 1938) on October 28 to create a new incentive grant program for states that enact primary laws against texting, emailing or talking on the phone (without a hands-free headset) while driving, similar to grant programs designed to encourage states to enact primary seat belt laws.

(*Ed. Note:* House Transportation and Infrastructure chairman James Oberstar (D-MN) said that he will amend his draft multi-year surface transportation bill to address the issue of distracted driving. Section 1517 of Oberstar's draft bill would withhold increasing percentages of

a state's highway funding each year unless the state passes a law requiring mandatory installation of breathalyzer interlock devices in the automobiles of persons who have a first offense DUI, even at the lowest .08 standard. The few studies that have been done on this issue indicate that texting while driving is far, far more dangerous than driving drunk at .08 BAC. Presumably, Oberstar would amend his bill to require a mandatory cell phone jammer with a six or eight foot radius be installed behind the dashboard of everyone convicted of a first offense driving-while-texting offense as well, no?)

Interested persons should read the article in the November 1 *New York Times* about how England is leading the way in harsh sentences for persons who text while driving and cause accidents:

<http://tinyurl.com/y9sa6xe>

NEW AND NOTABLE ON THE INTERNET

Cap-and-Trade Bill

The manager's amendment and explanation of S. 1733, the Senate cap-and-trade bill, are here:

http://epw.senate.gov/public/index.cfm?FuseAction=Majority.PressReleases&ContentRecord_id=84691b8e-802a-23ad-4728-e60de8d50fea&Region_id=&Issue_id=

Distracted Driving

Witness statements and an archived webcast of last week's Senate hearing on distracted driving is here:

http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=90d6e015-ee85-40c9-8561-48b82fdd0377

Witness statements and an archived webcast of last week's Senate hearing on distracted driving is here:

<http://transportation.house.gov/hearings/hearingDetail.aspx?NewsID=1029>

Hours of Service Rulemaking/Lawsuit Settlement

The joint court filing by Federal Motor Carrier Safety Administration and Public Citizen asking the court to put the lawsuit on hold pending a new rulemaking from FMCSA is here:

<http://www.citizen.org/documents/HOS%20Joint%20Motion%20to%20Hold%20in%20Abeyance.pdf>

National Mediation Board Change of Voting Procedure for Organization under Railway Labor Act

The text of the NMB's proposed rule to change the voting threshold for organizing a craft or class under the Railway Labor Act is here:

http://www.nmb.gov/representation/reprulechange_11-03-09.pdf

STATUS OF PENDING TRANSPORTATION-RELATED NOMINATIONS

Agency	Nominee	Position	Senate Committee	Latest Action
Department of Transportation	Chris Bertram	Assistant Secretary for Budget and Programs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of Transportation	Susan Kurland	Assistant Secretary for Aviation and Int'l Affairs	Commerce, Science and Transportation	Nomination confirmed 8/7/09
DOT-Federal Motor Carrier Safety Admin.	Anne Ferro	Administrator	Commerce, Science and Transportation	Nomination reported 10/27/09
DOT-National Highway Traffic Safety Admin.	Charles Hurley	Administrator	Commerce, Science and Transportation	Nomination reportedly will be withdrawn
DOT—Pipeline and Hazard. Materials Adm.	Cynthia Quarterman	Administrator	Commerce, Science and Transportation	Nomination reported 10/27/09
National Transport. Safety Board	Christopher Hart	Member for a term expiring 12/31/2012	Commerce, Science and Transportation	Nomination confirmed 8/7/09
National Transport. Safety Board	Mark R. Rosekind	Member for a term expiring 12/31/2014	Commerce, Science and Transportation	Nomination transmitted 10/1/09
Surface Transportation Board	Daniel Elliott	Chairman	Commerce, Science and Transportation	Nomination confirmed 8/7/09
Department of the Army	Jo-Ellen Darcy	Assistant Secretary for Civil Works	Armed Services <i>and</i> Enviro. & Public Works	Nomination confirmed 8/7/09
Department of Homeland Security	Erroll Southers	Assistant Secretary for Transport. Security	Commerce <i>and</i> Homeland Security	Nomination transmitted 9/17/09

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THIS WEEK IN COMMITTEE

Tuesday, November 3, 2009 — Senate Environment and Public Works — full committee business meeting to mark up S. 1733, climate change (cap and trade) — *9:00 a.m., SD-406 Dirksen.*

Wednesday, November 4, 2009 — House Transportation and Infrastructure — Subcommittee on Water Resources and Environment — subcommittee hearing on water infrastructure spending in the Recovery Act — *10:00 a.m., 2167 Rayburn.*

Thursday, November 5, 2009 — House Transportation and Infrastructure — full committee business meeting to mark up H.R. ____, the “Hazardous Material Transportation Safety Act of 2009”, H.R. 3377, the “Disaster Response, Recovery, and Mitigation Enhancement Act of 2009”, H.R. 1174, the “FEMA Independence Act of 2009”, H. Res. 841, expressing support for designation of November 29, 2009, as “Drive Safer Sunday”, and GSA Capital Investment and Leasing Program Resolutions — *11:00 a.m., 2167 Rayburn.*

COCONUT ROAD UPDATE

For anyone who missed the blurb in the Saturday, October 31 *Washington Post*, check the following link:

<http://tinyurl.com/ydnfcco>

STATUS OF MAJOR TRANSPORTATION BILLS — 111th CONGRESS

BILL	HOUSE ACTION	SENATE ACTION	RESOLUTION
Economic Stimulus Appropriations & Tax Cuts	H.R. 1 conference report passed House 2/13/09 by 246-183-1	H.R. 1 conference report passed Senate 2/13/09 by a vote of 60-38	Public Law 111-5 2/17/09
FY 2010 Congressional budget resolution	H. Con. Res. 85 passed House 4/2/09 by vote of 233-196	S. Con. Res. 13 passed Senate 4/2/09 by vote of 55-43	Conference report (H. Rept. 111-89) agreed to 4/29/09
FY 2010 Transportation-HUD Appropriations	H.R. 3288 passed House 7/23/09 by a vote of 256-168	H.R. 3288 passed Senate amended 9/17/09 by vote of 73-25	
FY 2010 Energy and Water Appropriations	H.R. 3183 passed House 7/17/09 by a vote of 320-97	H.R. 3183 passed Senate amended 7/29/09 by vote of 85-9	Public Law 111-85 10/28/09
FY 2010 Homeland Security Appropriations	H.R. 2892 passed House 6/24/09 by a vote of 389-37	H.R. 2892 passed Senate amended 7/9/09 by a vote of 84-6	Public Law 111-83 10/28/09
Federal Aviation Admin. Reauthorization Bill	H.R. 915 passed House 5/22/09 by a vote of 277-136	S. 1451 reported 9/29/09 S. Rept. 111-82	
Surface Transportation Reauthorization Bill	Subcommittee marked up draft bill on 6/24/09		
Short-Term Extension of Surface Transportation Laws	H.R. 3617 passed House 9/23/09 by a vote of 335-85	S. 1498 reported 7/22/09 S. Rept. 111-59	
Water Resources Development Act			
FY 2010 Coast Guard Authorization	H.R. 3619 passed House 10/23/09 by a vote of 385-11	S. 1194 reported 10/30/09 S. Rept. 111-95	
Transportation Security Admin. Reauthorization	H.R. 2200 passed House 6/4/09 by a vote of 397-25		