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## **INSIDE THE BELTWAY UPDATE**

This week, Congress returned to a busy agenda after a two-week recess. The House and Senate have largely opened up in-person meetings and many trade associations and interest groups are now holding in-person fly-ins.

During a hearing with Transportation Secretary Pete Buttigieg, Senator Manchin criticized the idea of more EV tax credits, calling them “ludicrous” and arguing they deepen U.S. reliance on Chinese minerals. This comment appears to complicate informal discussions of negotiating a mini version of the stalled Build Back Better Act (BBB). As you know, Senator Joe Manchin (D-WV) killed the previous multi-trillion iteration that focused on climate change, healthcare, and tax reform.

While Senator Manchin has previously expressed openness to a smaller BBB that raises taxes and pays for energy tax credits, he recently said that any BBB-style package should be focused on modernizing the U.S. tax code and fighting inflation. This means raising individual, corporate, and capital gains taxes. At the same time, Senator Manchin has convened a bipartisan group of senators to discuss energy tax credit legislation. This would likely include tax credits for renewable energy industries but structured in a way that traditional forms of energy would not be harmed. Senator Manchin has reiterated that he favors “innovation not elimination.” It is not clear whether this proposal has legs, but other Democrats have emphasized that this is not in lieu of BBB.

It is important to note that none of these discussions are formal. The White House and Senator Manchin are not negotiating anything yet, and it remains unclear as to what Senator Manchin and fellow moderate Senator Kyrsten Sinema (D-AZ) would actually support.

To address high gas prices, the Senate is expected to vote on legislation that would strengthen the Federal Trade Commission (FTC)’s ability to target alleged price manipulation. This bill is unlikely to move, however, due to opposition from EMA and many Senate Republicans. Other discussed ideas – such as a national gas tax holiday – are also unlikely to move due to opposition from Speaker Nancy Pelosi (D-CA), many other Democrats, and many Republicans.

Next week, the House and Senate will begin formally conferencing the “China legislation.” This refers to different House- and Senate-passed bills to spur American innovation and competition with China. This is important from a timing standpoint, as negotiations could take up much of the summer.

The uncertainty over Senator Manchin’s position on BBB meets a Congressional calendar that is not conducive to many big initiatives. Congress has about ten more weeks in session before the August recess, after which the focus will turn to the midterms. For Democrats, focus will probably narrow to two key priorities – finishing the “China legislation,” and getting something on the domestic/climate change/tax policy front. Even these two priorities will compete with two must-pass pieces of annual legislation that begin in the summer: beginning the government funding process for FY23 and beginning the defense policy bill process for FY23.

All signs point to a long summer.

## **FDA PROPOSES BAN ON MENTHOL CIGARETTES AND FLAVORED CIGARS**

The Food and Drug Administration (FDA) issued two new proposed rules this week that would ban the manufacture and sale of menthol flavored cigarettes and ban all flavored cigars and cigarillos. Should these federal flavor bans be finalized, it would represent the most far-reaching action taken by the FDA since Congress gave the agency the authority to regulate tobacco products in 2009. The proposed rules essentially mirror each other with a few exceptions. Both rules would: become effective one year after becoming finalized; focus enforcement on manufacturers, distributors and retailers, but not on consumers for possession or use. However, tobacco manufacturers as well as the Energy Marketers of America strongly oppose the menthol and flavor bans and will likely challenge the proposed rules which is likely to set off a protracted legal battle that would delay implementation of the rule for years and/or likely to stop implementation.

Specifically, the proposed rule for cigarettes would prohibit the use of menthol as a flavor in cigarettes and cigarette components and parts, including those that are sold separately to consumers. Specifically, the rule would provide that a cigarette or any of its components or parts (including the tobacco, filter, wrapper, or paper, as applicable) may not contain, as a constituent (including a smoke constituent) or additive, menthol that is a characterizing flavor of the tobacco product or tobacco smoke.

The proposed rule for cigars and cigarillos would prohibit the use of all flavors in cigars. The FDA proposes to define “cigar” as a tobacco product that: (1) is not a cigarette and (2) is a roll of tobacco wrapped in leaf tobacco or any substance containing tobacco. The rule would provide that a cigar or any of its components or parts (including the

tobacco, filter, or wrapper, as applicable) must not contain, as a constituent (including a smoke constituent) or additive, an artificial or natural flavor (other than tobacco) or an herb or spice. The banned flavors include, but are not limited to: strawberry, grape, orange, clove, cinnamon, pineapple, vanilla, coconut, licorice, cocoa, chocolate, cherry, coffee, mint, or menthol, that is a characterizing flavor of the tobacco product or tobacco smoke.

A proposed menthol ban would give rise to illicit sales of these products by vendors and individuals who would not verify the age of consumers or collect taxes. Convenience retailers train their employees how not to sell tobacco products to underage customers, yet law-abiding small businesses could lose in-store sales of flavored tobacco products and likely other in-store products if such a ban goes into effect. Menthol cigarette sales make up about one-third of overall cigarette sales and even more in some regions. The ban also has the potential to affect all levels of the tobacco industry from the thousands of unionized farmers, machinists, raw materials providers, truck drivers, warehouse operators, and retailers who operate responsibly in the legal, regulated industry today. In addition, the federal government and state governments combined stand to lose more than \$6.6 billion in tax revenue in the year following prohibition of menthol-flavored cigarettes and flavored cigars, as recently reported by the Tax Foundation, an independent tax policy nonprofit.

There is no timeline for the FDA rules to be finalized, but they are believed to be fast tracked and could be finalized by the end of 2022 or early 2023. The public comment period is open for 60 days and will close on July 4, 2022. After the rules are finalized, retailers will have one year from the effective date of the rules to sell remaining floor stocks. EMA encourages retailers to submit comments on the proposed rule highlighting that a ban on menthol cigarettes and cigars with characterizing flavors will likely lead to an illicit market that will put small business convenience stores out of business and lead to billions in lost government revenue.

### **FMCSA CONSIDERING SPEED LIMITER RETROFIT REQUIREMENT FOR COMMERCIAL MOTOR VEHICLES**

The Federal Motor Carrier Safety Administration (FMCSA) announced this week it will move forward with a proposed rulemaking that would require speed limiters commercial motor vehicles (CMVs) weighing over 26,000 pounds and operated in interstate commerce. The FMCSA, in conjunction with the National Highway Traffic Safety Administration (NHTSA), proposed a speed limiter rule back on September 7, 2016 that was never acted upon. That rule would have required speed limiters on newly manufactured CMVs. The FMCSA now says it intends to issue a supplemental proposed rulemaking that would require motor carriers to retrofit CMVs manufactured after 2003 with speed limiters.

According to the FMCSA, CMVs manufactured after this date are equipped with an electronic engine control units (ECUs) capable of governing maximum vehicle speed. Motor carriers would be required to retrofit ECUs by reprogramming them for use as a speed limiter set at a maximum speed that will be determined by the FMCSA in a final rulemaking. As in the previous proposed rule, the new FMCSA proposal would apply to CMVs over 26,000 pounds operating in interstate commerce. The proposed rule would also require motor carriers to maintain the ECU limit for the service life of the vehicle.

FMCSA is seeking comments and data from interested parties regarding the adjustment or reprogramming of ECUs. The data collection includes:

1. What percentage of the CMV fleet currently uses speed limiting devices?
2. If in use, at what maximum speed are the devices generally set?
3. What training is needed for maintenance personnel to adjust or program ECUs to set speed limits?
4. What tools or equipment are needed to adjust or program ECUs?
5. How long would adjustment or reprogramming of an ECU take?
6. Where can the ECU adjustment be completed, on site, at a dealership or service center?
7. Do responses to questions 3 through 6 change based on the model year of the power unit?
8. Since publication of the proposed rule in September 2016, how has technology changed as it relates to the ability to set speed limits using ECUs?
9. Should FMCSA revisit using the 2003 model year as the baseline requirement for the rule?
10. Should FMCSA consider a retrofit requirement in the rule and, if so, should it be based on model year or other criteria, and what would the cost of such a requirement be?

The data collected will then be used to issue a proposed rule later in the year. EMA will comment on the proposed rule and welcomes your comments on the 10 questions listed above. Send your Comments to Mark Morgan, EMA Regulatory Counsel at [mmorgan@emamerica.org](mailto:mmorgan@emamerica.org) before July 1, 2022.

### **EPA AGREES TO FINALIZE RFS ANNUAL BLENDING VOLUMES FOR 2021 AND 2022 BY JUNE 3**

The U.S. EPA has entered into a consent decree with Growth Energy to issue minimum biofuel blending volumes under the renewable fuel standard (RFS) no later than June 3. The consent decree was the result of settlement of a lawsuit between the EPA and Growth Energy over the agency's tardiness in meeting statutory deadlines for issuing blending volumes that ethanol producers and refiners rely on to manage production. The consent decree was approved by the U.S. District Court for the District of Columbia and covers the annual volumes under the RFS for 2021 and 2022.

The litigation centered around the annual volumes of conventional biofuel, such as corn ethanol, along with other renewables including advanced biofuels. The annual blending volumes for 2020 were finalized, but the EPA proposed to change them retroactively to reduce blending requirements for advanced biofuels. The upcoming rule to be finalized in June apply to volumes for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2021 and 2022, and the biomass-based diesel (BBD) applicable volume for 2022. The EPA is also expected to modify the volumes previously established for cellulosic biofuel, advanced biofuel, and total renewable fuel for 2020. In addition, to address the remand of the 2014-2016 annual rule by the D.C. Circuit Court of Appeals, the EPA is proposing a supplemental renewable fuel (ethanol) volume of 250 million gallons in 2022, and 2023. EMA supports limiting annual corn ethanol blending volumes to 9.7 percent of projected gasoline demand to address E15 compatibility issues with underground storage tank equipment.

Meanwhile, Midwest governors sent a letter to the EPA requesting a permanent reduction in the Reid Vapor Pressure (RVP) gasoline standard in order to allow retailers to sell E15 year-round without the need to receive temporary waivers in the future. Unfortunately, requiring a lower RVP standard will likely increase prices at the pump and not result in any additional savings to motorists given ethanol's lower energy content. According to the EIA, because ethanol contains about 67 percent of the energy content of gasoline per gallon, use of ethanol blends results in lower vehicle fuel economy (miles traveled per gallon) relative to gasoline that does not contain ethanol.

### **SENATE COMMITTEE TO EXAMINE ANTICOMPETITIVE PRACTICES BY CREDIT CARD INDUSTRY**

The Merchants Payments Coalition, of which EMA is a member, welcomed Wednesday's announcement that the Senate Judiciary Committee will hold a hearing next week, May 4, on anticompetitive practices by the credit card industry that have led credit card "swipe" fees to more than double over the past decade and are driving up prices as consumers face near-record inflation.

The announcement comes less than two weeks after Durbin, Senator Roger Marshall (R-KS); Representative Peter Welch (D-VT), and Representative Beth Van Duyne (R-TX), wrote to Visa and Mastercard asking that they withdraw \$1.2 billion in credit card swipe fee increases set to take affect this month.

Credit card swipe fees are still hidden and centrally fixed by the card companies. Fees have more than doubled over the past decade despite technological improvements that have driven down processing costs. The rates charged to U.S. retailers are among the highest in the world, seven times the maximum allowed in Europe. In 2019, card processing fees totaled \$116.4 billion, according to the Nilson Report. That was up 88 percent over the previous decade. Additionally, swipe fees are the second highest operating cost for convenience store retailers. In 2019, the industry's pre-tax profit was \$11.9 billion and card fees paid by the industry were \$11.8 billion. For small business energy marketers, swipe fees are the highest expense other than payroll. Because swipe fees are a percentage of the purchase, the amount collected goes up as prices go up, creating a multiplier effect for inflation and giving the card industry an unearned windfall even if rates stay the same.

### **OIL PRICES CONTINUE DECLINE ON CHINA LOCKDOWNS**

Oil prices continued their fall early this week amid concerns that COVID-19 lockdowns in China are affecting the economy and petroleum demand. West Texas Intermediate crude futures declined by \$3.00 per barrel in trading on Monday to below \$99.

### **MARCH PETROLEUM DEMAND SLIPS**

The American Petroleum Institute reports that total U.S. petroleum demand March slid 5.9 percent in March from February's level. The 20.4 million barrels per day marked the highest demand for the month of March since 2018. The decrease from February to March was the second largest in the past 10 years, topped only by the months at the start of the COVID pandemic. Distillate deliveries declined in the month by 8.8 percent to 4 million barrels per day.

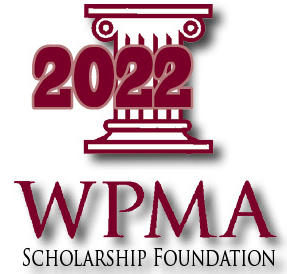
### **TRUCKING FORECASTS ECONOMIC DOWNTURN**

Economic recessions followed six of the last 12 trucking downturns since 1972. Spot market freight rates in trucking, which Joseph Rajkovic of the Western States Trucking Association calls "the proverbial canary in the mineshaft," are currently in correction territory.



**LOOK FOR ...**

Hawaii, Idaho, Montana, New Mexico, Oregon, Utah, Washington, Member-at-Large, and Associate scholarship winner announcements in **MAY!**



### **MARK YOUR CALENDARS FOR UPCOMING EVENTS**

**May 5-6, 2022** – Nevada (NPM&CSA) Big Dogs – Las Vegas, NV

**June 7-8, 2022** – Montana (MPMCSA) Convention – Fairmont Hot Springs Resort – Fairmont, MT

**June 20-22, 2022** – Washington (WI/ED) Convention – Suncadia Resort – Cle Elum, WA

**June 23, 2022** - Utah (UPMRA) Summer Golf Classic - Stonebridge GC - West Valley City, UT

**July 17-19, 2022** – Oregon (OFA) Annual Convention – Sunriver Resort – Sunriver, OR

**August 3-5, 2022** – Idaho (IPM&CSA) Convention – Coeur d’Alene Resort – Coeur d’Alene, ID

**August 22-24, 2022** – New Mexico (NMPMA) Convention – Sandia Resort & Casino – Albuquerque, NM

**September 14-16, 2022** – Utah (UPMRA) Convention – Sheraton Park City Hotel – Park City, UT

**February 21-23, 2023** – WPMA Convention & Expo – Mirage Hotel– Las Vegas, NV

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***Petro Pete:* “The laziest people always know what you should do.”**

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If you do not wish to receive information via fax or e-mail, please contact WPMA at: (801) 263-9762, Fax: (801) 262-9413, or e-mail: [janr@wpma.com](mailto:janr@wpma.com). Thanks.