

BEFORE THE U.S. DEPARTMENT OF TRANSPORTATION AND
THE FEDERAL HIGHWAY ADMINISTRATION

PETITION FOR RULEMAKING TO REPEAL THE
PROPRIETARY AND PATENTED PRODUCTS RULE
23 CFR 635.411

SUBMITTED BY
AMERICAN ROAD & TRANSPORTATION BUILDERS
ASSOCIATION

ON

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I. Introduction and Summary

On behalf of its more than 7,500 members, the American Road and Transportation Builders Association (“ARTBA”)¹ submits this petition to the Federal Highway Administration (“FHWA”) for a rulemaking to repeal the proprietary and patented products rule (23 CFR 635.411, the “Rule”). The Rule—a relic of the early 1900s—prohibits state contracting agencies from using federal funds to acquire patented or proprietary materials, products, or services, except under certain limited circumstances. In doing so, the Rule discourages industry and state contracting agencies from developing and deploying products that could save lives, minimize congestion, and otherwise improve the quality of our nation’s highways.

As Secretary Chao explained at her Senate confirmation hearing, “Our country’s transportation infrastructure is the underpinning of our world-class economy,” but this benefit is increasingly “jeopardized by infrastructure in need of repair, the specter of rising highway fatalities, growing congestion, and by a failure to keep pace with emerging technologies.”² Of particular concern, road fatalities have increased at an alarming rate after decades of decline. According to estimates from the National Safety Council (“NSC”), there were 40,100 motor-vehicle deaths in 2017, a 1% decrease from its 2016 estimates, but a 6% increase from 2015.³

Similarly, the National Highway Traffic Safety Administration (“NHTSA”) found that 37,461 people died in motor vehicle crashes in 2016, an increase of 5.6% over the prior year, and

¹ ARTBA’s membership includes private and public sector members that are involved in the planning, designing, construction, and maintenance of the nation’s roadways, waterways, bridges, ports, airports, rail, and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs.

² U.S. Senate Committee on Commerce, Science, and Transportation, Nomination Hearing for the Honorable Elaine Chao (Jan. 11, 2017).

³ NSC Motor Vehicle Fatality Estimates, Prepared by the Statistics Department National Safety Council, (December 2017) available at http://www.nsc.org/NewsDocuments/2018/December_2017.pdf.

an increase of 14.4% since 2014.⁴ The U.S. Department of Transportation (“DOT”) estimates that motor vehicle crashes alone cost our country \$242 billion a year (the NSC estimates \$413.8 billion in costs for 2017).⁵ And while there are new products on the market that could help address these harms, state contracting agencies are discouraged from acquiring and deploying them on our nation’s highways, *all because of a regulation first implemented in 1916 by the Secretary of Agriculture.*

The Rule is a prime example of a misguided regulation that impedes safety, quality, competitiveness, and innovation in the transportation industry, but has nevertheless survived for decades under prior Administrations. The Trump Administration has made clear that this type of regulation is no longer viable: “[e]very regulation should have to pass a simple test: Does it make life better or safer for American workers or consumers? If the answer is no, we will be getting rid of it and getting rid of it quickly.”⁶ The Rule fails this basic test—it effectively deters state contracting agencies from acquiring the safest and most advanced products and services, while simultaneously discouraging industry from developing new, innovative products and technologies.

For these reasons, and as explained in greater detail below, ARTBA respectfully requests that the FHWA follow the Administration’s directive and open a rulemaking to repeal the Rule (a process that will also assist the FHWA in carrying out the President’s Executive Order 13771, which directs agencies to eliminate two rules for every new rule promulgated).

⁴ Insurance Institute for Highway Safety, Yearly Snapshot, available at <http://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts>. According to the NSC, its figures are not comparable to NHTSA figures. NSC counts both traffic and non-traffic deaths that occur within a year of the accident, while NHTSA counts only traffic deaths that occur within 30 days.

⁵ *Id.* See also NSC Motor Vehicle Fatality Estimates, Prepared by the Statistics Department National Safety Council, (December 2017) available at http://www.nsc.org/NewsDocuments/2018/December_2017.pdf.

⁶ Remarks by President Trump at Signing of Executive Order on Regulatory Reform, Oval Office, (Feb. 24, 2017).

II. Why the Petition is Needed — Our Nation’s Highways Face Significant Challenges that Require Innovative Solutions

The U.S. faces serious challenges on our nation’s highways, including rising fatalities, increasing congestion, and an infrastructure in need of repair and improvement. Recognizing these challenges, the Trump Administration and Secretary Chao have committed the DOT to improving safety by eliminating “unnecessary, duplicative or seldom used regulations from the regulatory agenda, so we can ensure that resources are spent on actually improving safety, rather than paperwork exercises.”⁷ Unfortunately, the Rule, as explained in greater detail in Section III, stands in the way of solving these critical challenges.

A. Safety on Highways Continues to Present Significant Challenges

During the first decade of the 21st century, over 400,000 people died on America’s roadways, while 25 million suffered life-altering injuries.⁸ Such incidents have had a profound impact, not only on those injured, but also on their families and communities.⁹ Even more concerning, after years of declining rates, the number of motor vehicle fatalities has increased at an alarming rate the past few years.

According to preliminary estimates from the NSC, there were 40,100 motor-vehicle deaths in 2017, marking “the second consecutive year the annual fatality total has been around 40,000 after having not reached this level since 2007.”¹⁰ Similarly, NHTSA data for 2016 shows a total of 37,461 people died in motor vehicle crashes, a 5.6% increase in deaths compared with 2015,

⁷ Remarks by U.S. Secretary of Transportation Elaine L. Chao at Western Governors Association Winter Meeting, Phoenix Arizona, (Dec. 2, 2017).

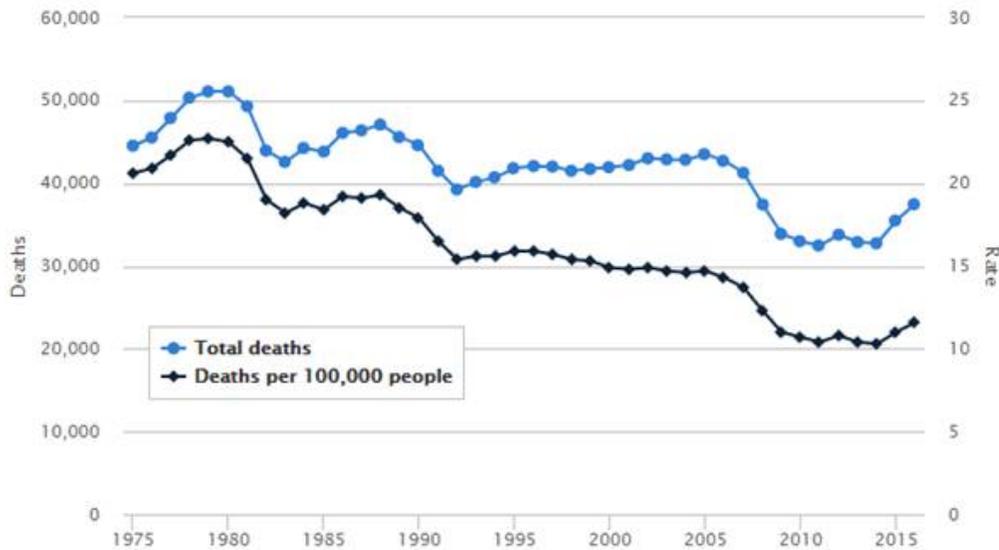
⁸ DOT Roadway Safety Plan, available at <https://www.transportation.gov/policy/transportation-policy/dot-roadway-safety-plan>.

⁹ *Id.*

¹⁰ NSC Motor Vehicle Fatality Estimates, Prepared by the Statistics Department National Safety Council, (December 2017) available at http://www.nsc.org/NewsDocuments/2018/December_2017.pdf.

and the highest number of traffic deaths since 2007.¹¹ NHTSA has reported that the rate of motor vehicle fatalities per 100,000 people is at its highest level since 2009.¹²

Fig. 2 NHTSA Data on Motor Vehicle Crash Deaths and Deaths Per 100,000 People¹³



According to NHTSA, the number of vehicle miles traveled on U.S. roads in 2016 increased by 2.2%, and resulted in a fatality rate of 1.18 deaths per 100 million VMT—a 2.6% increase from the previous year.¹⁴ Fatalities increased from 2015 to 2016 in almost all segments of the population—passenger vehicle occupants, occupants of large trucks, pedestrians, pedal cyclists, motorcyclists, alcohol-impaired driving, male/female, and daytime/nighttime.¹⁵

¹¹ National Center for Statistics and Analysis, *2016 Fatal Motor Vehicle Crashes: Overview*, Report No. DOT HS 812 456, (Oct. 2017).

¹² DOT National Highway Traffic Safety Administration, *Quick Facts 2016*, Report No. DOT HS 812 451, (Oct. 2017); *See also* NHTSA Fatality Analysis Reporting System, Data Tables Summary.

¹³ Insurance Institute for Highway Safety, Highway Loss Data Institute, *General Statistics 2016*, Citing FARS, (Dec. 2017) available at <http://www.iihs.org/iihs/topics/t/general-statistics/fatalityfacts/overview-of-fatality-facts>.

¹⁴ National Center for Statistics and Analysis, *2016 Fatal Motor Vehicle Crashes: Overview*, Report No. DOT HS 812 456, (Oct. 2017).

¹⁵ *Id.*

B. Our Highway Infrastructure is in Need of Repair and Expansion

The Trump Administration has warned repeatedly that “American infrastructure has fallen behind due to years of inaction and a broken permitting system.”¹⁶ According to the White House, “[o]ne out of every five miles of U.S. highway pavement is in poor condition,” “[o]ne third of America’s bridges are 50 years or older,” and Americans spend on average 42 hours per driver a year stuck in traffic. To address these challenges, the President continues to push for the “safe, fast, reliable, and modern infrastructure our economy needs and our people deserve.”¹⁷

Specifically, the Trump Administration has called for more “efficient and effective federal infrastructure decisions” to address the “poor” condition of our current infrastructure.¹⁸ In his State of the Union Address, President Trump called out the regulatory burdens limiting our ability to address infrastructure challenges: “We built the Empire State Building in just 1 year — is it not a disgrace that it can now take 10 years just to get a permit approved for a simple road?”¹⁹ Similarly, in a speech on August 15, 2017, the President explained that the approval process for building a routine highway requires “builders [to] get up to 16 different approvals involving nine different federal agencies governed by 29 different statutes.”²⁰ The President has further warned that these

¹⁶ President Donald J. Trump Will Rebuild American Infrastructure and Forge a Path Towards Greater Prosperity, Facts Sheet, (Jan. 30, 2018).

¹⁷ President Donald J. Trump’s State of the Union Address, (Jan. 30, 2018).

¹⁸ Presidential Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure, (August 15, 2017) available at <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-establishing-discipline-accountability-environmental-review-permitting-process-infrastructure>.

¹⁹ President Donald J. Trump’s State of the Union Address, (Jan. 30, 2018).

²⁰ Remarks by President Trump on Infrastructure, (Aug. 15, 2017). Similarly, the FHWA has recognized the need for “modernizing bridges and roads through better materials, new construction techniques, and consistent quality control” Federal Highway Administration Research and Technology Agenda, Meeting the Challenge: Infrastructure, (visited Feb. 8, 2018) available at <https://www.fhwa.dot.gov/research/fhwaresearch/agenda/researchareas.cfm?urlanchor=infrastructure#>.

challenges “not only . . . cost our economy billions of dollars but . . . also den[y] our citizens the safe and modern infrastructure they deserve.”²¹

More recently, in February, the President released the outline of his proposed Infrastructure Plan to “rebuild [the nation’s] failing infrastructure and develop innovative projects.”²² The Plan calls for the “[e]liminat[ion] of regulatory barriers” to provide “needed flexibility for projects to be developed and managed effectively and efficiently.”²³ This desire for regulatory reform is a pillar of the President’s Infrastructure Plan, which notes that excessive federal regulation can “impede creativity, add costs, and slow down the process”²⁴ of delivering projects.

III. The Proprietary and Patented Rule is a Roadblock to Achieving the Administration and Department’s Safety and Infrastructure Goals

Despite the alarming increase in fatalities on our roads, and the clear need to augment highway infrastructure, the FHWA is burdened with a 102 year-old rule that discourages industry and state contracting agencies from deploying the most innovative and efficient products and services.

Specifically, 23 CFR 635.411 prohibits state contracting agencies from using federal funds for patented or proprietary materials, specifications, or processes unless (1) the item is purchased or obtained through competitive bidding with equally suitable unpatented items; (2) the contracting agency certifies either that the proprietary or patented item is essential for synchronization with the existing highway facilities or that no equally suitable alternative exists; or (3) the item is used for research or for a special type of construction on relatively short sections of road for

²¹ Remarks by President Trump on Infrastructure, (August 15, 2017).

²² Building a Stronger America: President Donald J. Trump’s American Infrastructure Initiative, Press Release, (Feb. 12, 2018).

²³ *Id.*

²⁴ Building a Stronger America, Department of Transportation - Briefing Room, (Feb. 12, 2018) available at <https://www.transportation.gov/briefing-room/building-stronger-america>.

experimental purposes. Since many new technologies—particularly those that mark a significant advance in quality, performance, or durability—incorporate intellectual property, the Rule inevitably impedes the development and deployment of products from the market that could save lives, minimize congestion, and otherwise improve the quality of our nation’s highways.

As explained in this section, there are ample legal and policy reasons why repealing the Rule would benefit the public and help achieve the government’s stated goals of improving safety and our nation’s highway infrastructure. In this regard, President Trump has directed that regulations that do not make life better or safer for American workers or consumers should be gotten rid of and gotten rid of quickly.²⁵ And President Trump and the DOT have both stated a goal to empower local jurisdictions, such as by “enhancing State and local participation in safety planning processes.”²⁶ Repealing the Rule will help accomplish these objectives.

A. The History of the Rule Demonstrates its Lack of a Valid Basis

The Rule was first adopted by the Secretary of Agriculture in 1916 in response to the Federal Aid Road Act of 1916 (the “Act”).²⁷ While the Act has been superseded by many other funding statutes, the Rule has remained in place, even though it rested on questionable legal footing from the beginning and was subject to heated (and, as it turned out, accurate) criticism that it would stifle competition and inhibit the development of the best products and services.

Following passage of the Act in 1916, the Department of Agriculture, then in charge of the nation’s highways, began drafting regulations to govern implementation of the federal aid program. On February 6, 1917, representatives of the Department of Agriculture addressed the

²⁵ Remarks by President Trump at Signing of Executive Order on Regulatory Reform, Oval Office, (Feb. 24, 2017).

²⁶ *Id.*

²⁷ Creation of a Landmark: The Federal Aid Road Act of 1916 by Richard F. Weingroff and various news reports from 1916.

American Road Builders' Association ("ARBA")²⁸ to explain the new rules and regulations.²⁹ One of these rules, "Section 4," effectively barred state contracting agencies from using federal funds to acquire proprietary or patented products:³⁰

"No part of the money apportioned under the act shall be used directly or indirectly to pay or to reimburse a state, county or local subdivision for the payment of any premium or royalty on any patented or proprietary material, specification, process, or type of construction, unless purchased or obtained on open, actual competitive bidding at the same or a less cost than unpatented articles or methods equally suitable for the same purpose."

During the drafting phase of the regulations, the Department of Agriculture shared an early copy of the proposed rules with the American Association of State Highway Officials ("AASHO"),³¹ which unanimously voted to advise the Department to remove the proposed Section 4 rule.³² AASHO, however, was informed by the Department "that it would have to stay in spite of that body's previous unanimous vote advising its omission."³³

When the Rule was presented to ARBA in its final form, the state officials and private industry representatives present at the meeting immediately questioned the legal basis and wisdom of the Rule. According to the Department of Agriculture, the Rule was designed to require open competition in procurements using federal funds.³⁴ The Act, however, did not reference proprietary or patented products or otherwise direct the Department of Agriculture to restrict their use in procurements. One of the state officials present at the ARBA presentation read a paper from an

²⁸ The "ARBA" became the American Road & Transportation Builders Association in 1977.

²⁹ *Id.* at 85.

³⁰ Section 6 of the 1916 Act provided that "construction work and labor in each State shall be done in accordance with its laws, and under the direct supervision of the State Highway Department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this act."

³¹ The predecessor organization of the American Association of State Highway and Transportation Officials.

³² Creation of a Landmark: The Federal Aid Road Act of 1916 by Richard F. Weingroff at 87.

³³ *Id.*

³⁴ *Id.* at 86-88.

AASHO committee member who helped draft the underlying Act and wanted to file a “solemn protest” against the Rule.³⁵

According to the paper, the Rule presented a host of legal and practical problems:

- ***The Rule overstepped the Secretary of Agriculture’s authority*** – “The legality of the regulation has been questioned. It is asked whence the Secretary of Agriculture derives the power he proposes to exercise. This question can be well left to those better qualified to discuss it. That it can be raised at all is unfortunate. It is always regrettable for a leader to so perform his duties as to raise doubts in the minds of those under him as to the legality of his actions. Nothing is more subversive of discipline and co-operation.”³⁶
- ***The Rule was a misguided attempt to mandate competition*** – “[Mandating] competition is impossible in the case of meritorious patents under any strict interpretation of the language used. As published, the section represents the mind of the Government Officials modified by a somewhat obscure and, in execution, impracticable, proviso suggested by some of the State Officials to relieve the obvious objections to the section.”³⁷
- ***The practical impact of the Rule would be to bar the use of proprietary and patented products*** – “[For states,] there will be but one safe course to follow, and that is to cut out the use of anything patented. This is unfair, unprogressive, un-American, but it will be the only safe thing to do if one wants to keep cost within the appropriation, and failure to do so is generally noticed in criminal legislation.”³⁸

Following this protest, J. M. Head, attorney for Warren Brothers Company, a prominent contractor that held patents for bituminous concrete pavements, provided a lengthy discussion of the legislative background and reasons why the regulation involved “unjust discrimination.”³⁹ In its defense against these various criticisms, the Department demonstrated a clear bias against private industry and the patent system, with Director Page of the Office of Public Roads and Rural Engineering explaining that “the government and the state highway departments can conduct their

³⁵ *Id.* at 87.

³⁶ Remarks of Colonel Stevens, *Better Roads and Streets*, Vol. VII No. 3, (March 1917); *See also* Creation of a Landmark: The Federal Aid Road Act of 1916 by Richard F. Weingroff.

³⁷ *Id.*

³⁸ *Id.*

³⁹ Creation of a Landmark: The Federal Aid Road Act of 1916 by Richard F. Weingroff, at 88.

cooperative work without the advice of any patented material company. This is all I have to say.”⁴⁰ Indeed, Director Page had a documented bias against patented and proprietary products, including having participated in a 1905 Office of Public Roads⁴¹ annual report criticizing the use of proprietary and patented materials.⁴² This bias was reflected in Director Page’s irritated defense of the Rule: “I think it is nothing more than fair that open competition should be required in this. When a patented material is selected, competition is closed I think it is absolutely the only stand the government can take, and as far as I am concerned I shall never recommend to the Secretary of Agriculture . . . that the regulation be rescinded.”⁴³

B. The Rule Continues to Suffer from Numerous Legal Deficiencies

All of the problems identified in 1916 and 1917 continue to plague the Rule — only now, the impact of these problems is greater due to the challenges facing our country’s highways.

First, the Rule does not bear a reasonable relationship to the governing statute. The initial statutory authority for the Rule (the Act) did not direct the federal government to bar the use of proprietary or patented products. Those who drafted the Rule within the Department of Agriculture appear to have gone out of their way to target proprietary and patented materials. Today, according to the FHWA, the current version of the Rule is apparently based on a 1958 statute (23 USC 112)

⁴⁰ *Id.* at 89. This comment was in response to concerns raised by J. M. Head, attorney for Warren Brothers Company, a prominent Boston-based contractor that held patents for bituminous concrete pavements known as Bitulithic.

⁴¹ The Office of Public Roads (OPR) was changed into the Office of Public Roads and Rural Engineering in 1915.

⁴² U.S. Department of Agriculture, Report of the Director of the Office of Public Roads for 1905 by Logan Waller, at 785 (Sept. 29, 1905). The report stated that “[m]any worthless road preparations have been and are at present being manufactured and sold to the public through ignorance on the part of both producer and consumer These materials are sold under trade names, and as a rule carry no valid guarantee of quality.” Later, in same report Director Page expressed, “[t]here are on the market a number of patented and secret water-proofing materials, but none of these, we believe, has given satisfactory results under the varied conditions of service.” *Id.* at 790.

⁴³ Good Roads Vol. XIII, Use of Patented Pavements on Federal Aid Roads, 123 (February 17, 1917).

that is focused on “letting of contracts.”⁴⁴ Again, nothing in this statute directs the federal government to limit the ability of state contracting agencies to use federal funds to acquire proprietary and patented products for use on our nation’s highways.

Second, the Rule’s legal deficiencies are compounded by the fact that the Rule has, to our knowledge, never been subject to public input through a notice and comment process.⁴⁵ The overriding goal of the Administrative Procedure Act (“APA”) and its notice and comment mandate is to establish procedural fairness in agency rulemaking.⁴⁶ Courts have routinely echoed this sentiment, acknowledging that the “essential purpose of according notice and comment opportunities is to reintroduce public participation and fairness to affected parties”⁴⁷ and “assure[] that the agency will have before it the facts and information relevant to a particular administrative problem, as well as suggestions for alternative solutions.”⁴⁸

Thus, notice and comment procedures serve as an important safeguard against arbitrary government action by providing the public and interested parties a chance to present evidence and their views on such proposed action, which, in turn, helps the government make a more informed decision. While we recognize the Rule was first promulgated prior to the enactment of APA’s notice and comment mandate, the underlying rationale and need for these procedures to ensure

⁴⁴ See FHWA Construction Program Guide, Patented and Proprietary Products, available at <https://www.fhwa.dot.gov/construction/cqit/propriet.cfm>.

⁴⁵ Section 553 of the Administrative Procedure Act, enacted in 1946, generally requires that, to become effective, a legislative rule must go through notice and comment rulemaking, a lengthy process in which the public is given an opportunity to comment on a proposed version of the rule and the agency responds to the comments. The public-comment process sometimes significantly influences the content of legislative rules.

⁴⁶ See U.S. Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act, 9 (1947).

⁴⁷ *Dia Nav. Co. v. Pomeroy*, 34 F.3d 1255, 1265 (3d Cir. 1994) (citing *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C.Cir.1980)). See also *Morton v. Ruiz*, 415 U.S. 199, 232, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1974) (“The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.”).

⁴⁸ *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (citing *Guardian Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 662 (D.C.Cir.1978)).

fairness and rationality in rulemaking remains, especially given that the Rule was adopted under highly questionable and contentious circumstances. Granting this Petition will help protect the common-sense values of government transparency and accountability while promoting sound public policy.

Third, there does not appear to be any factual record to support the Rule, and we are unaware of any rulemaking proceeding in which the basis for the Rule has been adequately articulated. In this regard, the Rule is a relic of antiquated early 20th century views of antitrust, intellectual property, and procurement. The Department of Agriculture officials who promulgated the initial version of the Rule in 1916 demonstrated a clear bias against “materials . . . sold under trade names” Today, antitrust and intellectual property are viewed as complementary, with both playing an important role in fostering competition.

As explained by the Federal Trade Commission, patent and antitrust law “both are aimed at encouraging innovation, industry, and competition.”⁴⁹ New innovations and technologies are often subject to protection under our nation’s intellectual property laws, a framework designed to encourage innovation by granting innovators a limited monopoly in the intellectual property they develop so that they can recoup the cost of their research in designing the novel products and materials. Beyond the patent space, trade secrets protect proprietary formulas, procedures, and methods that are kept reasonably confidential from illegal disclosure. While the Department of Agriculture was openly hostile toward intellectual property in 1916, today’s Department of Transportation recognizes the many benefits of protecting and respecting intellectual property to use technology to improve safety and better our nation’s roads.⁵⁰

⁴⁹ FTC, *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy*, (2003). Patent law plays an important role in the property rights regime essential to a well-functioning and competitive economy.

⁵⁰ In a speech at the Western Governors Association Winter Meeting, Secretary Chao listed “[p]reparing for the future by encouraging innovation” as one of her top priorities. Remarks by U.S. Secretary of Transportation Elaine L. Chao

Finally, consideration has never been given to all of the important problems presented by the Rule, such as the effects or costs of the policy choice, or the factual circumstances bearing on that choice. Even back in 1917, it was recognized that the Rule would discourage use of the best materials on roads, and thus represented “an actual loss to the highway system on account of the exclusion of this patented [materials] from the competition.”⁵¹ This is, unfortunately, what has happened.

C. There are Compelling Policy Justifications for Repealing the Rule

The Trump Administration has unequivocally stated that it is the “policy of the United States to alleviate unnecessary regulatory burdens placed on the American people.”⁵² Similarly, Secretary Chao has stated that encouraging innovation “is especially important because transportation is on the verge of one of the most transformational eras in history. The U.S. Department of Transportation has an important role to play in building and shaping this future.”⁵³

Repealing the Rule would help achieve the President’s and Secretary’s shared policy goal of encouraging the deployment of new technologies that promise to improve safety, minimize congestion, and augment our nation’s highways. Moreover, the recent history of the Rule

at Western Governors Association Winter Meeting, Phoenix Arizona, (Dec. 2, 2017). Similarly, the FHWA’s website states the agency’s priority to “champion[] innovations by supporting new and better ideas to get highways planned, designed, built, and maintained. The Center for Accelerating Innovation (CAI) is FHWA’s focal point for advancing new technologies and practices through the Every Day Counts (EDC) program, the Accelerated Innovation Deployment (AID) Demonstration program, and the State Transportation Innovation Council (STIC) Incentive program.”

⁵¹ Municipal Engineering, Vol. 52 page 124, Engineering Publishing Company, (1917).

⁵² EO 13777. Executive Order 13771 directs agencies to repeal two existing regulations for every new regulation. Executive Order 13777 directs agencies, including the DOT, to establish a regulatory reform task force to research all regulations that are unnecessary, burdensome, and harmful to the economy, and therefore harmful to the creation of jobs and business.

⁵³ Remarks by U.S. Secretary of Transportation Elaine L. Chao at Western Governors Association Winter Meeting, Phoenix Arizona, (Dec. 2, 2017).

demonstrates that this is a bi-partisan issue—past Administrations have attempted to resolve the unnecessary limitations imposed by the rule, but have fallen short of a true fix.

1. Repealing the Rule will Spur Investment in and Deployment of New Technologies.

When the Rule was first adopted in 1916, the Department of Agriculture’s goal was to encourage open competition in the procurement market. While open competition is an important goal, the Rule was drafted and implemented in a narrow way that has, unfortunately, inhibited competition. Rather than promoting competition, the Rule discourages industry from developing new products in the first instance by limiting the market for them—state contracting agencies are unable to use federal funds to obtain proprietary products. This was predicted at the time of the Rule’s adoption by AASHO, which cautioned that mandating open competition would simply bar the use of the best products and services.

Today, there are many examples of new and innovative technologies that could help address the many challenges facing our nation’s highways, but which have not been as widely adopted as they could be, because the Rule discourages state contracting agencies from acquiring them. Just a few examples include:

- **Mobile Barriers LLC’s MBT-1** – Colorado-based Mobile Barriers has created a patented mobile, self-contained, semi-trailer that protects workers while reducing public disruption and lane closures. Movable barriers like the MBT-1 provide a physical and visual wall between traffic and maintenance and construction personnel. Studies have shown that movable barriers save lives and have a cost benefit of \$1.911 million per year over traditional non-movable barriers. The MBT-1 has been tested and accepted for use on the National Highway System (TL-3 use). The MBT-1 has received multiple awards for improving worker safety and efficiency. Although state contracting agencies have expressed significant interest in this product, they have been constrained in acquiring them because of the Rule.
- **RJ Watson Inc.’s Disc Bearings** – RJ Watson spent years developing patented “disc bearings” for bridges. While these disc bearings are now recognized as superior to alternatives in the market, RJ Watson had difficulty selling these products to state

contracting agencies until the patents on the disc bearings expired. If the Rule did not exist, these superior products could have been installed on bridges much sooner and efficiently.

- **HCB, Inc.’s Composite Beams** – HCB has developed the Hillman Composite Beam (HCB®) for use in bridges. The HCB provided a cost-competitive, resilient bridge system benefitting from the extended service life inherent in composite materials. The lightweight design provides added benefits for shipping and erection while using standard construction equipment and methods. While this technology has been deployed for numerous bridges, it has not been as widely adopted as possible given the proprietary product limits placed on state contracting agencies.
- **Transpo Industries’ Break-Safe** – In the 1970’s and 80’s the primary system used for ground mounted breakaway sign structures was the “Texas Slip Base”. The system was available to all state agencies as a non-proprietary design and was adopted by the majority of states. While the system performed well in some cases, it became evident that the system had significant limitations. To address these issues, Transpo Industries obtained a patent in the 1980s on Break-Safe, a unique sign post breakaway system that the company developed. After receiving the FHWA Acceptance Letter in 1989 to receive federal funding, Transpo began marketing the new patented system but experienced great resistance from state contracting agencies because of the product’s proprietary status. Today, after more than 25 years of continued effort to market the system it is finally accepted in 38 states and used by 12 states as their state standard.
- **Lindsay Transportation Solutions** – Lindsay markets a unique moveable barrier product that can be used for both permanent and temporary applications. It allows NCHRP 350 and MASH approved concrete and steel barriers to be quickly and efficiently moved under traffic conditions, to expand and contract work areas in construction work zones, and add/drop lanes for directional traffic in permanent applications. Because the product is patented and unique, many states simply do not specify this product, thus limiting wide-spread deployment of the very useful device.

Not surprisingly, in 2011, the DOT’s Retrospective Review and Analysis of Existing Rules for implementing Executive Order 13563⁵⁴ acknowledged the broad industry concern that the Rule imposes unnecessary restrictions on the ability of states to utilize proprietary methods, materials, and equipment on Federal-aid projects.⁵⁵ In response to these concerns, the FHWA agreed “that a

⁵⁴ DOT Plan for Implementation of Executive Order 13563, Retrospective Review and Analysis of Existing Rules, Slide 65-66 (Aug. 2011) available at <https://www.slideshare.net/whitehouse/departamentof-transportationregulatory-reformplanaugust2011>.

⁵⁵ FHWA recognized industry concern that “State DOT’s hands are tied when trying to use these products” and that a “new proprietary product that is developed and placed on the market cannot easily be used in highway construction until a ‘comparable’ product is produced. The inability of government agencies to specify a particular product which

further reexamination of its existing regulations and/or guidance in this area might accelerate project delivery and provide states needed flexibility.” Similarly, in a 2016 review of the Rule, the DOT again acknowledged the private sector’s concerns that: 1) State DOTs processes ensure competition in the traditional low bid system; 2) this system maintains the status quo and generally does not foster innovation; and 3) there is no intentional focus on pursuing innovation through the use of this regulation.⁵⁶

Unfortunately, efforts by the FHWA to moderate the impact of the Rule have not worked. While the Rule provides for limited exceptions to the general prohibition, a number of logistical and practical challenges are embedded in the Rule which continue to (and will likely always) inhibit the development and deployment of innovations that could enhance the safety and efficiency of the U.S. surface transportation network. The past Administration attempted to provide additional flexibility by clarifying that contracting agencies may approach the FHWA and request a “Public Interest Finding” to allow use of a specific material or product for a project even when other suitable products are available.⁵⁷ But even though states may petition a FHWA Division Administrator for approval to use a specific material or product, many states are reluctant to initiate such a process due to concerns about personnel time and increased cost. The burdens associated with acquiring such products can deny the public-needed improvements in roadway safety and more durable transportation infrastructure facilities.

currently has no ‘equal’ limits innovation by essentially ‘lowering the bar’ for all products in order to artificially produce competition within the market.” *Id.*

⁵⁶ Executive Summary from the PnPP National Program Review (Oct. 2016).

⁵⁷ Questions and Answers Regarding Title 23 CFR 635.41, (April 11, 2013) available at https://www.fhwa.dot.gov/programadmin/contracts/011106qa.cfm#_Hlk307505978.

Similarly, in 2006, the DOT implemented the Highways for Life (“HfL”) pilot program to allow greater flexibility for states to incorporate all forms of innovation.⁵⁸ The stated purpose of the Pilot Program was to accelerate the rate of adoption of innovations and technologies, thereby improving safety and highway quality while reducing congestion caused by construction.⁵⁹ This pilot program, however, did not address the underlying problems with the Rule.

In sum, the DOT under the two prior Administrations understood the need to address the Rule, but failed to resolve the chilling effect imposed by the Rule or otherwise promote innovative proprietary products when such products would provide added benefits to states. The current Administration, however, has made it a priority for federal agencies to seek out and repeal rules that are unnecessary or do not work to the benefit of the American people.⁶⁰

2. Repealing the Rule will Provide States Greater Flexibility to Address Key Challenges on our Nation’s Highways.

The Rule is a regulatory burden that prevents states from employing innovative technologies and thereby slows down sorely needed infrastructure development. Repealing the Rule will further the President’s call for improving our nation’s infrastructure by providing states increased flexibility to develop and manage projects effectively and efficiently.⁶¹ The Administration clearly prioritizes innovation as a key driver for partnering with states for infrastructure development. As the Administration points out, numerous regulatory barriers

⁵⁸ Federal Highway Administration, Notice of Implementation of the Highways for LIFE Pilot Program, 71 Fed. Reg. 30221, (May 25, 2006). The Highways for LIFE Pilot Program was outlined in Section 1502 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU).

⁵⁹ The federal register notice called out the “Super-Slab System” as an example of a proprietary product that could be used under the HfL program and encouraged states to adopt “performance-based specifications” to justify the use of these products. The FHWA stated that “[p]roprietary products frequently offer benefits in safety, quality and speed of construction[,]” and that the “FHWA is open to their use and will work with States to allow the flexibility to incorporate all forms of innovation into the HfL Program.” Id. at 30223.

⁶⁰ Remarks by President Trump at Signing of Executive Order on Regulatory Reform, Oval Office, (Feb. 24, 2017).

⁶¹ President Trump’s Legislative Initiative to Rebuild Infrastructure in America, Highlights Document, (Feb 12, 2018).

“needlessly get in the way of infrastructure projects.”⁶² Similarly, the DOT has noted the need to provide states and localities with more flexibility so they can develop data-driven roadway safety plans.⁶³ Repealing the Rule will accomplish these goals and provide state contracting agencies with the flexibility they need to procure the best and most efficient products.

3. The Rule is Out of Step with Other Federal Agency Approaches to Procurement.

The Rule’s restrictions on the use of proprietary and patented products conflicts with general federal competitive bidding rules that allow for single-source procurement under certain conditions—including when the item is available only from a single source.⁶⁴ The federal government’s general respect for flexibility in procurement is especially relevant when federal funds are awarded to states. The Rule, however, deviates from these principles by targeting patented and proprietary products and discouraging states from using them.

The Office of Management and Budget (“OMB”) has adopted *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards* (“Uniform Guidance”) as a “government-wide framework for grants management.”⁶⁵ The Uniform Guidance sets “standard requirements for financial management of Federal awards across the entire federal government.”⁶⁶ The FHWA, however, under the authority of 2 CFR 200.101(b)(3), has deviated

⁶² Building a Stronger America: President Donald J. Trump’s American Infrastructure Initiative, Press Release, (Feb. 12, 2018).

⁶³ DOT, Roadway Safety Plan at 5, available at <https://www.transportation.gov/policy/transportation-policy/dot-roadway-safety-plan>.

⁶⁴ 2 CFR 200.320(f).

⁶⁵ Office of Management and Budget, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Award, 78 Fed. Reg. 78589, (Dec. 26, 2013).

⁶⁶ *Id.*

from these carefully constructed rules in a few instances, particularly with regard to procurement by states.⁶⁷

Section 200.317 of the Uniform Guidance exempts states from sections 200.319 and 200.320, which specify the procurement methods that recipients must incorporate into their procurement procedures. When procuring property and services under a federal award, a state (including state agencies and instrumentalities of the state) is directed to use the same policies and procedures that it uses for procurements from its non-federal funds.⁶⁸ Other non-federal entities, by contrast, are subject to the competition and procurement method requirements set forth in section 200.319 and 200.320.⁶⁹

The Rule, however, limits states from following their own policies when it comes to the procurement of proprietary and patented products. This forces states to amend their policies and practices to conform to the Rule or lose federal funding despite no determination or finding that the state's procedures are deficient in anyway. As was cautioned when the Rule was adopted, "there are some meritorious patents and their use can be had on reasonable terms by honest and competent road officials. The practical denial of the right to bargain for such use would seem justifiable only on the assumption that state officials are either dishonest or incompetent."⁷⁰

Even if this was not the case, the competition rules set forth in 2 CFR 200.319 are more flexible than the FHWA's Rule. The FHWA may claim that its Rule operates in virtually the same manner, with similar goals and conditions, but this claim ignores the reality of the situation. By specifically focusing on patented and proprietary products, as opposed to a more principled

⁶⁷ See FHWA Memorandum, 2 CFR 200 Implementation Guidance, (Dec. 4, 2014).

⁶⁸ 2 CFR 200.317.

⁶⁹ *Id.*

⁷⁰ Remarks of Colonel Stevens, Better Roads and Streets, Vol. VII No. 3, (March 1917).

approach, the FHWA expresses (whether intentional or not) a bias against these products. States and other non-federal entities are therefore reluctant to use FHWA funds for patented or proprietary products even when such products would fit safely within an exception to the Rule.

This has been the case since the Rule was first adopted. Colonel Stevens, one of the AASHO committee members who helped draft the Federal Aid Road Act of 1916, strongly objected to the Rule, explaining that “[t]he language used has no exact meaning” and “there will be but one safe course to follow and that is to cut out the use of anything patented. . . . it will be the only safe thing to do if one wants to keep cost within the appropriation, and failure to do this is generally noticed in criminal legislation.”⁷¹

Moreover, the exemption provided by the Rule requires a state to either “certify that no equally suitable alternative exists” or make and submit a public interest finding to the Division Administrator who ultimately must approve the choice as being in the public interest.⁷² This administrative burden further strains any potential use of a patented or proprietary product, even when such a product would otherwise be the most economical and beneficial procurement.

The competition rules under the Uniform Guidance are far more flexible, allowing procurement by noncompetitive proposals when the item sought “is available only from a single source.”⁷³ Furthermore, this single-source procurement option is available at any dollar amount. And purchases under \$3,000 (“micro-purchases”) may be awarded without soliciting competitive quotations, regardless of the item’s availability from other sources.⁷⁴ Even purchases as much as \$150,000 (the Simplified Acquisition Threshold) only require “relatively simple and informal”

⁷¹ *Id.* See also *Creation of a Landmark: The Federal Aid Road Act of 1916* by Richard F. Weingroff.

⁷² 23 CFR 635.411.

⁷³ 2 CFR 200.320(f).

⁷⁴ 2 CFR 200.320(a).

procedures for obtaining price or rate quotations.⁷⁵ Competitive bidding procedures are only required for purchases over \$150,000, and even then, the exemptions for single-source procurement still apply.⁷⁶

Furthermore, the Department of Defense (“DOD”) and other federal agencies have set up systems that allow for the appropriate use of sole source contracts. The DOD, Coast Guard, and National Aeronautics and Space Administration, for example, make sole source purchases under 10 USC 2304(c). For example, 2304(c) allows an applicable agency to use non-competitive bidding when “the property or services needed by the agency are available from only one responsible source or only from a limited number of responsible sources and no other type of property or services will satisfy the needs of the agency[.]”⁷⁷ Section 2304(c) lists six additional circumstances where non-competitive, single-source procurement is permitted, for a total of seven permitted circumstances.⁷⁸

The DOD’s non-competitive spending is not insignificant, demonstrating a need for these procedures. While a recent GAO Report found that for FY 2016, 68% of the DOD’s commercial spending was competitive, the same report found that between \$41.2 and \$63.2 billion was spent by the DOD each year on contracts citing an exception to competitive bidding procedures.⁷⁹ Moreover, 60-70% of the non-competitive contracts awarded in that timeframe cited “only one responsible source” as the reason for using non-competitive procedures.⁸⁰ Other executive

⁷⁵ 2 CFR 200.320(b).

⁷⁶ 2 CFR 200.320(d).

⁷⁷ 10 USC 2304(c)(1).

⁷⁸ 10 USC 2304(c).

⁷⁹ GAO-17-645, Recent Legislation and DOD Actions Related to Commercial Item Acquisitions, (Jul. 17, 2017).

⁸⁰ *Id.*

agencies are subject to 41 USC 3304, which provides very similar avenues for sole source procurement under similar conditions.⁸¹

Finally, it is worth noting that there are numerous federal programs—including within the FHWA—that *actively encourage* industry to develop proprietary and patented products. These programs further demonstrate that the Rule is out of step with the federal government’s support for the development and procurement of the best products on the market. The FHWA’s Every Day Counts (“EDC”) program, for example, seeks to identify and rapidly deploy proven, yet underutilized innovations to enhance roadway safety, reduce traffic congestion, and shorten the project delivery process.⁸² Through the EDC model, the FHWA works with state and local transportation agencies and private industry to identify a collection of innovations to promote and adopt over a two-year deployment cycle.⁸³ To date, the EDC program has advanced over 43 different innovations, many of which have significantly improved transportation system project delivery and helped further a culture of innovation within the transportation community.⁸⁴ Unfortunately, the legacy of the Rule is so pervasive that the FHWA has provided that “[r]espondents should not submit unique, proprietary, or patented products” for consideration in the EDC program, even though the program is meant to promote innovation.⁸⁵

Another relevant example of how the Rule works to undermine efforts to innovate is how the FHWA implemented Section 1525 of Moving Ahead for Progress in the 21st Century Act

⁸¹ See Federal Acquisition Regulation (FAR), Subpart 6.3 – Other Than Full and Open Competition.

⁸² Every Day Counts: An Innovation Partnership with States, Fact Sheet, available at https://www.fhwa.dot.gov/innovation/everydaycounts/everydaycounts_overview.pdf.

⁸³ *Id.*

⁸⁴ FHWA Center for Accelerating Innovation, About Every Day Counts (EDC), (visited Feb. 23, 2018) available at <https://www.fhwa.dot.gov/innovation/everydaycounts/about-edc.cfm>; See also Every Day Counts: An Innovation Partnership with States, Fact Sheet.

⁸⁵ FHWA, Every Day Counts Initiative; Request for Information, 79 FR 1422, (Jan. 8, 2014).

(“MAP-21”).⁸⁶ Section 1525 required the DOT to modify a portion of the Rule “to ensure that States shall have the autonomy to determine culvert and storm sewer material types to be included in the construction of a project on a Federal-aid highway.”⁸⁷ The final rule adopted, however, explained that although the states had autonomy over material types for culverts and storm sewers, “. . . section 1525 does not relieve the States of compliance with other applicable Federal requirements, such as... the restriction against the use of proprietary products in 23 C.F.R. 635.411.”⁸⁸ In other words, even though Congress expressly included Section 1525 in MAP-21 to encourage states to use innovative products, the DOT still felt that the application of the Rule could not be avoided.

There are many other examples of government programs that encourage industry to develop new and innovative products. These programs, like EDC, demonstrate the inconsistency of the Rule—it makes no sense for the federal government to encourage the development of innovative products only to make it nearly impossible for states to acquire them.

- The DoD’s Rapid Innovation Fund provides a collaborative vehicle for small businesses to provide the department with innovative technologies that can be rapidly inserted into acquisition programs that meet specific defense needs.⁸⁹
- The DoD’s Defense Innovation Marketplace is a communications resource to provide industry with improved insight into the Research and Engineering investment priorities of the Department of Defense.⁹⁰
- The Defense Innovation Unit-Experimental, an effort within the DoD’s Defense Innovation Initiative, accelerates commercial innovation for national defense. It is able to

⁸⁶ Public Law 112-141 (2012).

⁸⁷ *Id.*

⁸⁸ Federal Highway Administration, Construction and Maintenance—Culvert Pipe Selection, 78 Fed. Reg. 5715, 5715-5715 (Jan. 28, 2013).

⁸⁹ Defense Innovation Marketplace, Rapid Innovation Fund, (visited Feb. 26, 2018) available at <http://www.defenseinnovationmarketplace.mil/rif.html>.

⁹⁰ Defense Innovation Marketplace, Connecting Industry and DoD, (visited Feb. 26, 2018) available at <http://www.defenseinnovationmarketplace.mil/>.

accomplish innovation in a “fraction of the amount of time” that it traditionally takes by facilitating pilot projects between companies and DoD entities without being bound by the Federal Acquisition Regulations (FAR); after a successful pilot, “any DoD entity has sole source justification to procure the piloted solution.”⁹¹

- The National Institute of Standards and Technology's Small Business Innovation Research program solicits R&D proposals from small businesses that respond to specific technical needs described in the subtopics of the annual Solicitation.⁹²
- The Regional Innovation Strategies Program, led by the Economic Development Administration's Office of Innovation and Entrepreneurship, awards grants to provide proof-of-concept and commercialization assistance to innovators and entrepreneurs and operational support for organizations that provide essential early-stage risk capital to innovators and entrepreneurs.⁹³

If other federal agencies have set up systems that allow for efficient procurement of proprietary and patented technologies, there can be no basis for the FHWA to bar states from using federal funds to do the same. Moreover, Secretary Chao has recognized that many states are leading the way in testing new transportation technologies and innovations, and thus the FHWA policy should be to support states in these efforts.⁹⁴

IV. Conclusion

The U.S. faces serious challenges on our nation's highways, including rising fatalities, increasing congestion, and an infrastructure in need of repair and improvement. The Rule is an example of a regulation that stands in the way of solving these challenges—it creates disincentives to the development of safe and innovative products and inhibits competition in the market. For these reasons, the DOT and the FHWA should grant this Petition so that the public can, for the

⁹¹ The Defense Innovation Initiative (DII), (visited Feb. 23, 2018) available at http://www.defenseinnovationmarketplace.mil/DII_Defense_Innovation_Initiative.html.

⁹² NIST Technology Partnership Office, Small Business Innovation Research Program (SBIR), (visited Feb. 26, 2018) available at <https://www.nist.gov/tpo/small-business-innovation-research-program>.

⁹³ Economic Development Administration, Office of Innovation and Entrepreneurship (OIE), Regional Innovation Strategies (RIS) Program, (visited Feb. 26, 2018) available at <https://www.eda.gov/oie/ris/>.

⁹⁴ Remarks by U.S. Secretary of Transportation Elaine L. Chao at Western Governors Association Winter Meeting, Phoenix Arizona, (Dec. 2, 2017).

first time, participate in the rulemaking process and engage in a dialogue with the Department on the Rule's various legal and policy implications. The public interest would be served because repealing the Rule will spur investment in and deployment of new technologies that promise to help improve safety, minimize congestion, and augment our nation's highways.

ARTBA appreciates the DOT's and the FHWA's consideration of our petition to repeal.

Please feel free to contact us if you have any questions.

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Respectfully,

/s/

Nick Goldstein
Vice President of Regulatory & Legal Issues
American Road & Transportation Builders Association
250 E Street, S.W.
Suite 900
Washington, D.C. 20024
202.683.1005

Of Counsel
James H. Burnley IV, Esq.
Andrew E. Bigart, Esq.
Christopher L. Boone, Esq.

Venable LLP
575 7th Street, NW
Washington, DC 20004
202.344.4000