American Road
& Transportation
Builders Association

250 E Street, S.W.
Suite 900
Washington D.C. 20024

P 202.289.4434
F 202.289.4435
W artba.org

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Docket Management Facility
United States Department of Transportation
1200 New Jersey Ave., SE
West Building, Ground Floor
Room W12-140
Washington, D.C. 20590-0001

Re: Docket No. OST-2017-0069, Notification of Regulatory Review

On behalf of the 7,500 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the United States Department of Transportation's (DOT) recent notification of regulatory review.

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.

ARTBA members must comply with numerous federal regulations in the course of delivering federal-aid transportation improvement projects. ARTBA's public sector members adopt, approve, and fund transportation plans, programs, and projects. ARTBA's private sector members plan, design, construct and provide supplies for federal-aid projects. This submission represents the collective views of our member companies and organizations.

Above all, ARTBA members seek to deliver federal-aid projects as safely, efficiently and cost-effectively as possible. We certainly understand and appreciate the role of federal regulations to protect the safety of the American people, provide stewardship of our natural resources, and ensure a level playing field in the broad and diverse U.S. economic marketplace. However, in recent years the rulemaking process has morphed from something intended to protect the public interest into a tool to achieve diverse policy and political objectives, many of which are largely unrelated to improving our transportation infrastructure.

Furthermore, this process has been routinely unaccountable to affected interests, while often dismissing or undervaluing the project cost increases, delays and compromises in safety which can result. Even more disturbingly, some regulatory initiatives advanced by the previous administration diverted from Congress's clear intentions in certain policy areas, infusing the administration's political priorities where they were not warranted.

In July, we submitted a compendium of ARTBA's regulatory reform priorities, called "Ripe for Reform: Federal Regulatory Issues Impacting Transportation Project Delivery," in response to the department's review of its policies, guidance and regulations. Our submittal described more than 20 federal rules or policy areas that should be improved so the transportation

construction industry can maximize safety, efficiency and cost-effectiveness in delivering projects.

During the intervening months, ARTBA has been pleased to see progress on two issues of great importance to our membership. Specifically, we applaud DOT for ending costly mandates of geographic-based hiring preferences on federal-aid projects (2 C.F.R. Part 1201) and beginning the process of reversing the previous administration's attempt to require measurement of greenhouse gas (GHG) emissions as a metric for transportation projects (81 Fed. Reg. 23806 (2016); also 23 U.S.C. §150(c)), which exceeded Congress' intentions.

We hope the department will build on these recent accomplishments by addressing several other critical regulatory areas, including the following which ARTBA respectfully suggests:

Disadvantaged Business Enterprise (DBE) Program (49 C.F.R. Part 26)

The DBE program "is designed to remedy ongoing discrimination and the continuing effects of past discrimination in federally-assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets nationwide." At the same time, it is a key – and often perilous – area of compliance for contractors on federal-aid projects.

The Obama Administration made significant revisions to the DBE program, primarily through rulemakings completed in 2011 and 2014. In many respects, U.S. DOT has revised and interpreted the DBE rule in ways that tend to add project costs, increase risk for prime contractors and do little to demonstrably enhance opportunities for DBE firms. In practice, the administration has also selectively reversed the longstanding policy (originating in case law) of allowing state transportation agencies the flexibility to craft DBE programs based on their particular markets. The administration has offered little empirical justification for these rule changes and interpretations, beyond third-hand anecdotes.

Here are examples of issues to address in reforming implementation of the DBE program for the benefit of all parties:

- DBE Program Goals (49 C.F.R. Part 26, Subpart C) – For a state's DBE program to work effectively, it is imperative to establish a DBE participation goal which accurately reflects the local market. In the case of its highway program, a state DOT often hires an outside consultant to conduct a disparity study. The state agency assesses the results and submits a DBE program goal to the Federal Highway Administration (FHWA). On occasion, the state DOT will recommend a more realistic, lower-percentage DBE goal to better reflect the local market and its DBE capacity. However, via the 2014 DBE rule change and in practice, DOT has established a strong presumption against the downward adjustment of DBE goals, no matter how compelling the state agency's case. The department should change this practice and give more deference to state transportation agencies in this regard.

- <u>Good Faith Efforts</u> (49 C.F.R. §26.53 and Appendix A) – The DBE rule requires prime contractors to make "reasonable" efforts to meet a project's DBE goal, while allowing prime contractors to reject DBE subcontractors if their quoted prices are "unreasonable." However, through several administrations, DOT has never clarified or quantified the meaning of these important terms. Moreover, some states maintain unofficial – and illegal – policies of not granting good faith effort waivers for prime contractors who cannot meet DBE project goals for documented and legitimate reasons. The current DOT administration should ensure that all state transportation agencies follow the law in this regard. Moreover, the vagueness of this – and other aspects – of the DBE rule can result in inconsistent enforcement across the states, which in turn undercuts the credibility of the DBE program as a whole.

  In a related issue, prime contractors must sometimes replace a DBE subcontractor who is not performing or has gone out of business. Despite the challenges in finding another available DBE subcontractor in the same discipline, often at a later stage of a project, DOT revised the rule in 2011 and 2014 to increase sanctions for prime contractors deemed not to follow these elusive good faith efforts requirements.

- <u>Counting the Purchasing of Materials and Leasing of Equipment</u> (49 C.F.R. §26.55(a)(1)) – It is common industry practice for a subcontractor to purchase materials or lease equipment from the prime contractor on a project, particularly if the prime contractor offers the best price and/or represents one of the only options if the project is in a remote location. Under a longstanding interpretation of the current DBE rule, the value of these transactions does not count toward the DBE project goal. Despite compelling testimony from both prime contractors and DBE subcontractors on this issue, DOT declined to change this provision in its 2011 rulemaking. The department should revisit this interpretation of the DBE rule and stop penalizing DBE subcontractors who are simply seeking the best prices for material and equipment.

- <u>Liability for Certifications</u> – Prime contractors should have a safe harbor when utilizing subcontractors who have been certified as DBEs by the appropriate public agencies. Unfortunately, when reviewing DBE certifications years later, some investigative authorities have actually held prime contractors criminally liable for improperly-certified DBEs. A potential DBE rule improvement would protect prime contractors in these situations.

- <u>Implementation of the DBE Rule</u> – DOT concluded an extensive revision of the rule in 2014, addressing approximately 30 different provisions. In some cases, DOT moderated draconian changes it had proposed at the beginning of the rulemaking in 2012. In practice, though, since the rule changes have taken effect, DOT has used the program review process at the state level to implement priorities not included in the final rule. Examples from particular states include requiring prime contractors to submit their DBE subcontractors at time of bid, making it more difficult to count credit for materials provided by DBE firms who are "regular-dealers," and reclassifying the North American Industry Classification System (NAICS) code assignments for DBE firms, making them

summarily ineligible for the DBE program. As noted, rather than a prescriptive approach intended to enforce policy priorities, DOT should allow states the flexibility to craft a DBE program reflecting their respective markets, within the parameters of the law.

- Other recent DBE program issues have involved (but have not been limited to) Prompt Payment and Retainage (49 C.F.R. §26.29), Counting of DBE Trucking Services (49 C.F.R. §26.55(d)) and Joint Checks and Retainage (see U.S. DOT's "Official Questions and Answers (Q&A's) Disadvantaged Business Enterprise Program Regulation (49 CFR 26)"). Guidance on these issues should better reflect standard industry practices.

Project Labor Agreements (PLAs) (Executive Order 13502)

In February 2009, the Obama Administration issued an executive order requiring project labor agreements (PLAs) on certain direct federally-funded construction projects, and encouraging their use on federal-aid projects. This action essentially reversed an executive order on this subject from the Bush (43) Administration. PLAs mandate the use of union labor on a construction project. The vast majority of ARTBA members – whether those utilizing a union or non-union workforce – oppose the mandating of PLAs. Among other shortcomings, these agreements can undermine existing collective bargaining agreements, create union jurisdiction issues and limit competition among contractors, which can drive up costs. Because it will require White House action to issue a new executive order, we urge DOT's leadership to implore the president to do so, prohibiting the use of PLAs on federally-funded projects and discouraging their use on federal-aid projects.

Hours of Service (HOS) for Motor Carrier Operators (49 C.F.R. Part 395)

The hours of service rule, which limits driving on on-duty time for motor carrier operators, was intended to address fatigue in long-haul drivers. In contrast, transportation construction drivers are normally limited to a smaller geographic area, and typically do not spend many hours per day on the road. Over-application of the HOS rule to this industry often adds costs to projects by disrupting delivery of materials and efficient employment of personnel on the job site, particular problem when public agencies and motorists expect projects to be completed as quickly as possible. Congress and/or the Federal Motor Carrier Safety Administration (FMCSA) have exempted the drivers in many industries from aspects of the HOS rule, and in fact construction drivers benefit from some limited exemptions. FMCSA should work with the transportation construction industry to exempt its short-haul drivers from as much of the HOS rule as possible.

Additionally, FMSCA should exempt the transportation construction industry from the electronic logging device (ELD) requirements associated with the HOS rule. As with the rule itself, ELDs are intended to track the mileage and work hours of long-haul truckers. Thus, the cost of installing ELDs in the transportation construction industry's short haul vehicles would far outstrip the safety benefits, resulting in higher project costs for the taxpayers as well.

Buy America (23 C.F.R. §635.410)

The Buy America law, dating to the early 1980's, requires that steel or iron components "permanently incorporated" in federal-aid highway projects be manufactured in the United States, subject to possible waivers and exemptions.

ARTBA supports a common sense interpretation of the Buy America rule so that the burden of compliance on transportation construction contractors does not lead to the likelihood of project cost increases and delays. Therefore, ARTBA supports efforts by the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA) and other federal transportation agencies to develop nationwide waivers that would exempt commercially available off-the-shelf products due to the burden of traceability of component materials in these products and their de minimis financial impact to total project value. At the same time, ARTBA supports Buy America protection for a core list of covered materials that are permanently incorporated into projects and which have been regularly enumerated by FHWA.

Ideally, compliance with Buy America begins with a design that has effectively vetted the specified materials to confirm that the iron and steel materials and manufactured products are produced and available in the United States. ARTBA supports FHWA and FTA policy modifications that would require designers and specifiers of transportation projects to assess the availability of materials to be incorporated into the project and make all reasonable efforts to use available Buy America qualified materials as the basis of design.

On April 18, 2017, President Trump issued an Executive Order (EO) on "Buy American and Hire American" issues (Executive Order 13788). The EO directs the heads of federal agencies to examine their use of waivers to Buy America requirements "by type and impact on domestic jobs and manufacturing," and tasks Secretary of Commerce Wilbur Ross with compiling a report based on this information. ARTBA continues to support the "common sense" interpretation of the Buy America rule, such as the nationwide waiver for small components formally proposed by FHWA in late 2016 (81 Fed. Reg. 71784 (2016)). For clarity in delivering federal-aid highway projects, ARTBA encourages FHWA to finalize and implement this proposal.

Proprietary Products (23 C.F.R. §635.411)

This decades-old regulation prohibits the expenditure of federal-aid highway funds on proprietary products. Since many new technologies — particularly those that mark a significant advance in quality, performance, or durability — incorporate intellectual property protected by patents or proprietary processes, this provision inevitably impedes the development and deployment of those same innovations that various Congressional and DOT/FHWA initiatives are intended to foster. The regulation does provide for limited exceptions to the general prohibition, and accordingly the FHWA issued guidance to its division administrators in 2011 confirming these opportunities to use patented or proprietary products on federal-aid projects. Unfortunately, a number of logistical and human factors stemming from this regulation continue to unnecessarily obstruct product innovations that could enhance the safety and

efficiency of the U.S. surface transportation network. This includes inconsistent application of the rule across the states.

Ideally the proprietary products regulation should be repealed and states should be given the flexibility to decide whether or not to use proprietary products on federal-aid eligible projects. Alternatively, FHWA should consult with other federal agencies (including the Department of Defense and National Aeronautics and Space Administration) to determine how they successfully strike a balance between ensuring competition while taking full advantage of innovations.

Corporate Average Fuel Economy (CAFE) Standards (42 U.S.C. §7521(a) and 49 U.S.C. §32.904(c))

Proposals to increase fuel efficiency without compensating the Highway Trust Fund for accompanying revenue loss exacerbate the trust fund's current structural revenue deficit and erect an even bigger obstacle to transportation infrastructure improvements. In 2012, ARTBA submitted comments to the National Highway Traffic Safety Administration (NHTSA) and the Environmental Protection Agency noting the revenue loss to the Highway Trust Fund from NHTSA's proposed fuel economy standards would exceed $70 billion over 15 years.

ARTBA welcomed President Trump's announcement on March 22, 2017 (22 Fed. Reg. 14671 (2017)), re-opening a review of the latest CAFE standards. As part of that review, the impact of CAFE standards on the Highway Trust Fund should be specifically addressed.

Guidance on Financial Planning and Fiscal Constraint for Transportation Plans and Programs (available at: https://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm).

According to this Federal Highway Administration guidance, "transportation conformity regulations specify that an air quality conformity determination can only be made on a fiscally constrained metropolitan transportation plan."[1] In practical terms, this means an area trying to achieve federal Clean Air Act standards can only do so through projects where the funding has already been fully committed. This type of restriction actually discourages long-range planning by forcing counties to forego long-term solutions in favor of stop-gap measures because they may not have enough dedicated funding. This guidance should be re-examined in order to allow for more long-range planning options.

"C-List" and "D-List" Categorical Exclusions (23 C.F.R. §771.117)

DOT should review the current system for processing categorical exclusions (CEs), with the objective of reducing unnecessary delay. One issue involves the distinction between two types of CEs. As stated in 23 CFR 771.117(c), "c-list" CEs normally do not require any further National Environmental Policy Act (NEPA) approvals by FHWA, while "d-list" CEs require additional

[1] Federal Highway Administration, "Financial Planning and Fiscal Constraint for Transportation Plans and Programs Questions & Answers," available at: https://www.fhwa.dot.gov/planning/guidfinconstr_qa.cfm.

documentation to be sent to a federal agency, as outlined by FHWA's 1989 programmatic model for "d-list" CEs .

As required by Section 1315 of the "Fixing America's Surface Transportation" (FAST) Act reauthorization law, FHWA under the previous administration developed a programmatic agreement template for CEs. The FAST Act specifically states the template was to be developed for "c-list" CEs, which normally require a simple administrative approval, because experience shows that these generally routine projects do not normally involve significant environmental impacts.

In fact, FHWA did not develop a template exclusively for the "c-list" CEs as required by the FAST Act, but one for both "c-list" and "d-list" CEs. As a result, this template applies various "d-list" constraints – such as case-by-case reviews by FHWA – on the use of "c-list" CEs, which are not otherwise required under the Code of Federal Regulations. This was not the intent of the FAST Act language, nor the intent of CE-related programmatic agreements.

FHWA should revisit this template revise its structure to match the intent of the FAST Act and its underlying regulations.

Conclusion

ARTBA hopes the Administration, Congress and stakeholders can work together to take significant steps forward in regulatory reform. As part of this process, ARTBA welcomes the opportunity to discuss these issues with DOT at any time. Thank you for your consideration and for undertaking this important initiative.

Sincerely,

T. Peter Ruane
President & CEO