



Help Repeal the Outdated Proprietary Products Rule

ARTBA formally petitioned the Federal Highway Administration (FHWA) March 27 to repeal a century-old rule that stifles innovation and safety improvements on federal-aid highway projects. The rule (23 CFR 635.411) prohibits state and local governments from using patented or proprietary products and processes on highway and bridge projects that receive federal funding, unless they seek a waiver from FHWA that applies under limited circumstances. FHWA responded to ARTBA's petition by publishing a Nov. 14 Notice of Proposed Rulemaking (NPRM) offering two options: repeal the rule or amend certain portions of it.

ARTBA has worked for over a decade with FHWA and other stakeholders to try to reform the rule, but the same institutional impediments remain. These efforts have led to our conclusion that the only successful reform will come from outright repeal. We also encourage all interested ARTBA members and allies to submit comments of their own.

The arguments favoring repeal described below are illustrative. It is more important, though, that comments stress how the rule will impact your company or public agency, including proprietary products' potential role in enhancing safety, efficiency and innovation. Comments that tell an individual story will be the most effective. Conversely, "cookie cutter" submissions are usually discounted by federal policymakers, so including original content will improve the impact of your comments.

FHWA will accept comments through Jan. 14, 2019, (either via on-line or mail submission to locations provided on the next page) before deciding which of the two options to take. Some central themes to assist in the development of comments, which also detail ARTBA's position on this issue, include:

- Innovation should be a hallmark of federal transportation policy. It can enable federal-aid highway projects to be built as safely, efficiently and cost-effectively as possible. Today's pace of technological advancement is, of course, infinitely faster than in 1916, when President Woodrow Wilson's administration initiated the proprietary products rule.
- Amending the rule will not solve the problem. While FHWA has reviewed and revised its guidance on the rule in recent years, federal approval – including an uncertain and laborious waiver process – is still a barrier to the development and use of many innovations. As long as any form of the rule remains in effect, state agencies will still need to petition their FHWA Division Administrator that it is in the public interest to allow use of a particular product. Unfortunately, many states may still be reluctant to initiate such a process because of the time, personnel, costs and uncertainty involved.

- Disallowing a patented or proprietary product may prevent timely development and implementation of transformative solutions in designing, building and maintaining highway assets. For example, through the years, every great paradigm shift in the bridge sector originated in such intellectual property. Federal regulations should incentivize research and development, rather than discouraging it.
- The current rule is predicated on preserving competition, but ensuring a level playing field should not be eclipsed by institutionalizing the lowest common denominator or status quo. The goal of competition is to determine the best outcome, not the easiest. In this regard, the current rule's effect is actually anti-competitive.
- Repealing the rule would not mandate the use of proprietary products on federal-aid projects. Rather, it would equip state agencies with the flexibility—which they may or may not utilize—to determine which products are the best fit for their own unique transportation needs. State agencies will still have appropriate authority to assess and approve (or disapprove) the use of patented or proprietary products on their federal-aid projects.
- The integrity of the procurement process for federal-aid projects should never be compromised. Other federal agencies, including the U.S. Department of Defense, Coast Guard and National Aeronautics & Space Administration, have shown that proprietary products have a place in such a process. Additionally, state transportation agencies have managed over \$40 billion per year in federal highway funds and have the ability to protect the public interest while utilizing the innovation offered by proprietary products.
- Given the Trump administration's focus on reducing unnecessary regulatory burdens and delays while also seeking to spur innovation in transportation construction, the antiquated proprietary products rule is a perfect candidate for their regulatory reform initiative.

Comments may be submitted online via www.regulations.gov. The Docket number is FHWA-2018-0036. Comments may also be mailed to: Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE, West Building, Ground Floor, Room W12-140, Washington, DC 20590, Attn: Docket No. FHWA-2018-0036. **All comments must be received by Jan. 14, 2019.**

Once again, it is very important that comments stress the individual perspective of your company or agency. ARTBA is aware of many innovations, as well as research and development toward future technologies, that have been slowed or blocked by this rule. ARTBA's members can best tell this story and better inform FHWA as it decides how to proceed.

If you have any questions about this document or require further information or assistance, please contact Nick Goldstein, ARTBA vice president of regulatory and legal issues at (202) 683-1005 or ngoldstein@artba.org.