American Road
& Transportation
Builders Association

Ripe For Reform:
Federal Regulatory Issues
Impacting Transportation Project Delivery

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ARTBA's membership includes private and public sector professionals integral to 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. Above all, these transportation construction professionals are committed to delivering projects as safely, efficiently and timely as possible. However, numerous regulatory provisions, including many initiated or revised by the Obama Administration, have made these objectives more difficult to achieve on federal-aid projects. In carrying out a significant and needed increase in federal transportation investment, the Trump Administration also has the opportunity to improve these regulations and reverse counterproductive administrative actions of recent years. Lessening the transportation construction industry's unreasonable regulatory burden will maximize the value of the significant new dollars being invested in transportation improvement projects, unleash innovation in designing and building them, and take full advantage of job-creation possibilities.

On the following pages, there is a summary of these regulatory issues, their status and specific ways in which they affect the transportation construction industry.

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U.S. Department of Transportation (U.S. DOT)

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 be recommending 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, U.S. 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.

- **Good Faith Efforts** (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, the current U.S. DOT (and its predecessors) have 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 next U.S. DOT 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, U.S. DOT revised the rule in 2011 and 2014 to increase sanctions for prime contractors deemed not to follow these elusive good faith efforts requirements.

- **Counting the Purchasing of Materials and Leasing of Equipment** (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, U.S. 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.

- **Liability for Certifications** – 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.

- **Implementation of the DBE Rule** – U.S. DOT concluded an extensive revision of the rule in 2014, addressing approximately 30 different provisions. In some cases, U.S. 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, U.S. 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, U.S. 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.

Geographic-Based Hiring Preferences (2 C.F.R. Part 1201)

Federal law (23 U.S.C. §112) requires construction contracts on federal-aid projects to be awarded on a competitive, low-bid basis. For this reason, U.S. DOT has prohibited state and local transportation agencies from instituting hiring preferences for their contractors based on geography, economic status, or other categorizations. In March 2015, U.S. DOT announced that, based in part on a new legal opinion from the U.S. Department of Justice, it was proposing to end this prohibition through a formal rulemaking, and also instituting a pilot project through which the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) could consider and approve hiring preferences submitted by state and local agencies.

In reality, local hiring preferences can add to the cost of projects, as contractors must account in their bids for the increased risk of hiring untrained or unnecessary workers under these mandates. They raise serious safety concerns, in that contractors will likely need to hire individuals with inadequate training or self-awareness to safely function in a work zone. It is also likely that contractors would have to displace existing workers or break up work crews in favor of new workers qualified solely because of their place of residence.

An appropriations provision for FY2016, still in effect, put sensible limits on any hiring preferences, requiring a transportation agency to certify that it would not displace current workers or increase project costs, and that a qualified pool of local workers was available. The Office of Management and Budget (OMB) is now reviewing U.S. DOT's proposed rule change allowing local hiring mandates. The new administration should return to the long-standing policy of prohibiting hiring preferences for the reasons stated above.

The transportation construction industry's opposition to mandatory local hiring quotas should not be construed as resistance to creating employment opportunities in local communities. Through ongoing or project-specific partnerships, numerous contractors have worked successfully with public agencies and community groups to meet and exceed voluntary hiring goals of various types. This remains the best way to achieve the objectives that underlie the Obama Administration's local hiring mandates.

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. The incoming administration should reverse the Obama executive order on PLAs, prohibiting their use 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.

Measurement of Greenhouse Gas (GHG) Emissions from Transportation Projects (81 Fed. Reg. 23806 (2016); also 23 U.S.C. §150(c)) and Extraneous Policy Priorities

FHWA has proposed to measure and report greenhouse gas emissions from new transportation projects. The proposal is ostensibly part of larger performance measures required under the 2012 "Moving Ahead for Progress in the 21st Century" (MAP-21) surface transportation reauthorization law. In reality, though, FHWA's proposal exceeds both the authority of the FHWA and the intent of MAP-21. Neither Congress nor the Obama Administration sought to include emission measurements in MAP-21's performance management section, nor were such provisions included in MAP-21's successor, the "Fixing America's Surface Transportation" (FAST) Act, passed in December 2015. Both MAP-21 and the FAST Act passed both houses of Congress with broad bipartisan majorities.

In short, the intent of Congress on this issue is clear, but the current administration has sought to inject its policy policies priorities into the associated rulemaking. In California, assessing transportation projects through GHG emissions has led to permitting delays and required mitigations that have added costs and time to projects. Federal-aid project planning and delivery should only follow this model if it is Congress' intention to do so. Since that is clearly not the case, the next administration should withdraw the proposed GHG measurement system and stay within the scope of current law.

Further, the GHG issue represents just one example of the Obama Administration's attempting to further extraneous policy priorities through the rulemaking process and other activities. Although not directed to do so by Congress, the current administration has made discretionary funding decisions or created programs relating to its own priorities like "livability" or favoring one mode of transportation over another. The next administration should cease these rogue activities and implement the federal transportation programs consistent with congressional intent.

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. The transportation construction industry acknowledges the important public policy rationale for this law, namely that federal-aid highway and transit investments should "support an entire supply chain of American companies and their employees."

In extreme cases, though, the administrative costs of ensuring Buy America compliance can outstrip the value of the products themselves, creating a net economic negative. FHWA is currently addressing these outlier scenarios through a rulemaking which would formalize two exemptions to these requirements, including for "miscellaneous steel or iron products" (such as nuts, bolts and tie wires). ARTBA supports these exemptions, as well as – generally speaking – a common sense interpretation of the Buy America rule, through which transportation construction contractors should not be unreasonably burdened to comply. An extreme interpretation of the rule – such as requiring Buy America documentation for products worth literally pennies apiece – can result in delays and administrative costs that far outweigh the value of the components in question. Besides the current rulemaking on the exemptions described above, FHWA has been exploring possible ways to update and "modernize" the rule, a process which started with an advance notice of proposed rulemaking in 2013. FHWA's current and future rulemaking on Buy America should seek to prevent outlier interpretations that undermine efficient delivery of transportation projects.

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 U.S.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 NASA) 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 would 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.

U.S. Environmental Protection Agency (EPA)

Waters of the United States (WOTUS) Rule (80 Fed. Reg. 37054 (2015))

The EPA and the United States Army Corps of Engineers (Corps) would greatly expand federal jurisdiction under the Clean Water Act (CWA). Under the rule, roadside ditches would be considered subject to federal jurisdiction if they filled with water (such as after a rainstorm). Transportation construction projects would face increased prospects of litigation and unnecessary delays due to greater permitting requirements. The rule is currently in litigation and has been stayed by a federal appellate court. ARTBA is part of a broad coalition opposing the rule.

Nationwide Permits (33 U.S.C. §1344(e)(1) and 81 Fed. Reg. 35,186 (2016))

Nationwide permits allow regulated industries to save time by not having to obtain individual permits for projects that "cause only minimal adverse environmental effects." Permission to operate under a nationwide permit is usually obtained in an average of 10 months, while individual permits can take over two years. Thus, an effective nationwide permit program is essential in reducing regulatory delay and keeping transportation construction projects moving. The WOTUS rule would drastically expand the jurisdiction of the Corps and EPA to require permitting for virtually any wet area, including roadside ditches. If implemented, it would decrease the amount of activities that qualify for nationwide permits and increase the need for time-consuming individual permits. While the WOTUS rule should not move forward (see the previous description), the Nationwide Permits program should be exempt from the rule if it does.

The transportation constriction industry is also awaiting EPA's renewal of the Construction General Storm Water Permit, planned for 2017. In this new version, the EPA should reverse the recent trend of more prescriptive, onerous permitting, which adds costs and delays to projects.

National Ambient Air Quality Standards (NAAQS) (40 C.F.R. Part 50)

Under the Clean Air Act, the EPA must review NAAQS for six different pollutants every five years. NAAQS compliance is a particularly important issue for the transportation construction sector, as counties which do not meet Clean Air Act standards can have federal highway funds withheld. These funds are important to areas aiming to improve air quality through transportation improvements which ease congestion. Overall, EPA must reform the manner in which it reviews NAAQS. Local officials need some sense of predictability in order to develop long-range transportation plans to achieve emissions reduction goals. In many instances, counties are focusing on addressing existing NAAQS. Any additional changes to the standards are akin to "moving the goalposts in the middle of the game."

Social Cost of Carbon (SCC) (79 Fed. Reg. 19777 (2014))

The SCC, which was developed in 2010 by a group of 13 federal agencies, is "an estimate of the monetized damages associated with an incremental increase in carbon in any given year." Various organizations have raised concerns over the methods used in calculating SCC and whether or not SCC has undergone an adequate notice and comment process in prior agency rulemakings. The SCC as a measurement needs to be further defined before it is used in guidance and/or regulation. This could be accomplished by further study and additional opportunities for participation and comment by the regulated community.

U.S. Department of Labor (DOL)

Crystalline Silica Exposure (81 Fed. Reg. 16285 (2016))

In March 2016, the Occupational Safety and Health Administration (OSHA) issued new regulations that will significantly tighten the existing federal standard for allowable worker exposure to crystalline silica dust. The new rule, which was decades in the making, is based on outdated health data. In setting the new standard, OSHA has relied on studies from as far back as the 1930s. More recent data clearly shows silica exposure has been dramatically reduced under the existing standard. According to the Center for Disease Control (CDC), deaths due to silicosis have declined 93 percent over the past 39 years. The new rule is also based on faulty economic data. OSHA estimates compliance with the new rule will "only" cost the construction industry about $659 million per year. However, an economic analysis of the proposed standard, conducted by Environomics, Inc. for the Construction Industry Safety Coalition (CISC), shows the industry burden will be nearly $2.2 billion per year. The rule is currently being litigated in the federal courts. The compliance date for the construction industry is June 23, 2017. At a minimum, OSHA should extend this compliance date, preferably for at least one additional year, while reopening the rulemaking.

The Mine Safety and Health Administration (MSHA) is formulating a companion rule that is of equal concern to aggregates producers and other suppliers critical to the transportation construction industry. MSHA should carefully consider the industry viewpoint before releasing its version of the new rule.

Reporting and Recordkeeping (29 C.F.R. Part 1904)

In May 2016, OSHA issued a new rule requiring some employers to submit their injury and illness records electronically. The rule takes effect Jan. 1, 2017, and will allow OSHA to post these records online. The rule also prohibits employers from discouraging their workers from reporting an injury or illness. These "anti-discouragement" provisions became effective in August 2016. The new rule will couple this increased reporting with shorter reporting periods, which could present issues for employers when their employees do not report injuries or illnesses in a timely manner. Also, there may be potential confusion regarding what types of injuries OSHA will consider to be "reportable" depending on how a doctor prescribes treatment for minor injuries (e.g. over-the-counter remedies vs. prescriptions, etc.). The distinction between non-reportable first aid remedies and reportable injuries often hinge on the treatment as opposed to the severity of the injury. This proposed rule further complicates that distinction and the paired reporting requirement. In the new administration, OSHA should – at the very least – issue guidance addressing these practical concerns.

"Fair Play and Safe Workplaces" for Federal Contractors (Executive Order 13673 (2014))

In July 2014, President Obama signed an executive order requiring prospective federal contractors to disclose labor law violations and giving agencies guidance on how to consider labor violations when awarding federal contracts. In August 2016, after extensive input from the public, the Department of Labor (DOL) and the Federal Acquisition Regulatory Council (FAR Council) issued the final rules and guidance implementing the Executive Order. Under the rule, direct federal contractors bidding on solicitations of $50 million or more would be required to disclose their violations of 14 different federal workplace health and safety laws. The final rule, which is to be phased in, ultimately will require disclosure of labor violations on solicitations of $500,000 or more, will require subcontractors to disclose their labor violations, and will expand the reporting requirement to state law equivalents of the federal labor laws. Contractors will have to make additional reports every six months after a federal contract is awarded. The DOL contends the rule will ensure federal contractors comply with all necessary regulatory requirements. Concerned employers counter that the rule will "blacklist" them from federal awards for violations or even unsettled claims, which they do not have the ability to properly track. In October 2016, a federal court blocked implementation of the rule because of pending litigation. The new administration should withdraw the executive order and work cooperatively with federal contractors to address the underlying purposes of the new rule.

Overtime Revisions (81 Fed. Reg. 32,391 (2016))

New regulations will change the manner in which workers qualify for overtime pay. Currently, if a salaried employee earns more than $23,660 per year, they can be exempted from overtime pay if their primary responsibilities fall into certain categories, such as managerial and administrative duties. The new rule will more than double the minimum yearly salary level for workers exempt from overtime pay to $47,476, before their specific duties can be examined for an exemption. The rule also includes a mechanism to automatically adjust the salary threshold every three years based on the 40th percentile of wages in the lowest wage Census region. The first update will take place on January 1, 2020, with the new salary level being announced 150 days prior. A major concern is that the new minimum salary level for overtime exemption does not reflect geographic differences in average salary levels. In other words, the minimum salary in New York City is very likely to be much higher than it would be in Cheyenne, Wyoming. DOL should instead look to regional cost-of-living differences when setting the minimum salary threshold.

Paid Sick Leave (Executive Order 13706 (2015))

This Executive Order requires firms contracting directly with the federal government to provide their employees with at least seven (7) days of paid sick leave per year. This mandate is particularly difficult for transportation construction contractors, which often employ many seasonal or short-term workers. This order will also make prime contractors liable for violations by subcontractors, who may or may not have been working for that prime contractor at the time of the transgression. All of this contractor risk will likely result in increased costs on direct federal construction projects. The next administration should repeal the Executive Order or, at the very least, exempt construction firms because of the nature of their workforce.

Proposed Standards Improvement Project – Phase IV (29 CFR 1926)

Currently, various OSHA and FHWA regulations require transportation construction contractors to reference three different versions (from 1988, 2000 and 2009) of the Manual on Uniform Traffic Control Devices (MUTCD), a key document in ensuring safe design and construction of roadways. While OSHA has allowed employers to use the newer editions of the MUTCD, its underlying regulations cite the earlier versions. This conflict creates risk and uncertainty for contractors seeking to comply with MUTCD requirements in good faith. Updating OSHA's reference to the most current version of the MUTCD will alleviate much of that confusion. The National Committee on Uniform Traffic Control Devices (which includes ARTBA) has strongly recommended that OSHA update its regulations to rely solely on the most recent version of the MUTCD.

U.S. Department of the Interior (DOI)

Endangered Species Act/Critical Habitat (16 U.S.C. §1533)

Proper determination of "critical habitat" designation by the DOI is a very important issue for state and local governments, as well as businesses located in areas impacted by ESA activity. A determination of critical habitat can literally remove hundreds of miles from the possibility of any type of development. The U.S. Fish & Wildlife Service can even make this designation based on the "historical" presence of a species years in the past. In the transportation arena, the critical habitat designation is especially relevant as states promulgate transportation plans years, if not decades, in advance. If DOI summarily declares an area "off limits" through an overly broad critical habitat designation, then it can unnecessarily jeopardize carefully designed plans for economic development. At a minimum, all economic analysis necessary for a critical habitat determination should be based on the best data available and incorporate an area's planned transportation improvements.

U.S. Equal Employment Opportunity Commission (EEOC)

Revisions to the EEO-1 Form (81 Fed. Reg. 45,479 (2016))

As part of the Obama Administration's "equal pay" initiative, the EEOC announced revisions to EEO-1 form for employers of 100 or more. This form requires information on employees' ethnicity, race and gender by job category. The EEOC will now require employers to include salary data as well. The pay data, EEOC has stated, will "be used to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further examination." Generally speaking, the proposed EEO-1 revisions would unnecessarily increase the amount of data collected and the administrative burden on affected employers, while not yielding accurate, useful information for its stated purpose. The proposal also carries security and legal risks for the firms submitting the information. Employers of 100 or more must begin compliance on their 2017 EEO-1 forms, due by March 31, 2018.

White House Council on Environmental Quality (CEQ)

Greenhouse Gas (GHG) Reviews in NEPA (CEQ Guidance, "Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews," Aug. 1, 2016).

Congress passed the National Environmental Policy Act (NEPA) in 1969, long before GHGs and climate change were being looked at from a regulatory perspective. Consequently, the original statute does not include the proper regulatory mechanism for assessing these factors. NEPA was drafted to deal with present environmental issues and designed to account for the direct impacts of federal actions. For transportation projects, this means tangible effects on the environment, such as removal of wetlands and impacts to wildlife. Climate change impacts, however, are different. They are speculative and may not be realized until long after a project is completed. Therefore, CEQs attempts to include GHGs in NEPA reviews are beyond the scope and the purpose, and this policy should end.

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