THE ROAD TO THE NEXT FEDERAL HIGHWAY & PUBLIC TRANSIT INVESTMENT BILL

PROJECT 2019 REAUTHORIZATION TASK FORCE POLICY REPORT
The members of the American Road & Transportation Builders Association (ARTBA)—the men and women who design, build and maintain our roads and bridges, transit systems, airports, ports and waterways—envision a future with a state-of-the-art infrastructure network that drives robust economic growth.

The government’s role in achieving this vision is articulated both in the U.S. Constitution and the nation’s transportation marketplace, where federal resources consistently support more than half of all annual state highway and bridge capital expenditures.

A two-pronged federal approach is necessary to deliver the 21st century surface transportation network to support the economy and enhance the quality of life for all Americans. First and foremost, a dependable and robust revenue foundation must be established to support needed improvements to aging and neglected infrastructure facilities. These resources should be complemented and optimized by building on several recent federal policy reforms to advance new regulatory efficiencies, outcome-focused policy structures, and enhanced safety and accountability metrics.

ARTBA’s public and private sector members are pleased to contribute to this important public dialogue by proposing specific policy and revenue recommendations for the next reauthorization of the federal highway and transit programs and/or any infrastructure improvement package.

**National Highway Freight Network**

The top federal funding and investment priority is modernization of the 68,000-mile National Highway Freight Network (NHFN) designated by Congress in 2015. The NHFN—America’s Economic Expressway—includes the Interstate Highway System and its critical urban and rural connectors to the nation’s major ports, inland waterways, rail hubs, airports and pipelines. Of all the transportation infrastructure needs we have as a nation, improving the safe and efficient movement of goods is the key to increasing U.S. productivity, lowering the costs of things we produce and purchase, improving our environment and giving us the competitive edge in world markets.

The recommendations on the following pages would help provide the resources the nation’s transportation network requires for its logical evolution through direct federal investment and facilitation of private sector capital as well as a regulatory framework to ensure needed improvements advance in a timely manner.

Almost 70 percent of all freight moves by trucks over our interstate highways. And that’s increasing every year as we do more and more shopping online and as we grow our domestic energy industry.

Federal government forecasts say that by 2035 there will be 70 million more Americans and that truck shipments will have to grow by 40 percent to serve an expanding...
population and economy. Most Americans know our current transportation network is not ready for that.

Strategic and targeted investments in the NHFN will help prepare our interstates for autonomous trucks, cars and communications platforms that will use technology to increase safety, cut traffic congestion, save fuel, and improve air quality. Every state and every American would benefit from such investments, no matter where they live.

Project 2019 Task Force
President Barack Obama signed the five-year Fixing America’s Surface Transportation (FAST) Act into law Dec. 4, 2015. It was the longest federal highway and public transit investment law in nearly a decade and has helped provide much-needed transportation construction market stability.

ARTBA’s road to reauthorization of the FAST Act began in January 2016. Then-Chairman David Zachry, CEO of Zachry Corporation, announced the creation of the “Project 2019” Task Force. The group was co-chaired by Martin Marietta Materials President & CEO Ward Nye and Caterpillar Construction Industries Group President Rob Charter (now retired).

On July 13, 2016, more than 25 industry executives gathered at ARTBA’s request. The task force focused on how to ensure sustainable and robust future funding for the federal highway and public transportation investment program. It reviewed and discussed, in the context of the current political environment, all of the major user-based funding options that are—or could be—available to achieve these goals. The group charted a new direction.

The BOLD Act
Out of the July 2016 meeting emerged the innovative and comprehensive federal transportation tax and revenue reform package—the “Transportation Helps Everyone: Building Our Legacy & Destiny Act” (“BOLD Act”)—that could be advanced as part of any federal infrastructure investment initiated by Congress and the Trump administration.

The BOLD Act aims to create a new and sustainable paradigm for funding expanded federal investments in critical intermodal transportation infrastructure. It reinforces the constitutionally-based federal role in supporting critical transportation infrastructure investments that facilitate interstate commerce. And it puts in place a permanent revenue solution for expanded Highway Trust Fund (HTF) road, bridge and transit supported investment programs that is fair, user-based and sustainable.

The BOLD Act concept, and an increase in the federal gasoline user fee excise, remain the linchpin for the future of America’s transportation network and are at the core of the funding recommendations contained in this report.

Project 2019 Reauthorization Task Force
In January 2019, ARTBA Chairman Bob Alger, president and CEO of The Lane Construction Corporation, announced the next step in the process with creation the “Project 2019 Reauthorization Task Force.” Its charge: to develop a legislative and regulatory policy blueprint for the scheduled 2020 highway and transit bill.


As the co-chairs of the Project 2019 Reauthorization Task Force, we’ve spent the past three months working with more than two dozen industry leaders from all eight ARTBA membership divisions—see the group’s full roster on page 7— to produce this policy report. It has included multiple conference calls, a face-to-face April 10, meeting in Denver, and subsequent conference calls with representatives of each division to get their suggestions and additions.

What stood out to us about the April 10 meeting was its liveliness. We were impressed by the diversity of viewpoints articulated by several generations, including a few long-time ARTBA activists, chapter leaders, new members, and executives representing the Industry Leader Development Council. Their contributions were incisive and forward-looking.

Key Recommendations
The recommendations in this report are grouped into five sections outlined on the next page.
• Make Enhanced, Outcome-Oriented Investments in the Nation’s Surface Transportation System
  ◊ Continue support for a federal motor fuels tax increase and/or the BOLD Act concept, capturing value from supply movements and making major new investments in the nation’s highway freight network, while finally putting the Highway Trust Fund on sound financial footing.
  ◊ Provide flexibility for states to make key project-level decisions.
  ◊ Require transparency and accountability so tax-payers can better see where federal-aid dollars are going.

• Effectively Utilize Innovative Finance & Procurement to Supplement Core Investments
  ◊ Reform and improve the Transportation Infrastructure Finance Innovation Act (TIFIA) program, lift the cap on Private Activity Bonds for highway projects, and eliminate the federal ban on tolling.

• “Finish the Job” on Project Delivery Reforms
  ◊ Establish a commission to assess and make recommendations to improve the regulatory environment for federal-aid projects.
  ◊ Change the paradigm for existing and new streamlining initiatives to ensure they are being fully utilized at the project level.

• Unleash Innovation & Improve Safety
  ◊ Repeal the 1916 proprietary products rule and continue investment in research, technology and education programs.
  ◊ Save lives in work zones through better implementation of positive protection.

• Achieve Cost Savings, Efficiencies & Opportunities in Contracting
  ◊ Invest in workforce development efforts specific to transportation construction and related industries.
  ◊ Target inefficiencies in the regulatory and compliance regime for federal-aid contracts by initiating improvements relating to hours of service, Buy America, unmanned aerial systems and the Disadvantaged Business Enterprise (DBE) program.
The Outcomes of ARTBA’s Recommendations

ARTBA’s members envision the outcomes of these recommendations would result in this U.S. transportation future:

- Permanently eliminating the Highway Trust Fund’s structural deficit and restoring the legacy of user-based funding by establishing new and growing revenue streams that support increased highway and public transportation investment.

- Reestablishing a constitutionally-mandated federal role as a program priority. Investment levels would support all economically-justifiable improvements on the 48,500-mile Interstate Highway System (IHS) and upgrade an additional 19,500 miles of non-Interstate Primary Freight Highways, as well as Critical Urban and Rural Freight Corridors that connect IHS to major ports, inland waterways, airports, rail hubs—the National Highway Freight Network designated by Congress in the FAST Act.

- Maximizing the efficiency of federal investments and reducing project delivery times, while maintaining all existing protections for natural resources and the public interest.

- Improving accountability for federal-funding recipients that assures achievement of specific outcomes, and a transparency process that informs all Americans of the value they receive from federal highway and public transportation investment.

- Reducing vehicular congestion throughout the nation’s transportation network that results in increased economic throughput, greater leisure time for all Americans, and an improved environmental and greenhouse gas footprint through the operation of vehicles moving at efficient speeds as opposed to bumper-to-bumper traffic.

- Enhancing public health by greater investment in infrastructure safety measures and polices that minimize the threat to both drivers and workers in construction work zones.

Conclusion

The Project 2019 Reauthorization Task Force initiative serves as a reminder of the unique benefits of ARTBA’s federation membership structure and how forging consensus among sometimes divergent perspectives leads to a longer-lasting and higher-quality product.

The entire industry owes a huge debt of gratitude to all of the Task Force members for their leadership. Their final recommendations on the following pages reflect industry consensus.
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Solve the Highway Trust Fund Revenue Shortfall – Pay for What You Use

Current situation: The Highway Trust Fund (HTF) cannot support a multi-year reauthorization of the highway and transit capital programs without new revenue or dramatic cuts in surface transportation investment. Since 2008, Congress has supplemented existing federal motor fuels and commercial truck tax revenue with $140 billion in general fund transfers and budget gimmicks. The trust fund’s average cash flow shortage will have grown from $14 billion per year when the Fixing America’s Surface Transportation (FAST) Act was enacted in 2015 to almost $18 billion per year beginning in October 2020.

Recommendations:

• Raise the federal gasoline and diesel rates. The fuels tax remains the most transparent, efficient and effective mechanism to generate revenue to support surface transportation improvement. The experience of 27 states that have increased their motor fuels tax rates since 2013 confirms these user fee increases have broad public support and minimal political consequences.

• Capture value from supply chain movements. The movement of freight throughout the nation is the embodiment of the federal government’s constitutional responsibility to regulate and promote interstate commerce. A 6.25 percent Air Cargo Tax has been imposed on the cost of goods movement via air transportation since 1972 to support the nation’s aviation infrastructure system. The same concept could be applied to the surface transportation arena through either a commercial truck air cargo tax companion or a mileage tax.

• Initiate a one-time federal excise tax on electric vehicle batteries or some other comparable mechanism exclusively applied to alternative fuel vehicles. Fully electric motor vehicles do not contribute financially to the HTF. The tax rate of this new construct should generate the 10-year equivalent of the revenue motorists would pay over the same period under the federal motor fuels tax. This provision would result in parity among roadway users in terms of their financial support of the infrastructure system on which their vehicles rely—regardless of how the vehicle is propelled.

Outcome: Two congressionally-chartered commissions and multiple stakeholders have identified multiple revenue solutions to fund HTF-supported improvements. The most important component of any infrastructure package or federal surface transportation program reauthorization is the enactment of a permanent, user-based trust fund revenue solution that will support the increased levels of highway and transit investment the U.S. economy and all Americans need.

Making the National Highway Freight Network a Federal Investment Priority (Existing ARTBA Policy, 2017)

Reinforcing the Constitutionally-based federal role of supporting interstate commerce, in the 2015 FAST Act surface transportation program reauthorization Congress designated the scope of a “National Highway Freight Network” (NHFN) and established a program structure for investments to upgrade it. The NHFN consists of the 48,500-mile Interstate Highway System (IHS) and an additional 19,500 miles of Critical Urban and Rural Freight Corridors that connect the IHS to the nation’s major ports, inland waterways, airports, rail hubs and intermodal terminals.

The importance of the NHFN to the U.S. economy and the nation’s competitiveness cannot be overstated. As such, ARTBA believes the NHFN should be a primary focus of federal capital investments supported by a NHFN-dedicated, user-based revenue stream to the HTF.

Rationale: ARTBA has long supported the creation of a dedicated revenue stream derived from highway-related freight shipments and for investing those resources in freight-related improvements on the NHFN. Furthermore, the ARTBA Board of Directors in 2006 approved the association’s Critical Commerce Corridors (3C) proposal for a federal freight program. While existing ARTBA policy references the importance of the nation’s highways to goods movement, it does not specifically cite this area as a federal priority.
Establishment of an HTF National Highway Freight Network Account (Existing ARTBA Policy, 2017)

ARTBA advocates the establishment of a third account in the Highway Trust Fund—a “National Highway Freight Network Account”—for the deposit of freight-related user-based revenues. The new account would assure those resources are dedicated to investments in the NHFN designated by Congress in the 2015 FAST Act surface transportation program reauthorization and any subsequent modifications.

Rationale: To assure the shippers who would be paying the 6.25 percent Highway Transportation Services Tax—or any other freight-related revenue stream—that their contributions would be dedicated to the roadways and bridges that directly benefit goods movements. ARTBA calls for the creation of a separate account within the HTF where the proceeds from the new freight tax would be deposited. This segmentation of revenue is consistent with the practice and intent behind the trust fund’s current Highway and Mass Transit Accounts.

Performance Management (Existing ARTBA Policy, 2017)

The 2012 Moving Ahead for Progress in the 21st Century (MAP-21) surface transportation program reauthorization law established a comprehensive performance management process designed to direct federal highway funds to specific national goals. ARTBA supports this important reform and believes this process should—as directed by MAP-21—focus on outcomes related to the physical conditions and system performance of the National Highway System as opposed to externalities such as greenhouse gas emissions, livability and land-use planning. System performance standards should: reflect the causes and consequences of traffic congestion; be data driven; incorporate the economic costs of congestion; reflect the impact of infrastructure conditions on roadway safety; and be integrated with national freight policy. Any pavement condition standards should also attempt to balance both pavement smoothness and an assessment of subsurface conditions and foundations.

Given the primacy of safety in the list of national goals in Section 150 (b), the minimum conditions for the Inter-
state Highway System should not be limited to pavement conditions, but should include safety measures, including maintenance of shoulders and right of way, pavement markings, guardrails, signage and other elements affecting safe travel.

Balancing National Priorities & Project Decisions

**Current Situation:** The nation’s surface transportation infrastructure needs continue to outpace highway, bridge, and public transportation investment at all levels of government. As such, project owners and the transportation construction industry are routinely evaluating products, materials, and procurement methods to deliver the highest quality service to the traveling public and meet existing federal performance management standards.

**Recommendation:**
- Federal transportation policy should identify national priorities, strengthen already established accountability mechanisms, and provide requisite investment levels and regulatory/policy framework to achieve those objectives. The federal government should not dictate to states project delivery decisions such as procurement methods and product and material choices, rather leave these decisions to state transportation agencies per their performance expectations, programming and delivery needs.

**Outcome:** Focusing on the identification and achievement of national transportation priorities, while leaving implementation decisions to project owners and the private sector, will continue the federal/state partnership that is the foundation of the federal-aid highway program. A policy approach that embraces flexibility and market-based decisions has the dual benefit of also ensuring the pursuit of national objectives is in concert with diverse transportation challenges facing each community, state and region in the U.S. Flexibility on project-related decisions, however, is not intended to supplant programmatic requirements for federal-aid funds such as low-bid, quality assurance and qualifications-based selection for engineering services.

Require Transparency & Accountability to the American Taxpayers

**Current situation:** American taxpayers are largely unaware of the value they receive from federal investments in highway and public transportation. In turn, this disconnect can impede an informed discussion with the public, media, and elected officials about the benefits
derived from federal transportation revenues, projects and priorities. In contrast, state and local transportation agencies and public officials can often show a direct connection between public investment and particular projects.

Both MAP-21 (2012) and the FAST Act (2015) included provisions (Sec. 1503 (c) and Sec. 1402, respectively) intended to provide real-time public information on the use of core federal highway and transit investments, as was required for the highway and public transportation investments from the 2009 American Recovery & Reinvestment Act. More than three years after passage of the FAST Act, the U.S. Department of Transportation (U.S. DOT) has yet to meet the requirements of these provisions.

**Recommendations:**

- Direct U.S. DOT to provide a status report on implementation of the FAST Act’s Sec. 1402 within 30 days of enactment of a new surface transportation authorization law.
- Modify Sec. 1402 to include the creation of visual graphics and other user-friendly features that convey the status of the requested information for each given year, updated quarterly.
- Require U.S. DOT to provide members of Congress with the same notifications of new project awards for apportioned funds as is currently required for the discretionary grant programs.

**Outcome:** With these changes, Congress and American taxpayers will better understand where and how federal user fee revenues are invested and how those improvements benefit each state and community. The resulting benefits from this reform will also allow for a more meaningful, open discussion with the general public on what the future of federal highway and transit programs should look like.

**Continue Support for the Public Transportation Capital Program**

**Current Situation:** The FAST Act law authorized $2.3 billion per year in Capital Investment Grant (CIG) funding for transit construction projects. Because spending on these programs is subject to the annual appropriations process, funding has sometimes varied from authorized levels or been significantly delayed due to the appropriations process.

**Recommendation:**

- Congress should continue to support greater investment in the CIG program and push back against attempts to cut these critical federal capital investment projects. At minimum, funding growth should be commensurate with the investment levels of HTF-supported programs.
- In addition, federal policy should be clear that loans from the Transportation Infrastructure Finance and Innovation Act (TIFIA) program repaid with non-federal funds will count toward a project sponsor’s non-federal share of project costs.

**Outcome:** Continuing to grow the CIG program to allow for greater investment in public transportation will help alleviate congestion and improve the quality of life for transit riders and drivers alike.
Reform the TIFIA Program

Current situation: The Transportation Infrastructure Finance and Innovation Act (TIFIA) Program provides federal credit assistance in the form of direct loans, loan guarantees, and standby lines of credit to finance surface transportation projects of national and regional significance. Each dollar of federal funds can provide up to $10 in TIFIA credit assistance and support approximately $42 in transportation infrastructure investment.

According to the Congressional Research Service, the TIFIA program is “a relatively low-cost way for the federal government to support surface transportation projects because it relies on loans, not grants, and the TIFIA assistance is typically one-third or less of project costs. Another advantage from the federal point of view is that a relatively small amount of budget authority can be leveraged into a large amount of loan capacity. Because the government expects its loans to be repaid, an appropriation need only cover administrative costs and the subsidy cost of credit assistance.”

However, as the TIFIA program has matured and Congress has diversified its portfolio, project sponsors and developers have expressed increasing concern about policies that have undermined the value of TIFIA credit assistance, the program’s status as a preferred credit option for key projects, and full realization of the leveraging described above.

Since 1998, the TIFIA program has supported more than 70 projects with over $30 billion in loans, helping enable delivery of more than $130 billion in transportation infrastructure projects. According to U.S. DOT’s outcome-based data, in only one case does there remain a question about full repayment of the TIFIA loan. Nonetheless, despite this enviable record of high performance, the program has continually tightened its credit terms. This trend has discouraged project sponsors from using TIFIA and undermined the value of the program for those who do.

Moreover, potential program participants have noted redundancies and inefficiencies in the TIFIA application process, suggesting a need to further modernize the program’s administrative operations. ARTBA’s recommendations refer to specific issues that have been part of this discussion, as well as ways to address them.

Recommendations:

- Congress should return the TIFIA program to $1 billion in annual funding. With this funding growth should come additional improvements and reforms to the TIFIA program and its administration, many of which can be specified in legislation.

- Related TIFIA reforms – many of which Congress can specify and incorporate into the next surface transportation reauthorization bill – should include:

  ◊ Better investment in administrative resources – Congress and U.S. DOT should ensure a high caliber of in-house expertise to focus on the full life cycle of loans from underwriting, negotiation, closing and post-closing loan administration activities (including draw requests, amendments, consents, etc.).

  ◊ Improving the documentation and application processes –

    - TIFIA program staff at U.S. DOT can improve the documentation process by refraining from adding information requests “up front,” providing support to project owners, publishing risk framework, establishing a regular U.S. DOT Credit Committee meeting schedule, and soliciting feedback from the industry.

    - Congress and U.S. DOT should reverse the growing bureaucratic requirements for TIFIA applicants by clarifying the application process, including removing overly-burdensome details, clearly communicating standards for a completed application, enforcing processing timeframes, fast-tracking application review for projects that already have credit ratings and initiating an on-line dashboard indicating the status of TIFIA applications.

    ◊ Streamlining Appropriate Projects for TIFIA Support – Projects supported primarily with local sales taxes or other non-federal revenues should receive streamlined processing in light of their dedicated revenue source. This is true of issuers that are themselves investment grade. In such circumstances, the letter of interest (LOI) stage need not be more than a determination of legal eligibility. TIFIA officials should not recreate the
better-resourced work the rating agencies and other technical advisors have already performed. TIFIA program policy should also clearly state that TIFIA loans repaid with non-federal funds will count toward a project sponsor’s non-federal share of project costs.

Developing credit guidelines to maximize value – In addition to the process improvements described above, ARTBA recommends that Congress direct U.S. DOT to form a task force including six state/local agency and six industry practitioners. The group will develop specific credit guidelines which will seek to balance appropriate levels of value from and risk to the TIFIA program.

Outcome: Modernizing the TIFIA program’s operations will help restore it as a financing tool of choice for a variety of key transportation projects, providing supplementary resources for public and private investment. Reinstating $1 billion in annual TIFIA funding, subject to these program reforms, will ensure TIFIA helps address the nation’s many pressing transportation infrastructure needs, particularly relating to large and complex projects.

Lift the Cap on Private Activity Bonds for Highway Projects

Current Situation: Private Activity Bonds (PABs) are debt instruments issued by state or local governments whose proceeds are used to construct projects with significant private involvement. PABs help provide private developers and operators with access to tax-exempt interest rates, significantly lowering the cost of capital and enhancing investment prospects. They have become a key funding option for transportation improvement projects related to public-private partnerships (P3).

Certain highway and freight transfer facility projects have been eligible for financing through PABs since 2005. However, there is a statutory $15 billion limit on PABs issued for this purpose.

Closer examination shows that the $15 billion limit will likely be exhausted in the near future. As of mid-2018, U.S. DOT had issued $8.9 billion in PABs, and another $1.3 billion had been allocated for a current issuance, with allocations totaling in excess of $10 billion. According to ARTBA’s analysis of current and potential P3 projects, there will conservatively be another $10 billion to $12 billion needed for projected deal-flow within the next 24-36 months, easily exceeding the current $15 billion cap. No matter which estimate one utilizes, it is clear the demand for PABs in surface transportation infrastructure projects will soon exceed the existing limit. Current and prospective project sponsors are well aware of the looming shortage of PABs resources, which will increasingly lead to growing restraint on the market for some projects. At best, the PABs shortage will result in severely-limited financing options for this continuous pipeline of transportation infrastructure projects. At worst, many of these projects will not be able to move forward at all.

It is very important to note that other forms of transportation infrastructure which are eligible for PABs – including airports, docks and wharves, mass commuting facilities and high-speed intercity rail facilities – have no such statutory caps whatsoever.

Recommendation:

- Congress should remove the $15 billion cap on PABs for highway projects. These projects should be on a par with those from other modes and not be subject to an arbitrary limit on the allocations of PABs.

Outcome: Removing the $15 billion cap will ensure continued deal-flow of P3 projects and the viability of PABs as a financing option.

Enable Greater Tolling Flexibility to Supplement Constrained Federal Resources

Current Situation: Toll financing is a means of addressing the specific mobility challenges of certain areas. Numerous examples around the country show tolling capability can be a key factor in ensuring numerous road and bridge projects can proceed.

By federal law, there is a general prohibition on the tolling of federal-aid highways, with the exception of some programs established by Congress. These include pilot programs for Interstate tolling and value pricing.

Recommendations:

- Congress should eliminate the federal prohibition on tolling existing portions of the Interstate Highway System, enabling states and localities to use toll financing to meet their transportation needs as they deem appropriate.

- To ensure the smooth flow of traffic on tolled roadways, states should be strongly encouraged to utilize automated collection mechanisms for tolls. A nationally-consistent infrastructure for the collection of tolls would be appropriate.

- The priority use of toll revenues should be to operate,
maintain and improve the tolled facility. To ensure the integrity of tolling as a transportation revenue tool (rather than being a general revenue-oriented tax), toll revenues must be explicitly prohibited from being diverted to non-transportation purposes.

**Outcome:** With federal barriers to tolling removed, states and localities will be much better positioned to determine and implement solutions to their specific mobility needs.

**Incentivize Innovative Procurement and Non-Federal Revenue Measures**

**Current Situation:** Some states and localities have been reticent to explore alternative forms of financing, procurement and project delivery for surface transportation projects. At the same time, others have been aggressive in using these methods, as well as raising transportation-related revenue on the state and local levels. Efficiencies achieved through innovations in procurement, as well as this additional revenue, are valuable complements to existing, core investments at the federal, state and local levels.

**Recommendation:**
- Congress should create a program expending new, supplemental discretionary funding and incentivize infrastructure owners to:
  - Secure and commit their own revenue measures, bond programs and project revenues well beyond traditional federal-state funding splits;
  - Assure long term performance of all new capital improvements by avoiding future deferred maintenance and to instead capture lifecycle cost efficiencies through outcome-based specifications and strong funding commitments;
  - Modernize business practices and update outmoded procurement policies and project delivery approaches to better reflect 21st century models, including P3s, and to capture the best of private sector capabilities; and
  - Incorporate new and rapidly evolving technology and design their capital spending programs in ways that maximize the benefits of innovation, including autonomous and connected vehicles.

**Outcome:** This incentive program will facilitate utilization and evaluation of additional ways to deliver needed projects, and reward those states and localities who develop new, stable revenue sources.
Revise the Financial Plan Requirement for Major Highway Projects

Current Situation: Existing law (23 U.S.C. § 106(h)) requires that a state planning a “major” federal-aid highway project (estimated at $500 million or more) submit a financial plan to U.S. DOT. In part, the plan must assess the appropriateness of a P3 to deliver the project. A recent report from the U.S. DOT Office of Inspector General (OIG) expressed concern that FHWA was not fully implementing this requirement. One challenge is that 14 states do not have P3 enabling legislation. In some instances within those states, this has resulted in only a cursory review – or less – of P3-related options for major projects.

On a separate issue, states with extensive and successful experience in delivering larger projects have expressed frustration with the regulatory burden of submitting financial plans under this provision.

Recommendation:

- Congress should amend the existing financial plan requirement for major projects in two ways.
  - Clarify the P3 assessment for major projects to include – at minimum – a thorough review of P3-related materials provided by FHWA, regardless of whether the state has P3-enabling legislation in place.
  - Allow states to petition the U.S. secretary of transportation for a waiver exempting a major project from the entire financial plan requirement. The secretary should consider the waiver request based on the state’s degree of experience with and successful stewardship of such projects in the recent past.

Outcome: These improvements will relieve experienced states of a burdensome regulatory requirement in delivering major projects, while ensuring other states benefit from a rigorous review of potential financing and delivery options, including P3s, in the spirit of existing law. However, nothing in this provision should be interpreted as requiring the use of P3s by states.
III. “FINISH THE JOB” ON PROJECT DELIVERY REFORMS

Establish a Commission to Improve the Regulatory Environment for Federal-Aid Projects

Current Situation: The planning, design and construction of transportation improvement projects triggers a host of federal regulatory assessments and requirements. Many federal regulations were initiated as well-intended efforts to protect the public interest and achieve societal goals. These procedures, however, do not occur in a vacuum, and each transportation improvement project is subject to a host of considerations beyond improving safety, mobility and infrastructure conditions. While streamlining the environmental review and approval process has been a federal priority for over 20 years, there is little appreciation of the impact of other federal regulations on project costs and delivery times.

Recommendation:
• Congress should establish a commission of federal, state, and local governments and the private sector to review all federal laws, regulations, and guidance pertaining to the expenditure of federal surface transportation funds.
• The commission should be tasked with developing a report to Congress on how these requirements impact the delivery of transportation improvement projects and recommend potential steps to reduce, consolidate or improve the efficiency of the federal-aid highway and public transportation regulatory environment.
• The environmental review and approval process should be excluded from this effort as it is the subject of separate initiatives.

Outcome: This process will identify potentially unnecessary steps the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) require states and subrecipients to go through to obligate federal funds. Improving the efficiency of transportation project related regulations will improve project delivery times, reduce costs and continue to protect the public interest through consolidation and procedural enhancements.

Emphasize Utilization of Existing Project Delivery Tools

Current situation: The past four federal surface transportation reauthorization laws have included significant provisions to expedite the review and approval process for transportation improvement projects. While these measures have included multiple reforms intended to cut red tape while preserving environmental protections, the permitting process time horizon has not substantially improved. There are several reasons for this outcome, but one major cause is the lack of utilization and/or awareness of these reforms by project sponsors.

Examples of these tools include:
• The option for a state DOT to request U.S. DOT to impose a two-year time limit on completion of an Environmental Impact Statement (EIS) if the process has already taken at least two years (from MAP-21);
• Establishment of U.S. DOT as the lead agency for coordinated project reviews, although the department may not set a mandatory schedule for other agencies to follow (from MAP-21 and the FAST Act); and
• A provision calling for planning documents to be used in the National Environmental Policy Act (NEPA) process “to the maximum extent practicable and appropriate,” rather than generating the same or similar material all over again (from the FAST Act).

Recommendation:
• Make existing process reforms the new standard. Rather than the discretionary approach taken over the past 20 years, Congress should require their use. However, to preserve flexibility, states should be able to opt out of using reforms on a particular project, if they provide U.S. DOT with a written explanation of their determination.

Outcome: The more state and federal agencies actually use these reforms, the greater their impact will be. The default use of these reforms will better achieve Congress’ original intent in enacting them, provide a more accurate measure of their effectiveness, and help identify areas for further improvements in project delivery.

Encourage Greater Participation in the NEPA Delegation Program

Current situation: All states have the opportunity to assume the role of the federal government during the NEPA review process. This option has the potential to cut the duration of the environmental review and approval process, and lessens the burden on federal agencies. Cur-
rently, eight states have taken advantage of the program. While other states have cited various reasons for not participating, several have mentioned potential liability and litigation costs, as the state would also be assuming federal responsibilities for litigation over any project where NEPA delegation occurred.

**Recommendation:**
- Congress should direct U.S. DOT to report on the progress of the NEPA delegation program, quantifying its successes and making recommendations to increase state participation, including addressing liability concerns.

**Outcome:** This report will suggest strategies for enlisting additional states in the NEPA delegation program, which benefits both the federal government and the states involved. On the state level, projects are delivered faster, while federal resources that would be used on NEPA reviews are available for other tasks. An examination of the program aimed at identifying and alleviating state concerns will help continue its growth.

**Reduce Delay in the Use of Categorical Exclusions (CEs)**

**Current situation:** Under Section 1315 of the FAST Act, FHWA developed a programmatic agreement template for categorical exclusions (CEs) as required by the legislation. In some instances, FHWA’s template is more restrictive and burdensome than the current federal regulations for existing CEs, requiring additional case-by-case review.

**Recommendation:**
- Congress should direct FHWA to reexamine the FAST Act-developed model programmatic agreement for CEs and provide a single, uniform process for processing CEs that does not result in unintended delays to the existing process.

**Outcome:** Making this clarification will conform the regulations to Congress’ intent through the FAST Act provision and reduce unnecessary delay in the CE process.

**Establish Clear Timelines for NEPA Reviews**

**Current situation:** Past reauthorization bills have set enforceable deadlines for permitting decisions. However, there remains no set legislative time limit for the completion of NEPA documents.

**Recommendation:**
- Congress should set strict, enforceable timelines for NEPA decisions. The lead agency and project sponsor should determine a realistic time frame for the project early in the planning process, allowing for project-specific flexibility and external agencies to fulfill the obligations with a clear deadline for all involved parties.

**Outcome:** When initiating a NEPA review, project planners have no sense of when the process is going to be completed. Setting timelines in statute would add predictability to the NEPA process and allow project planners to more accurately plan schedules for environmental review.

**Reform the National Ambient Air Quality Standards (NAAQS) Setting Process**

**Current situation:** Under the Clean Air Act (CAA), the U.S. Environmental Protection Agency (EPA) must review NAAQS for six different pollutants every five years. In many instances, counties are still focused on addressing existing NAAQS when new changes are proposed. If counties do not meet these standards, federal highway funding can be withheld. This is akin to “moving the goal posts in the middle of the game” and often results in counties trying to comply with multiple sets of NAAQS at once.
**Recommendation:**
- Congress should reform EPA’s review process of NAAQS. Specifically, it should extend the five-year timeframe for NAAQS reconsideration to 10 years.

**Outcome:** Extending the NAAQS timelines will better enable local officials to meet current standards before they are altered. Further, it will also provide counties a sense of predictability when developing long-range transportation plans to achieve emissions reduction goals. As traffic congestion reduces average speed, air pollution increases. For carbon monoxide and volatile organic compounds, two of three primary mobile source pollutants, the optimal average operating speed is approximately 55 miles per hour, according to U.S. DOT. Vehicles operating at posted speeds unimpeded by congestion are far more efficient—and therefore far less carbon-intensive—than vehicles caught in stop-and-go traffic. Traffic congestion has increased dramatically in the past 30 years as growth in vehicle miles traveled, the U.S. population and economy have greatly outpaced the addition of new highway and public transit capacity. Simply put, the nation’s road and transit network is outdated and in need of modernization to meet today’s mobility challenges. Removing unnecessary regulatory barriers which place funding at risk would allow states to move more quickly in providing targeted transportation improvements aimed at alleviating congestion.

**Repeal FHWA Fiscal Constraint Requirements**

**Current situation:** The regulatory policy of “fiscal constraint” strictly limits state Transportation Improvement Plans (TIPs) and State Transportation Implementation Plans (STIPs) to current resources. In practical terms, fiscal constraint requirements discourage long-range planning by forcing counties to forego long-term solutions in favor of stop-gap measures when there are uncertainties in long-term funding.

**Recommendation:**
- Congress should repeal fiscal constraint requirements. In the alternative, the requirements should be modified to allow for the delay or cancellation of programmed projects. States and metropolitan planning organizations (MPOs) should be permitted a reasonable level of “over-programming” to assure that all available federal funding is utilized.

**Outcome:** Constraining MPO plans to current resources is inappropriate and counterproductive. MPO plans should define workable solutions to projected needs and be used to define funding needs, regardless of current revenues. Repealing fiscal constraint requirements will allow counties the flexibility to address their long-term transportation needs.

**Fix the Endangered Species Act (ESA) Critical Habitat Provisions**

**Current Situation:** The ESA protects threatened and endangered species throughout the transportation project delivery process. However, the ESA’s “critical habitat” provisions are often applied in an overly-broad manner, causing additional regulatory burdens for projects located in areas with little or no benefit to protecting species. In the transportation arena, the critical habitat designation is especially relevant as states formulate transportation plans years—even decades—in advance. If a regulatory agency summarily declares an area “off limits” through an overly-broad critical habitat designation, then it can unnecessarily jeopardize carefully-designed plans for economic development and related transportation improvements.

**Recommendation:**
- Congress should reform the critical habitat provisions of the ESA to focus on preserving essential species habitat without imposing unnecessary and excessive restrictions on development. Further, 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.

**Outcome:** Refining the critical habitat process will allow the ESA to achieve the best possible solutions for species protection without causing unnecessary project delays in areas with no real value to endangered or threatened species.

**Develop a “De-Minimis” Classification for Wetlands**

**Current situation:** The Clean Water Act permitting process treats all wetlands the same, regardless of actual ecological value.

**Recommendation:**
- Congress should initiate a classification system for wetlands based on their ecological value, allowing increased protection for the most valuable wetlands while also creating flexibility for projects impacting wetlands considered to have little or no value. This system should define a “de minimis” level of impacts, below which would not require permitting.

**Outcome:** A “de-minimis” standard for wetlands impacts
would remove a regulatory hurdle to transportation projects in areas which are not environmentally sensitive.

**Strengthen the Federal Permit Improvement Steering Council (FPISC)**

**Current Situation:** In MAP-21, Congress enacted state-level performance measures in a variety of areas. However, there are no similar performance measures on the federal level. There should be an easily-understood metric to track the performance of U.S. DOT’s role in project delivery. Currently, FPISC maintains a “permitting dashboard” which tracks project timelines.

**Recommendation:**

- Congress should direct FPISC to expand its dashboard to include federal agency response times on regulatory issues. Performance metrics, including response times, should be developed for federal agencies as well.

**Outcome:** These improvements will provide the public a more complete picture of how a project is proceeding.

**Increase Consistency in U.S. DOT’s Application of Federal Regulations**

**Current Situation:** Through its stewardship of federal-aid projects, U.S. DOT and its agencies are responsible for the implementation of relevant federal regulations. However, project sponsors and the industry have noted inconsistencies in their interpretation, particularly when comparing those of different FHWA division offices.

**Recommendation:**

- Congress should broaden the mission of U.S. DOT’s existing regulatory reform task force. In addition to identifying rules appropriate for repeal or reform, this group should assess the consistency with which the department is interpreting and applying federal regulations, as well as the extent to which those regulations directly relate to the relevant agency’s core mission.

**Outcome:** Working toward consistent application of federal regulations will help to ensure a sense of predictability among the regulated community. It will also help reduce delay, as there will be less confusion as to how a regulation is applied by different regional U.S. DOT offices.

**Codify “One Federal Decision”**

**Current situation:** President Donald J. Trump issued the “One Federal Decision” Executive Order directing all Federal agencies with environmental review, authorization, or consultation responsibilities for major infrastructure projects to develop a single Environmental Impact Statement (EIS) for such projects, sign a single Record of Decision (ROD) and issue all necessary authorizations within 90 days thereafter, subject to limited exceptions. The order also sets a two-year goal for the completion of the environmental review and approval process.

**Recommendation:**

- Congress should enact “One Federal Decision” into law. Requiring all agencies to work together on infrastructure projects while allowing the lead agency to set schedules would go a long way toward reducing unnecessary delay. Also, the process could be improved by treating a missed deadline by an agency as an approval.

**Outcome:** Legislatively enacting “One Federal Decision” would reduce unnecessary delay by aligning federal environmental reviews amongst multiple agencies. It would also mandate a two-year average for completion of the environmental review and approval process.

**Educate Project Participants on the Use of Dispute Resolution Boards**

**Current Situation:** Timely decision-making and claims resolution are key factors in keeping construction of transportation projects on schedule. Some states have used dispute resolution boards (DRBs) as part of their contract administration strategies. While procedures vary from state to state, generally these entities include expert members recommended by the project owner and contractor or industry. A DRB can be specific to a particular project, with the members carefully following its progress, meeting regularly and resolving issues as needed. To cite one example, the transportation department and industry in Florida highly recommend this approach.

**Recommendation:**

- Congress should direct FHWA to utilize its Every Day Counts program to educate state transportation agencies and the industry on the use of dispute resolution boards for appropriate projects.

**Outcome:** FHWA will raise awareness of dispute resolution boards as an option for the timely and efficient administration of federal-aid highway construction contracts.
Repeal the FHWA “Proprietary Products Rule”

**Current Situation:** The patented and proprietary products rule (23 CFR 635.411)—which dates to 1916—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 impedes industry and states from deploying products that could save lives, reduce costs, alleviate congestion and improve the quality of our nation’s highways.

**Recommendation:**
- Congress should statutorily repeal the 1916 rule prohibiting the use of federal funds for patented and proprietary products on highway projects.

**Outcome:** Repealing the rule would provide state transportation agencies the flexibility to deploy the best, most cost-effective and safest products for highway construction, maintenance and operations. States would still utilize their own procurement laws and would not be mandated to use these products. However, they would be able to unleash the full power of innovation in their respective states to reduce project costs, extend the useful life of infrastructure facilities and improve roadway safety.

Continue Support for Research, Technology and Education Programs

**Current Situation:** Federal highway research, technology and education programs serve an important role in our continuous efforts as a nation to make our roadways safer and promote innovation. Over time, application of this research improves the efficiency of transportation design, construction and maintenance. Accordingly, ARTBA supports using Highway Trust Fund (HTF) revenues for current dedicated federal research and education programs. In the FAST Act, research, technology and education programs received an average of $418 million in funding each year. This represents 0.9 percent of total HTF-supported investment for all highway programs.

**Recommendations:**
Maintain funding for all research, technology and education programs at the same percentage of funding in the next reauthorization bill.

This includes funding for:
- Federal support and involvement in highway-related research, particularly in safety, Intelligent Transportation Systems (ITS) and other advanced technology solutions, and pavement durability;
- Continued federal support for the Local Technical Assistance Program (which serves highway technology transfer centers across the nation) and university transportation centers that facilitate solutions to transportation challenges;
- Support and implementation (where appropriate and practical) for products and techniques developed by the Strategic Highway Research Program; and
- Additional resources to fund a merit-based initiative that would support new research on innovative infrastructure development, such as the integration of autonomous vehicles with the roadway environment.

Outcome: Stabilizing and growing Highway Trust Fund revenues will not only ensure valuable new investments in projects, but also continued support for research, technology and education programs. These programs provide for long-term future benefits in highway transportation research, technology and education programs to improve the quality, durability, safety and operation of our highways and bridges.

Highway Safety (Existing ARTBA Policy, 2017 with 2019 update)

ARTBA believes that building safety into the highway system should be a top priority of transportation policy makers, planners and appropriators at all levels of government. More than 37,000 people were killed in motor vehicle accidents on U.S. roads during 2017. In a study by the National Highway and Traffic Safety Administration (NHTSA), highway-related deaths and injuries cost Americans almost $1 trillion in loss of productivity and loss of life. Clearly, highway safety should be a paramount public health interest.

The good news is that experience has proved that emphasizing safety features in the design, construction, reconstruction and operation of highway facilities does save lives. The U.S. highway fatality rate has dropped 75 percent since 1970, from 4.5 per 100 million vehicle miles
traveled, to 1.16 per 100 million vehicle miles traveled in 2017, and the rate for 2018 appears to be moving in a positive direction.

ARTBA strongly encourages and supports:

• Continuation of the Highway Safety Improvement Program and full dedication of funds from this program to infrastructure safety activities, including devices and equipment that provide positive separation of construction site workers from nearby traffic;
• Federal financial support for driver education programs from outside the Highway Trust Fund;
• Requirements that mandate any reconstruction project should contain, as a component, restoration of safety features to enhance the level of safety performance.

Highway reconstruction is increasingly being done under traffic conditions. The safety of industry employees and motorists in these construction work zones is of special concern to ARTBA. In any highway construction site, effective traffic control plans should be implemented, traffic control devices and other appurtenances should be properly maintained, and careful consideration of use of positive separation between workers and motorists should be documented. ARTBA supports federal encouragement of training, education and voluntary certification programs for personnel responsible for traffic control at highway construction sites.

Experience has shown that safety information aggregation, posting and public awareness programs aimed at industry stakeholders and motorists can help to reduce the number of accidents in these work sites. ARTBA encourages the U.S. DOT and all state transportation departments to initiate and/or continue these programs.

**Improve Work Zone Safety through Positive Protection**

**Current Situation:** Over the past eight years, work zone fatalities have increased significantly, from 586 in 2010 to 799 in 2017 (the latest year for which data is available). Any such tragedies, much less an upward trend, are unacceptable.

Through federal rulemaking pursuant to 2005’s SAFE-TEA-LU and further provisions in both MAP-21 and the FAST Act, Congress and previous administrations of both parties have addressed the relationship of positive protection between workers and motorists on highway construction projects and the enhancement of work zone
safety. Reversing a previous statutory presumption, a
provision in MAP-21 (reiterated in the FAST Act) required
positive protection (i.e. some form of barrier) be used in
specified dangerous situations, unless an engineering
study determines otherwise. That law has not been im-
plemented and positive protection is still not considered
as seriously as it should be.

There is also a need for better definitions of what, where,
when and how positive protection (including full lane clo-
closures) should be used, and more consistency in policies
for its application. The lack of clear federal regulations
and consistent use/enforcement raises concerns about
potential legal liabilities for all parties.

Moreover, new products and technologies have become
available in recent years that should be considered,
allowing more practical and cost-effective use of positive
separation.

ARTBA believes the law is clear as to when positive
protective systems are to be assessed and used by the
owner/agency, unless an engineering study determines
otherwise. ARTBA believes there should be documenta-
tion of any such analysis commissioned by a state DOT.
The study should also be accessible to the public and
subject to appeal by the contractor or other party directly
affected by the decision.

**Recommendation:**

- Congress should:
  - Clarify areas of FHWA’s Subpart K regulation in
    accordance with MAP-21, requiring additional
    considerations for use of positive protection,
    including full lane closures;
  - Institute provisions allowing for clear definitions
    and more consistent application of its use to pro-
tect workers and motorists;
  - Direct U.S. DOT to work with all stakeholders to
    develop better definitions and understanding of
    positive protection needs and options; and
  - Require that positive protection considerations
    be included in FHWA’s Manual on Uniform Traffic
    Control Devices (MUTCD).

**Outcome:** The industry’s pursuit of zero fatalities on
roadway construction projects will be greatly enhanced
if the current law is clarified, strengthened and enforced
by requiring more thorough and consistent consideration
of positive protection options when workers and motor-
ists operate in defined, dangerous situations. The rising
trend in work zone fatalities and injuries can be reversed
if all stakeholders are required to study, weigh and more
thoughtfully consider and document all safety options
available.
Help Build & Develop a Ready and Willing Transportation Construction Workforce

Current Situation: One of the biggest long-term challenges to the transportation construction industry is the availability of a ready workforce. While states and localities are currently able to use other programmatic funding for training and education programs, more can and should be done at the federal level to train potential industry workers and build awareness of the opportunities that exist in transportation construction.

For the past three years, ARTBA has joined with the Federal Highway Administration, U.S. Department of Labor’s Employment & Training Administration, American Association of State Highway & Transportation Officials (AASHTO) and Associated General Contractors (AGC) of America in the Highway Construction Workforce Partnership (HCWP). The initial stage of this program focused on 12 pilot cities and states, with the objective of matching industry needs with resources provided by workforce investment boards and other entities. The HCWP began expanding nationally in April 2019. This experience has enabled ARTBA and its partner organizations to consider potential new workforce development efforts specific to transportation construction. Ideally, any new initiatives would complement existing programs at the state and local levels.

Recommendation:

- Create a new federal training grant program, administered by U.S. DOT, to help bolster workforce development throughout all facets of the highway construction and supporting industries. Any revenues provided for this program should add to current research, education and training investments.

Outcome: ARTBA and AGC endorse this new program as a way to encourage cooperative efforts among the highway construction industry, FHWA, state DOTs, local workforce development boards, community colleges and technical schools. Grants could be used to promote highway construction worker career opportunities, support outreach and awareness efforts, develop education and training materials (including for elementary through high school students), provide life-skill training, deliver rudimentary math and other basic skill training and other, related support services. U.S. DOT could make grants to both public or private sector entities for these purposes.

To the extent these efforts are targeted at groups underrepresented in the industry workforce, there will be dual benefits of promoting diversity and inclusion, while helping alleviate industry workforce challenges more generally.

Prohibit Mandatory Hiring Preferences

Current Situation: In 2015, the U.S. Department of Transportation initiated a pilot program allowing for mandatory hiring preferences – such as those based on residence or income level – on federal-aid highway and transit projects. This reversed decades of department policy, during which it had considered such preferences to be anti-competitive and contrary to low bid requirements. In 2017, the department ended the pilot program and reinstated its previous policy.

While the transportation construction industry continues to seek workforce solutions, it opposes mandatory hiring preferences because they can compromise contractors’ efficiency and safety in building projects. Transportation construction is a highly skilled industry with many positions requiring specialized safety training and craft expertise. Workers often move with a company from project to project and cross geographic boundaries as the work progresses. Mandatory localized hiring requirements run counter to the manner in which transportation projects are most efficiently built, which is by engaging a contractor who brings skilled and trained workers. Because they generally do not require experience in transportation construction for participants, these mandates can lead to displacement of a contractor’s existing trained workforce, risking a greater possibility of jobsite injuries, inefficiencies in construction, higher project costs and increased risk for the project owner.

Recommendation:

- Congress should codify longstanding department policy and prohibit the use of mandatory hiring preferences on federal-aid highway and transit projects.
Outcome: Prohibiting mandatory hiring preferences will ensure contractors do not displace existing, qualified workers or break up work crews in favor of new workers solely because of their place of residence or income level. The proper way to address these issues is through ongoing partnerships in education and training, leading to careers in transportation construction, as opposed to employment of limited duration and tied to a particular project. Numerous contractors have worked successfully with public agencies and community groups to meet and exceed voluntary hiring goals of various types. Project owners can also develop incentives for contractors to identify, recruit and properly train workers in target areas, making efforts to ensure they will remain in the transportation construction ranks long term. The industry continues to welcome opportunities to build a next-generation, enduring workforce in this manner.

Exempt Transportation Construction Workers from the Federal Hours of Service (HOS) Rule

Current Situation: In an effort to prevent fatigue and related safety risks, the federal hours of service rule limits the time a driver may operate a commercial motor vehicle. However, it is important to note that the rule is targeted at long-haul drivers who are at greatest risk of fatigue and sleep deprivation.

In contrast, drivers in the transportation construction industry are typically not long-haul operators. Instead, they may drive a vehicle for a short time while carrying out other duties for the balance of their work day, or sit in a queue picking up and delivering construction materials, rather than being on the road. Nonetheless, the hours of service rule limits when and how workers can be deployed on projects, which can also limit the contractor’s ability to meet aggressive construction schedules. Congress and the Federal Motor Carrier Safety Administration have exempted other industries from the rule, and provided limited exemptions for segments of the transportation construction industry.

Recommendation:

- Congress should exempt transportation construction industry drivers from the hours of service rule if they are working and driving within 150 air miles of their home base or construction project site.

Outcome: Exempting short-haul transportation construction industry drivers from the hours of service rule would help contractors deploy their workers more efficiently, thus holding down project costs and delays without compromising roadway safety.
Allow for a De Minimis Waiver of “Buy America” Requirements

**Current Situation:** 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. Some interpretations of Buy America have required that contractors provide extensive documentation and certification for the smallest and least expensive project components. In these cases, the administrative costs and potential related delays can easily outweigh the slight economic benefits for domestic manufacturing interests. Codifying a waiver for these products would save on these compliance costs, while preserving and reaffirming the law’s coverage of core project materials and components, which ARTBA supports.

**Recommendation:**
- Congress should waive Buy America requirements for “commercially available off-the-shelf” (COTS) items permanently incorporated in federal-aid highway and transit projects. The Federal Highway Administration has defined a COTS item as any manufactured product incorporating steel or iron components (with some exceptions) that is:
  1. Available and sold to the public in the retail and wholesale market;
  2. Offered to a contracting agency, under a contract or subcontract at any tier, without modification, and in the same form in which it is sold in the retail or wholesale market; and
  3. Broadly used in the construction industry.

This waiver should not be intended to preempt or compromise project specifications or quality standards relating to these items.

**Outcome:** Exempting COTS items from Buy America requirements will ensure the law protects domestic manufacturing interests while not causing project cost increases and delays relating to small, inexpensive components.

Remove Bureaucratic Barriers to the Use of Unmanned Aerial Systems (UAS) for Construction of Transportation Projects

**Current Situation:** In recent years, the transportation construction industry has exponentially increased its use of unmanned aerial systems (UAS) technology (commonly known as drones). Drones can be used in dozens of ways that offer significant cost and time savings. They also provide enhanced safety for industry professionals who can now perform previously-dangerous tasks with remote equipment. Examples include bridge inspections, lighting installation, project scoping and surveying, emergency response and tracking of materials quantities.

In part because UAS technology is a relatively recent development, its federal regulatory regime often does not distinguish between most drone operators (including hobbyists) and those from the transportation construction industry performing an important public purpose. For example, without appropriate waivers, industry UAS operators may not fly these devices out of their line of site or over traffic. Consequently, under the current regulatory structure, every contractor and consultant – even those on the same project – must apply for certificates of authorization (COAs) or waiver exemptions needed to perform certain UAS-related tasks (under 14 CFR part 107). Moreover, it can take many months for the Federal Aviation Administration (FAA) to process and approve these waivers. Such redundancy and lack of timeliness are major impediments to the full use of UAS technology and the realization of its benefits.

Congress can help facilitate the enhanced use of UAS technology on construction and maintenance of highway, bridge and public transportation projects by addressing the issue in the surface transportation bill.

**Recommendation:**
- Congress should create a blanket waiver process that addresses both industry needs and FAA safety-related concerns, by either: (1) allowing contractors to be considered agents of the project owner for permitted purposes; or (2) mandating conditions within the COA or waiver itself for usage by a current UAS operator operating under contract with the owner; or (3) establishing an expedited process for approving individual UAS operators to operate under a previously approved COA or waiver.

**Outcome:** These provisions will help remove bureaucratic barriers to the increasing and innovative use of UAS technology in the construction, inspection and maintenance of federal-aid transportation projects.

Direct a Comprehensive Study of the Disadvantaged Business Enterprise (DBE) Program

**Current Situation:** Compliance with the Disadvantaged
Business Enterprise (DBE) Program, which has been in place for nearly 40 years, is a key task for transportation agencies and contractors on federal-aid highway and transit projects. The program’s purposes include developing DBE firms and ensuring a level playing field in contracting for federal-aid projects. As with other regulatory requirements, the transportation construction industry seeks to comply with the DBE program rule while carrying out its core objective of delivering projects in an efficient, timely and safe manner.

**Recommendation:**

- Congress should direct the Government Accountability Office (GAO) to conduct a study of the DBE program’s first four decades, focused on assessing the program’s fulfillment of its stated purposes and recommendations for program improvements to achieve its desired outcomes. In carrying out the study, the GAO should seek a full range of stakeholder views.

**Outcome:** A GAO study of the DBE program will serve as a catalyst for all interested stakeholders – including the U.S. Department of Transportation, state agencies, contractors and the minority- and women-owned business communities – to collaborate on improving the program’s efficiency and effectiveness.

**Prohibit Contractor Rating Systems Which Alter Project Bids**

**Current Situation:** In 2016, with the approval of FHWA, the New Mexico Department of Transportation initiated a rating system for contractors on certain highway projects, which results in a unique multiplier applied to their future bids. In some cases, this controversial practice has altered the order of bids on a project, so that the department awarded the contract to someone other than the actual “lowest responsible bidder.” Contractors have raised concerns about the objectivity and transparency of this ratings process, especially the metric which penalizes them for pursuing legitimate claims on a project. While so far only New Mexico has imposed such a ratings system, transportation officials from a number of states have monitored this program's progress with interest.

**Recommendation:**

- Congress should prohibit use of federal-aid highway funds for design-bid-build projects subject to a contractor rating system which can alter bids and preempt the low bid system.

**Outcome:** Prohibiting these types of ratings systems on design-bid-build projects will preserve both the objectivity and transparency of the low-bid contracting system, while ensuring taxpayers get the best price for the project.