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

**RE: Docket No. DOT-OST-2019-0165, Non-Traditional and Emerging Transportation Technology Council**

On behalf of the more than 8,000 members of the American Road & Transportation Builders Association (ARTBA), we respectfully offer comments on the U.S. Department of Transportation's (USDOT) recent notice regarding the Non-Traditional and Emerging Transportation Technology (NETT) Council.

ARTBA's membership includes public agencies and private firms and organizations that own, plan, design, supply and construct transportation projects throughout the country. These include prime contractors, sub-contractors and suppliers. Overall, our industry generates nearly \$500 billion annually in U.S. economic activity and sustains the equivalent of 4 million American jobs.

USDOT created the NETT council in April 2019 "to identify and resolve jurisdictional and regulatory gaps associated with non-traditional and emerging transportation projects pending before [US]DOT, including with respect to safety oversight, environmental review, and funding issues." In its November 26 notice, USDOT asked for examples of "existing Federal transportation laws or regulations that inhibit innovation by creating barriers to testing, certifying, or verifying compliance, or operating non-traditional and emerging transportation technologies."

Promoting innovation in the design and construction of the nation's transportation infrastructure network to enhance public safety, accelerate the delivery of projects, and maximize scarce resources is a long-time priority for ARTBA. Part of our efforts in this area is working to ensure patented and proprietary products are eligible for federal-aid highway and bridge improvements.

**Repeal of 23 CFR 635.411**

ARTBA was extremely supportive of the Federal Highway Administration's (FHWA) decision to formally rescind 23 CFR 635.411 (commonly known as the "proprietary products rule"), a federal regulation that prohibited state and local governments from using patented or proprietary products on highway and bridge projects that receive federal funding.

In its decision, FHWA characterized the rule as a “barrier to innovation in highway technology” and noted that its repeal “best provides State DOTs [Departments of Transportation] greater flexibility to use innovative technologies in highway transportation.”

The FHWA action will allow states to use federal highway funds on a host of patented or proprietary road and bridge technologies that can help deliver a safer and more efficient roadway system for American motorists and businesses. These include reflective road lane dividers that deter tired motorists from drifting into oncoming traffic, traffic signs that minimize injury by collapsing at the slightest impact and road barriers on wheels that provide physical, but movable walls between traffic and construction workers.

### **Forthcoming Update to the Manual on Uniform Traffic Control Devices (MUTCD)**

On October 5, 2018, the FHWA announced it plans to update the MUTCD, which regulates the use of all traffic control devices on U.S. roadways. As part of the announcement, FHWA noted that updating the MUTCD is essential to "reflect advances in technological and operational practices, incorporate recent trends and innovations, and set the stage for automated driving systems as those continue to take shape" and "propose[s] to allow more flexibility and innovation to improve travel for drivers, pedestrians and bicyclists."

Currently, the MUTCD, like 23 CFR 635.411, prohibits the use of patented products. **For reasons identical to those stated in support of the repeal of 23 CFR 635.411, ARTBA supports a repeal on the MUTCD’s prohibition on patented and proprietary products and believes the issue must be considered in the upcoming MUTCD update.**

The MUTCD currently explains (in Sections IA.09-10) the prohibition on patented and proprietary products as part of its discussion on the introduction of new products through an “experimental” process:

“The request for permission to experiment should contain the following:

A legally binding statement certifying that the concept of the traffic control device is not protected by a patent or copyright. (An example of a traffic control device concept would be countdown pedestrian signals in general. **Ordinarily an entire general concept would not be patented or copyrighted, but if it were it would not be acceptable for experimentation unless the patent or copyright owner signs a waiver of rights acceptable to the FHWA...**”

The FHWA explains the reasoning behind not allowing patented products in the MUTCD by noting:

“Patented traffic control devices run counter to the principle of uniformity. If one patented device for a specific application were to be allowed, then competing patented devices developed to serve the same purpose with unique designs could not be denied approval. The result would be a violation of the road user's expectancy due to the

inconsistent appearance and messages of these widely differing devices. Traffic control devices are designed for instant recognition and response by the road user. Without this consistency, there would be longer response and reaction times, potentially compromising the safety of road users.

FHWA's justification for restricting patented and proprietary products is duplicative. The MUTCD currently contains other provisions and specifications—such as those addressing colors, fonts, shapes, dimensions, crashworthiness, etc.—which provide adequate assurances of uniformity to ensure motorists are not surprised by new and innovative devices.

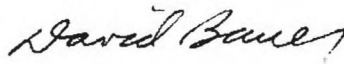
In order to carry out FHWA's goals of increasing flexibility and innovation, it is essential that the impending update to the MUTCD includes a revision of how the manual deals with patented and proprietary products. Currently, the MUTCD is written in a manner which stifles the use of patented and proprietary products. Such an approach is directly contrary to the ideal of fostering flexibility and innovation. 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, the MUTCD's current approach inevitably impedes the development and deployment of those same innovations that various Congressional and FHWA initiatives are intended to foster.

Patented and proprietary products can bring about innovation, opportunity and competition that enhance the safety and efficiency of our roads. It is also important to point out that when a state outright disallows a patented or proprietary product, they may be preventing a transformative solution to a serious problem from taking place in a timely manner.

The present MUTCD structure and its current implementation effectively prohibits innovation, and agencies may be forced to settle for products that perform marginally at best. Such outcomes are contrary to public expectations, as well as the safety and efficiency needs of the U.S. surface transportation network.

ARTBA looks forward to working with the NETT Council and hopes it will examine the MUTCD's current approach to patented and proprietary products and urge FHWA to address this topic in the coming update to the MUTCD.

Sincerely,

A handwritten signature in cursive script, appearing to read "David Bauer".

David Bauer  
President & CEO