



May 3, 2021

Secretary Pete Buttigieg  
U.S. Department of Transportation (DOT)  
1200 New Jersey Ave SE  
Washington, DC 20590

**RE: DOT Direct Final Rule on Administrative Rulemaking, Guidance, and Enforcement Proceedings**

Dear Secretary Buttigieg:

Today, I write on behalf of more than three million Americans for Prosperity (AFP) activists across all 50 states to provide adverse comments on Department of Transportation's direct final rule on Administrative Rulemaking, Guidance, and Enforcement Procedures.<sup>1</sup> Inconsistent with existing Departmental and specific office rules, the changes in this direct final rule are: not minor nor in the public interest; controversial; substantive; and likely to result in adverse comment. These actions, in both form and content, are inappropriate, an ineffective means of achieving policy objectives and inconsistent with the Department's previously articulated procedural, good government, and transparency objectives. Current DOT procedures and rules require the withdrawal of a direct final rule upon receipt of an adverse comment.

The form of this final rule, which rescinds good government provisions that increase transparency, directly contradicts existing Departmental requirements regarding how the Department may issue direct final rules, process comments, and adopt guidance documents. DOT has provided no legal or public interest justification for the revocation of the unidentified but "not directly attributable to the now-revoked executive orders" provisions in 49 CFR 5.

In addition, the Department's acknowledgement that "removing these provisions... ensures that the Department is able to effectively and efficiently promulgate new Federal regulations and other actions to support the objectives stated in E.O. 13990"<sup>2</sup> makes clear that political expediency - rather than transparency - guide this final rule. In addition, the public has been denied the opportunity to meaningfully comment on the intersection of the Administration's executive orders and these regulatory changes adopted more than a year ago.

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<sup>1</sup> AFP intends these adverse comments to apply for any docket associated with the final rule at 86 FR 17292, including for the Office of the Secretary, Pipeline and Hazardous Materials Safety Administration, Federal Motor Carrier Safety Administration, National Highways Traffic Safety Administration, and Federal Transit Administration.

<sup>2</sup> 86 FR 17293.

The Department has failed to provide justification for its conclusion that “this is a rule of agency procedure for which notice and comment is not required.”<sup>3</sup> The 2019 rule was arguably in the public interest, as it resulted in greater transparency and opportunity for public comment, while these changes all move in the direction of minimizing public participation to achieve certain non-statutory political objectives. Similarly, it is not clear if DOT is reversing its previous position that guidance documents could “have a substantial economic impact on regulated entities that alter their conduct to conform to the guidance” and thus require a good faith cost estimate.<sup>4</sup> The result of this action is to shift far more substantive changes to sub-regulatory guidance.

The final rule fails to reconcile the Department’s direct final rule with the December 2018 petition for rulemaking that prompted the December 2019 reforms.<sup>5</sup>

In violation of current DOT rulemaking procedures at 48 CFR 5, DOT has not provided “interested persons a fair and sufficient opportunity to participate in the rulemaking through submission of written data, analysis, views, and recommendations” not ensured “that the public is given an adequate period for comment.” It is not clear, for example, if DOT is rescinding enhanced procedures for economically significant and high-impact rulemakings, several of which are currently underway. In the dead of night and with a short, unclear Federal Register notice with no accompanying public docket, the Department may have eviscerated pages of important procedural requirements on information access, cost-benefit analysis, and compliance with the Congressional Review Act. Even if some of those provisions survive in internal procedures, this ignores the value of transparency and durability resulting from inclusion in the Code of Federal Regulations.

Based on the Federal Register rule and accompanying Regulations.gov entry, it is difficult for members of the public to identify a docket for submitting adverse comments and impossible to access any filed comments to determine if adverse or substantive comments have been filed.

As a result of this adverse comment, we encourage DOT to withdraw this rule. AFP appreciates the opportunity to comment, and our activists look forward to consideration of this feedback.

Sincerely,

Clint Woods  
Policy Fellow, Regulations

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<sup>3</sup> 86 FR 17293.

<sup>4</sup> 84 FR 71715.

<sup>5</sup> 84 FR 71714.