

January 18, 2023

The Honorable Shailen Bhatt
Administrator
Federal Highway Administration
1200 New Jersey Ave, SE
Washington, D.C. 20590

Dear Administrator Bhatt:

Congratulations on your confirmation as Administrator of the Federal Highway Administration (FHWA). As you transition into this new role leading the agency, we respectfully request that you rescind the “Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America” memorandum issued on December 16, 2021.¹

We supported the Infrastructure Investment and Jobs Act (IIJA), because it represents the most significant infusion of investment in our infrastructure since the enactment of the Interstate Highway System in the mid-1950’s. It is also a carefully negotiated and balanced package of policy reforms and targeted national investments that will make Americans’ lives better. However, the Dec. 16 memo elicited significant confusion within the transportation community as the guidance intended to serve as an overarching policy framework that prioritizes IIJA resources towards certain projects, which was inconsistent with what was laid out under the legislation President Biden signed into law the month before.

As transportation stakeholders, we are concerned about the precedent that this policy memo sets. We fear the potential policies that future administrations could prioritize without undertaking a formal notice and comment rulemaking.

The recent December 15 U.S. Government Accountability Office determination that this memo is a rule under the Administrative Procedures Act (APA) further underscores two of our concerns.² First, if the memo articulated a valid rule, the regulated community – including state and local transportation agencies – must comply with its parameters. Second, formulation of the rule must comply with the APA, requiring public notice and comment which did not occur in this case. If FHWA wishes to prioritize certain types of programmatic policy changes, then the agency should work with Congress to legislate such changes or follow the notice and comment rulemaking process as required under the APA. Here, FHWA did neither.

The IIJA includes robust funding levels that will help stabilize and enhance every state’s long-term transportation improvement efforts. Furthermore, this multi-year plan will facilitate private sector investments in equipment and personnel. Ensuring that implementation undertakes transparent and lawful processes to engage the broadest possible spectrum of stakeholders is critical to maximizing IIJA’s transportation improvement and job growth outcomes.

¹ https://www.fhwa.dot.gov/bipartisan-infrastructure-law/building_a_better_america-policy_framework.cfm

² <https://www.gao.gov/products/b-334032>

At this critical point in the IIJA's lifespan, when federal agencies, recipients, and industry should be working in close partnership to achieve these objectives, the continued attention to this document threatens to create uncertainty that could dilute the impact of the new law. As such, we respectfully urge that you withdraw the December 16 memorandum.

Thank you for your attention to our concerns.

Sincerely,

American Concrete Pavement Association
American Concrete Pipe Association
American Council of Engineering Companies
American Highway Users Alliance
American Road & Transportation Builders Association
American Traffic Safety Services Association
American Trucking Associations
Associated General Contractors of America
Association of American Railroads
Associated Equipment Distributors
Association of Equipment Manufacturers
Concrete Reinforcing Steel Institute
National Asphalt Pavement Association
National Ready Mixed Concrete Association
National Stone, Sand, and Gravel Association
Portland Cement Association
Surety & Fidelity Association of America
U.S. Chamber of Commerce