

January 23, 2020

Open Letter to the United States House of Representatives: Support the Revamping American Infrastructure Act of 2020

Dear Members of Congress:

We write in strong support of the Revamping American Infrastructure Act of 2020 (H.R. 5571). The bill would order the Secretary of Transportation to conduct a comprehensive review of Department of Transportation regulations and determine which existing prescriptive regulations can be replaced by performance-based requirements. It further requires that department rulemakings going forward, “[t]o the maximum extent possible,” develop outcome-based performance requirements rather than prescriptive rules.

Prescriptive regulations define the narrow means of compliance, often through detailed design or operating standards. That precludes alternative compliance methods, even if those alternatives produce superior outcomes at lower costs. In contrast, performance-based rules set a targeted outcome and grant regulated entities the flexibility to meet the standards by harnessing new technologies and practices. Performance-based standards are technology-neutral, focusing solely on results.

Since 1993, President Bill Clinton’s Executive Order 12866 has instructed federal agencies to “specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.” This approach enjoys bipartisan appeal, with Presidents George W. Bush and Barack Obama reaffirming their administrations’ support for the performance-based principles of Executive Order 12866.

The bipartisan recognition that prescriptive safety regulations can inhibit both economic growth and the achievement of regulatory outcomes has remained constant. But in the case of the Department of Transportation, progress across modal agencies has been uneven at best. Congress, aware of this problem, adopted Section 329 in the FAA Reauthorization Act of 2018. This provision requires the FAA, “to the maximum extent possible and consistent with Federal law,” to promulgate performance-based regulations in lieu of rigid, prescriptive rules.

Consider the Federal Railroad Administration. After years of policy debate and development, the agency in 2018 finally published a performance-based safety regulation on passenger railcars to allow the uptake of crash energy management technology—crumple zones. This technology has been widely deployed throughout the world for years while the United States continued adherence to rigid “buff strength” safety principles that required railcars to remain rigid up to a certain force threshold. Compliance with this rule meant manufacturers were required to add significant bulk and weight to passenger railcars, greatly increasing costs and perversely increasing crash risk because heavier railcars take longer to decelerate.

But in 2016, when the aforementioned passenger railcar rule was first proposed, the Federal Railroad Administration proposed a mandatory two-person crew rule that would forbid rail carriers from taking full advantage of mandated positive train control technologies, which ironically were used by the Federal Railroad Administration to significantly inflate a net benefits finding in the positive train control mandate's Regulatory Impact Analysis. The rule would have reduced railroads' incentive to invest in automated systems that could greatly decrease or even eliminate operator error.

The proposed crew rule was designated a long-term action in 2017, but was not finally withdrawn until May 2019. This inconsistent approach toward risk-informed, outcome-focused regulatory policymaking occurred within a single modal agency. The differences across the modal agencies within the Department are even more concerning.

Regulated entities should be encouraged to adopt the most cost-effective and safety-effective technologies. Outdated regulations restrict innovation and the adoption of new superior safety technologies, with consumers then facing higher prices and more hazardous conditions than would otherwise be the case.

The Revamping American Infrastructure Act of 2020 would finally codify the rulemaking principles expressed in Executive Order 12866 that have too often been ignored by the Department of Transportation. We urge you to support these important reforms.

Sincerely,

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