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Before The Subcommittee on Administrative Law
and Governmental Relations
Committee on The Judiciary
House of Representatives
Hearing on H.R. 743, "Negotiated Rulemaking
Act of 1989"

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Mr. Chairman and members of the committee, my name is Neil Eisner. I am the Assistant General Counsel for Regulation and Enforcement at the Department of Transportation and it is a pleasure to have an opportunity to be here today to testify on H.R. 743, the "Negotiated Rulemaking Act of 1989."

The Department of Transportation supports the negotiated rulemaking process. I am the Department's representative on the Administrative Conference of the United States, and we participated actively in the development of the Conference's two sets of recommendations on regulatory negotiation. We have also been actively involved in a number of ongoing efforts by the Conference to encourage the use of the regulatory negotiation.

The Department of Transportation conducted the first regulatory negotiation in the Federal government; the rulemaking involved a Federal Aviation Administration rule on flight and duty time limitations for air carrier crew members. At the present time, the Department's Office of the Secretary is engaged in another

negotiated rulemaking to implement the Air Carrier Access Act of 1986, which prohibits discrimination on the basis of handicap in air travel. Finally, the Department's Federal Highway Administration and National Highway Traffic Safety Administration are considering establishing a Federal advisory committee to negotiate a rule to implement Pub. L. 100-641, which requires the Department to issue regulations for a uniform system for parking for the handicapped. The legislative history of the statute includes a request to use regulatory negotiation for the rulemaking.

Our experience thus far with regulatory negotiation has been positive. We believe that if the negotiations are properly set up -- if, for example, all of the appropriate parties are invited to participate -- the process can be helpful even if it does not result in the ultimate objective of full consensus on all issues. The opportunity to discuss, in a relatively non-adversarial setting, issues and problems -- rather than attack proposed solutions -- offers a positive approach. Parties with a significant interest have an opportunity to play an important role in shaping the regulatory solution. The ability to ask many questions and to exchange information easily enables everyone to better understand the issues involved. The assistance of an experienced mediator or facilitator helps in the narrowing of differences. The process can provide the agency with more information than it would normally obtain through the notice and comment process of the Administrative Procedure Act. With this

information it should be able to have a more successful rulemaking. Since the interested parties have been offered an opportunity to play such an important role in the development of the rule, they will have a better understanding of how difficult the agency's job is and should find the rule more acceptable than they otherwise might find it. Having a better understanding through this process of the problems that others would have with different solutions should make the rule more acceptable to all of the parties and should make them less likely to challenge it.

This does not mean that regulatory negotiation is the ultimate solution for all rulemaking issues. There are rulemakings where this added step would be unnecessary, where there would be insufficient trade-offs available to foster meaningful negotiation, or where the issues would be considered by the parties to be non-negotiable.

The Department also recognizes that the process can add costs and time to the rulemaking process. For example, the need to hire a mediator can add costs that would not otherwise be incurred. Seeking public comment on the agency proposal to establish an advisory committee to negotiate a proposed rule, plus the time taken by the negotiations themselves, can add time to the normal rulemaking process.

An excellent illustration of this is the Department of Transportation's initial effort in this area, the FAA's flight and

duty time regulations. For many years the FAA had thought it necessary to update these regulations. The FAA found that the old rules had been overtaken by major changes in airline industry equipment and operating practices. The agency found some of the old rules very difficult to enforce, and the rules were so complex that the FAA had to issue over 1,000 pages of interpretations. In 1977 and 1978, the FAA issued related notices of proposed rulemaking on the subject. Based upon the comments received from the airline industry, the FAA decided that it was necessary to issue a supplemental notice in 1980. The nature of the objections raised by the commenters required the FAA to withdraw that NPRM. As the FAA explained it, "virtually all affected segments of the air transportation community opposed one or more aspects of the proposals." As a result, in 1983, the FAA decided it was time to try a new approach and initiated a regulatory negotiation. That process resulted in the issuance of a final rule in 1985. Although full consensus was not achieved on all issues, the participants generally seemed quite pleased with the process and the agency achieved an objective that it had been unable to achieve prior to regulatory negotiation: it issued a final rule. That rule still stands today.

In our second regulatory negotiation, the one involving the implementation of the Air Carrier Access Act of 1986, many of the parties requested that the Department use the regulatory negotiation process. The Department had some initial reservations about conducting a regulatory negotiation because the matter

involved issues that we thought might be so crucial to some of the participants that they would be unable to compromise. After the Department briefed the potential participants on the concept of regulatory negotiation and what it involved, they advised us that they understood our reservations but thought the process would be valuable. After asking for public comment, we decided to establish an advisory committee to conduct the regulatory negotiations. The negotiations started in June 1987 and proceeded through November 1987. Near the end of the scheduled time for the development of the proposed rule, the participants representing the interests of the handicapped left the negotiations over an impasse on the issue of whether there should be any restrictions on who can sit in aircraft exit row seats.

Despite this, the Department believes that the process was valuable. So did the principal disability group participants, who subsequently sought the use of regulatory negotiation in the rulemaking on parking for the handicapped. Progress was achieved on many issues prior to the premature termination of the negotiations and the Department has a much better understanding of the problems and potential solutions at issue in that proceeding. Based on the information that we gathered, the Department issued a notice of proposed rulemaking on June 22, 1988. At the request of representatives of the handicapped, we extended the comment period until December 19, 1988, and, at the request of representatives of the aviation industry, we provided a response period, which closed on January 18, 1989. At the present time, the Department is

completing its review of the public comments and exploring with the mediator what the next appropriate steps would be.

The Department welcomes Congressional consideration of the value of the negotiated rulemaking process and agrees with the general purpose of H.R. 743, which is "to encourage agencies to use the process when it enhances the informal rulemaking process." We do not believe that the bill provides us with any additional authority but, rather, simply codifies the existing practice of those agencies that are using the process. The Administration is continuing to review the bill and hopes to provide comments to the Committee in the near future. One general point that I would like to make is that any legislation should avoid a detailed framework that could overly formalize the negotiated rulemaking process by establishing norms. Although section 581 in H.R. 743 stresses that it is establishing a framework and should not "be construed as an attempt to limit innovation and experimentation," an agency might be discouraged from using the process for fear it might have to explain any deviations.

Because we believe there are benefits in the regulatory negotiation process, we support the general purpose of the proposed legislation. We believe that such legislation could encourage the use of this alternative form of dispute resolution.

I appreciate the opportunity to testify here today and would be glad to answer any of your questions at this time.