

Statement of Stephen H. Kaplan
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Before the Senate Governmental Affairs Committee

on

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My name is Stephen H. Kaplan, and I am the General Counsel of the Department of Transportation (DOT). I appreciate very much the opportunity to share with you our views on S.219, a bill that would establish a moratorium on ~~regulatory~~ rulemaking actions. This bill would cause significant problems, many of which may not be fully appreciated by those supporting this legislation.

We at the Department of Transportation take our rulemaking responsibilities seriously and are proud of the job we do. Indeed, we require many things of ourselves not mandated by statute or executive order. For example, we do economic analysis of almost all of our rules, not just those with major impacts. At the same time, we believe that there is room for improvement in our rulemaking process as well as the resulting rules. As an example, I recently wrote to each element of the Department providing a list of steps they ~~should~~ consider to improve our ability to respond to the concerns of small businesses. Everyone may not agree with the rules we issue, but I can assure you that --having personally sat through many meetings on a variety of rulemaking issues--although the decisions are often very difficult, our process is fair and thorough. I must stress that one reason the decisions are often so difficult is that the

statutes that mandate our rules leave us little discretion and can be vague and confusing.

We would like to work with you to identify ways to further improve the quality of our rulemaking as well as the legislation on which it is based. But I strongly believe that imposing a moratorium, such as that suggested by S.219, would be a serious mistake and may cause damage to those it is intended to help.

One of our major concerns is that we are an agency that primarily regulates safety and environmental matters. Neither the Congress nor the Administration want to have another Exxon Valdez accident where 10.8 million barrels of oil were spilled into Prince William Sound. That is why Congress passed the Oil Pollution Act of 1990 mandating Federal rulemaking. Nor do we want another Conrail-Amtrak accident like the one that occurred in Chase, Maryland, in 1987, killing 16 people, injuring 174, and causing \$16.5 million in damage; the NTSB found the Conrail crew's failure to obey signals because of marijuana use was a probable cause of the accident. Or the subway accident in New York city in 1991 believed to be caused by a driver impaired by alcohol; that accident resulted in 5 deaths, 200 injuries and significant damage to rail cars and the structure of the station and track. These accidents were among the reasons Congress passed the Omnibus Transportation Employee Testing Act of 1991, mandating that DOT issue alcohol and drug testing rules. ~~The Testing Act passed the Senate by a _____ to _____ vote.~~

This Administration's concern with safety as well as our need to work with our regulated industries and the affected public led to our holding safety summits with a number of our modes of transportation, such as aviation, rail, and pipelines. We are forming partnerships with those affected by our rules to ensure that, when it is deemed necessary to issue rules, those rules are even better than they have been in the past. It is noteworthy that one result of these summits was a request for additional regulation. Many of our regulated entities recognize the value of federal rules. For example:

- They help to increase consumer confidence. For example, as a result of a recent series of accidents, ridership fell 15 percent on commuter airlines. S.219 would prevent or make it more difficult to issue proposals or rules to increase safety standards for, and consumer confidence in, this industry.
- Without federal regulations, many regulated industries would be subject to multiple, inconsistent state regulations that would otherwise be preempted. Indeed, Congress has mandated that we issue regulations to preempt in certain areas, such as hazardous materials transportation, to prevent inconsistencies. Under S.219 we could not issue such rules. As another example, we are required to set fuel economy standards each year for light trucks. Those for this fall's model year were published in _____. Under the moratorium bill they would be "extended" to a later date. There would, therefore, be no standard and a state could regulate if it wanted.
- Many want to ensure that competitors are subject to the same standards. For example, the American Trucking Associations just

asked us to require foreign-based motor carriers to implement drug and alcohol testing. Under S.219 we could not issue such a rule.

- We also often must harmonize our standards with those of other countries. Even if this may increase some burdens, the overall uniformity is better. For example, 3M recently wrote to us supporting our proposal to align our hazardous materials regulations with international standards and authorize compliance on January 1, 1995, the effective date of the international standards, so that they would not have to comply with two sets of standards. We did so, but the moratorium would bar this.

- Many of our rules essentially establish "rules-of-the-road." Although these are not "routine administrative functions" (as that term is used in Sec. 6 (B)(iii) of H.R. 450), they are needed by our regulated entities. For example, the Coast Guard may need to issue or adjust opening times for drawbridges, or establish special navigation rules to permit the America's Cup races; the FAA must issue rules about the use of airspace near airports. S.219 would prevent this.

Some of our rules achieve tremendous safety benefits at relatively low costs. For example, the National Highway Traffic Safety Administration estimates that a year's delay in implementing a new vehicle standard concerning head impacts in vehicle interiors would result in a loss of 1150-1400 lives and 680-820 injuries over 20 years. The cost for compliance would be \$29-49 for cars and \$45-68 for light trucks.

The Senate bill does establish procedures for obtaining very limited exceptions "because of an imminent threat to health or safety or other emergency." However, these procedures, even in the amended House version, are quite cumbersome and could result in serious harm. As a result of an accident, the FAA may identify a problem that needs to be remedied overnight. Indeed, they cannot wait to publish some of these in the Federal Register before making them effective; they ~~send~~^d them to affected persons by telegram or electronic means. Finally, the moratorium would bar us from working on rulemakings that would prevent deaths and injuries after the moratorium. This would considerably delay those rules and their resulting benefits.

The retroactive provisions of the bill will adversely affect safety and the environment. They will cause confusion and impose unnecessary financial burdens on regulated entities. And they may result in litigation against regulated entities over action they took under rules retroactively delayed. Let me explain through the use of some examples.

We issued new alcohol and drug testing requirements last year in response to a statutory mandate. The first "deadline" for compliance was January 1, 1995, for large companies. The compliance date for small companies is generally January 1, 1996. Among other things this permits the small companies more time to "piggy-back" on the compliance programs created by or for large companies. But this bill would delay the requirements for large companies and defeat the advantages of the phase-in. It would also create a burden on those companies that have purchased equipment to

perform the testing. It also may force out-of-business service or equipment providers who have "geared-up" in response to the rule and then, under a moratorium, would have no use of their equipment or personnel.

The bill will also cause tremendous confusion under the alcohol and drug testing rules. For example, if someone tests positive today before the moratorium bill is adopted, it appears the positive result will remain effective despite the retroactive provisions of the bill. But the rules also set forth requirements that must be met before the individual can be returned to safety-sensitive functions. Can the individual go back to work? What are the requirements if the rules are retroactively delayed before return-to-duty? The rules provide for follow-up testing. If the employee has been returned to duty, is the employer then barred by the moratorium from conducting follow-up tests? What happens to someone who is tested for drugs just before the moratorium but the results do not get to the employee until after the moratorium? Must the employer ignore any positive tests? Many states adopt our federal standards as their own. Indeed, states are required by statute to adopt our Federal Motor Carrier Safety Standards in order to receive funding under the Motor Carrier Safety Assistance Program. What happens in states that have adopted these rules that are then retroactively delayed at the federal level? Will motor carriers that think they are complying with federal or state regulations in this confusing situation be subject to litigation by employees who object? Will they be forced to continue to use employees in safety-sensitive functions who have "flunked" drug or alcohol tests because they later find that their authority to test was delayed? In reflecting on the potential problems a

moratorium would cause in just this one example, you must remember that these DOT rules implement a statutory mandate.

If we have issued new standards to harmonize existing standards with international standards, as ^Fnoted earlier we have done with our hazardous materials regulations, what will happen to those companies that have already spent resources to comply with the new standards? They may have insufficient supplies to comply with the old requirements if the new ones are delayed. And they will have to meet two sets of standards if they ship internationally, since the moratorium will not delay the international standards. Confusion over which standards are applicable can cause mistakes that could lead to accidents and litigation against the regulated entities.

In the few minutes I have had here today to present this statement, I hope I have made clear our concern with the proposed legislation. However well-intended, you must understand the serious problems it will cause. Because of the speed at which the legislation is moving, many of them will not even become evident until it is too late to correct them.

Thank you for the opportunity to testify today. I am ready to answer any questions you may have at this time.