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BEFORE THE

SUBCOMMITTEE ON NATIONAL ECONOMIC GROWTH,  
NATURAL RESOURCES AND REGULATORY AFFAIRS  
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

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Good afternoon, Mr. Chairman and Members of the Subcommittee. I am Stephen Kaplan, General Counsel of the U.S. Department of Transportation, and I am pleased to have the opportunity to present the Department's views on H.R. 994, the "Regulatory Sunset and Review Act of 1995." On March 28, 1995, Ms. Sally Katzen, Administrator of OMB's Office of Information and Regulatory Affairs, testified about this bill before this subcommittee. The Department agrees with her comments. While I will not take the time to repeat her testimony, I would like to provide you with the Department's perspective on how the provisions of this bill will prevent the Department from carrying out its most important mission -- protecting the safety of the traveling public.

H.R. 994 requires agencies to regularly review their regulations, and if any regulation is not reviewed in a timely manner, that regulation will be automatically terminated. The Department of Transportation opposes H.R. 994 for five reasons.

First, H.R. 994 is not necessary. The Department of Transportation is now conducting, and has in the past conducted, its own regulatory review, and has eliminated regulations which have outlived their usefulness. Second, this legislation as drafted will greatly impair the ability of the Department to protect the safety of the traveling public. The criteria this bill requires for review of regulations: (1) may force the Department to terminate existing safety regulations

that we have already determined to be cost-beneficial; and (2) possibly expose us to litigation because the language of the bill provides us with little discretion when crafting new regulations. Third, the legislation places unrealistic and unreasonable demands on the Department. The time constraints in this legislation will ensure that some rules will be terminated. Fourth, in a futile effort to keep that from happening, the bill will prevent the Department from responding to new developments in transportation technology, by having our staff review past regulations instead of focusing on new problems. Fifth, the paperwork burden this bill imposes on us comes at a great cost, with very little gain in terms of common-sense regulations.

Safety is the number one mission of the Department of Transportation. This country has the safest transportation system in the world, owing in no small part to the success that the Department has had in issuing common-sense regulations to ensure that personnel, technology, and operational practices in aviation, maritime, motor carrier, railroad and other transportation industries are as safe as practicable. Many of these regulations have been in place over a long period of time, and are well-integrated into the daily practices of transportation providers. We work every day to ensure these rules respond to new technology and changed conditions, and that they deal effectively with safety problems that arise.

Further, the Department has a long-standing commitment to regulatory reform and doing regulations the right way. As part of this commitment, we participate fully and effectively in efforts to review existing regulations. We reviewed our regulations as part of Administration initiatives during the Reagan and Bush Administrations. Now, we are enthusiastic participants in President Clinton's regulatory reform initiative. As part of this effort, we will produce, by

June 1, 1995, a list of DOT regulations that can be modified or eliminated as obsolete, unnecessary, or overly burdensome.

The Department, however, does not wait for Administration-wide initiatives to review its rules. Nor do we wait for Congress to act either. For example, the Federal Highway Administration (FHWA) is currently in the midst of a zero-based review of all its motor carrier safety regulations. This review, which started prior to November 1994, has already resulted in the rescission of a number of obsolete or unnecessary regulations.

H.R. 994, while mandating us to do something we already do, also requires us to do something in a way which we believe might impair our ability to ensure that the United States has the safest transportation system in the world. The bill states that when reviewing a regulation we must look at 18 different criteria to determine whether the rule should continue to exist. For example, the bill states that we must examine for every rule "the extent to which the regulation impedes competition." Under the "impedes competition" aspect of the bill, could the Department have issued our rule mandating antilock braking systems for trucks, tractor trailers and buses? This rule, which is expected to prevent about 29,000 crashes involving 500 deaths and 25,000 injuries annually, will affect small companies in a different way than it will affect larger companies; will this impede competition? Does that mean we should not have issued the rule? No, it does not. But would this bill have prevented us from doing so? Maybe. Among the bill's 18 criteria is one to determine whether the regulation "protects the health and safety of the public." H.R. 994 provides us with no guidance as to whether we should issue a rule which protects the safety of the public but at the cost of "impeding competition."

This is just one example of the possible detrimental consequences this legislation might have on the Department's safety mission. Our issuance last

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March of the airline commuter safety proposal might also be affected by this legislation. Secretary Peña has made the strongest commitment to ensuring that there is "one level of safety" for airline passengers. The Secretary does not believe that a passenger on an MD-90 should have a safer flight than does a passenger on a Beech-1900. Would we have been able to issue the airline commuter safety proposal if H.R. 994 had been signed into law?

The provisions of H.R. 994 also do not necessarily allow us to balance what is in the public interest when crafting regulations. The bill requires us to issue a regulation which "maximizes the utility of market mechanisms to the extent feasible" and is "the most cost-efficient alternative." What happens if we determine that a regulation is necessary to protect the health and safety of the public but is not the most cost-efficient alternative, because a more cost-efficient alternative might save very few lives but at a lower cost per life saved? Should we issue the rule that saves the most lives in a cost-beneficial manner, or do we issue the rule that saves the most lives at the least cost? H.R. 994 not only provides us with no guidance on this subject, but it will leave the Department open to substantive challenges to our rules.

This legislation also places unrealistic and unreasonable demands on the Department. In prior administrations, the Federal Aviation Administration (FAA), over the years, has conducted many extensive reviews and revisions of major portions of its aviation safety rules. For example, one review covering aircraft certification rules, despite being designated a high priority, took approximately eight years. Under this bill, that would not have been good enough. Given this history, I question whether legislation mandating reviews is necessary: this Department, and Presidents of both parties, have a good record of reviewing existing regulations without it.

Nevertheless, when looking at a legislative proposal to require reviews of existing regulations, the Department must ask the same question it asks about all regulatory reform proposals: Would the proposal improve the situation, and provide more common sense in the regulatory process, so that we can do a better job? I'm afraid that for H.R. 994, the answer must be "no."

Given the complexity of transportation systems and technology, many DOT safety rules are necessarily lengthy and complex, and involve careful and detailed judgments balancing risks, costs, and benefits. They affect many different parties, such as transportation providers, equipment manufacturers, transportation employees, and consumers. As a result, reviewing transportation regulations is not something that can be done quickly or lightly, especially if we are to have full and effective public participation. Doing the job right is not compatible with meeting short, rigid, arbitrary deadlines.

Our DOT restructuring efforts are based on the maximum effective use of staff, not on the pointless review of rules that are already working well. The plain fact of the matter is that the Department does not have the staff, time or resources to review all its existing rules within 7 years. The sheer volume of DOT rules, and the length and complexity of the more significant safety rules, preclude our doing so. This is not an effective use of public resources.

Moreover, there are a great many DOT safety regulations. Many of them, individually, are "routine and frequent" rules. For example, Coast Guard rules that set opening times for drawbridges are "routine and frequent." Other such rules are the FAA rules regarding airspace actions that establish "rules of the road" around airports and other busy locations. In fact, DOT publishes in excess of 6,000 routine and frequent regulations each year. While these are not costly or, for the most part, controversial, they are vital to the everyday business of safe transportation.

Must these rules be reviewed under this bill? What would happen if the Department could not review all of its rules within 7 years? How would commuters like it if there were no rule in effect governing when the Woodrow Wilson Bridge opened for ship traffic? How would people who fly frequently in and out of Indianapolis like it if an FAA regulation governing use of the surrounding airspace suddenly lapsed? These rules generally do not have to be reviewed -- they are working.

Under the terms of this bill, some substantial number of DOT safety rules would go out of existence -- not because they are irrelevant, not because they are too expensive to implement, not because they fail to save lives, not because the reasons for them were not carefully considered after comments from the interested parties -- but simply because insufficient personnel and funds were available to conduct all of the reviews before an arbitrary deadline passed. This is not acceptable. The safety of the American traveling public is too important to be subordinated to the indiscriminate "sunset" requirement proposed by this bill.

The bill eliminates new rules -- those promulgated after the bill's enactment date -- after only three years. This even shorter review period has two drawbacks. First, it is not always possible to meaningfully review a rule after so short a period of time. Often, there will be a phase-in period that does not require full compliance for 1-5 years after promulgation. At least for many important and complex rules, data concerning the effectiveness and impacts of the rule are not available for analysis immediately after the effective date. Instead, it may take at least 3-5 additional years before sufficient data have been developed to enable us to make statistically significant findings. Second, because the Department will need to review newer rules immediately, it will make it that much more difficult to rationally schedule reviews of existing rules, compounding the number of rules which may then be terminated.

More important, the unreasonable schedules for the termination provisions will force agencies to spend most of their time looking backward. As a result, agencies will be unprepared to solve present safety problems and unable to look forward and effectively address future problems. The bill places a safety agency in an untenable position. Should the FAA use its staff and resources to review its existing pilot qualification rules or to respond to safety issues raised by new communications technology? Should NHTSA respond in a timely fashion to side-impact and other issues raised by the burgeoning popularity of minivans if, by so doing, it risks the elimination of its existing "air bag" rules? We cannot have it both ways. By creating these "either/or" choices, Congress guarantees that the safety of the American traveling public will be the loser.

Beyond this fundamental safety point, the Department objects to the overwhelming paperwork burden -- the 18-point reviews, the proposed and final reports to Congress on each regulation reviewed-- that this bill would place on agencies for very little gain in terms of common-sense regulation of transportation safety. This bill, of course, also applies to the regulations that facilitate the Department's very important task of assisting states and localities in building and maintaining a sound transportation infrastructure. Indiscriminate interference with the regulations that make infrastructure programs work effectively serves no one's interest.

The sunset provisions of the bill would also impose unreasonable burdens on industry and state and local governments, who would have to comply with safety, program, nondiscrimination and other statutory mandates without the legal and technical certainty our regulations provide.

The Department also objects to the judicial review provisions of the bill, which would make every aspect of its complicated review and report process subject to legal attack. It is one thing to make the substance of regulations subject

to court review; as the present Administrative Procedure Act quite properly does. It is another to multiply opportunities for legal challenges based on arcane points of procedure. It is ironic that, in a Congressional session that has devoted considerable attention to what some call "lawsuit abuse," H.R. 994 encourages litigation that allows special interests to harass and block the most important functions of this Department.

As Sally Katzen stated in her testimony, the Administration supports reasonable, systematic, and responsible regulatory review requirements. Unfortunately, H.R. 994 falls well short of this standard, and I cannot foresee circumstances in which the Department could support it. We are most willing to work with this Subcommittee, and with other Committees and Members, to develop sensible regulatory review legislation that will make the regulatory process, and the substance of our regulations, better.

Thank you, Mr. Chairman. I will be happy to answer your questions.