

**Statement of Marc Herbst
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**U.S. Department of Transportation Regulatory Review
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Thank you. My name is Marc Herbst, and I serve as executive director of the Long Island Contractors' Association, representing the heavy construction industry in New York's Nassau and Suffolk Counties. Today I am here in my capacity with the American Road and Transportation Builders Association. My association has been an affiliated chapter of ARTBA for many years, and at this time I am serving concurrently as vice chairman of ARTBA's Council of State Executives, the peer group of chapter CEOs.

ARTBA, now in its 109th year of service, provides federal representation for more than 5,000 members drawn from all business sectors of the U.S. transportation construction industry, public and private. Our industry generates more than \$200 billion annually in U.S. economic activity and sustains more than 2.2 million American jobs.

ARTBA appreciates this opportunity to participate in your review of D-O-T regulations. While there are a myriad of possibilities for us to discuss today, in the interest of time I would like to highlight three regulatory areas of concern for our members. The first is the Disadvantaged Business Enterprise – or DBE – program, the second is hours of service regulations for commercial motor vehicle operators, and the third is the use of proprietary products in highway construction. The common theme is ARTBA's desire to maximize

efficiency, minimize cost and preserve safety in the planning and construction of transportation improvement projects, objectives we know the Department shares.

First, ARTBA and the Department have maintained a virtually continuous dialogue about the DBE program over the program's nearly 30 years of existence. In recent years, ARTBA has submitted detailed comments as part of the Department's DBE rulemaking process, and several representatives of the association have participated in the Department's "DBE roundtable meetings." For a complete description of our views on this matter, I would refer you to ARTBA's comments from July 2010 which addressed a number of implementation issues with the program. There are a few overarching areas of concern that I wish to reference today.

First, the DBE program's regulations often diverge from the transportation construction industry's customary business practices, thus undermining efforts to provide the most efficient, cost-effective projects for the taxpayers. However, these aspects of the DBE program have little or no demonstrable benefit for the disadvantaged businesses for whose benefit the program was created. One example is when a prime contractor is also a major materials supplier. This is a fairly common situation in that many contractors are vertically integrated. Since local ordinances or other environmental regulations often limit the number of plants or quarries in a given region, it may be the case that the prime contractor is one of the few suppliers in a geographic area for those construction materials. Normally, a DBE subcontractor would not hesitate to purchase materials from the prime contractor if it made business sense and the price was right. Yet the DBE program, as currently implemented, does not allow the cost of those materials to be counted towards the project's DBE goal. Therefore, even if the prime contractor is offering a favorable price and sales terms, there is a strong incentive for the DBE subcontractor to turn away from what may be the most efficient option, which benefits the project's owner and the taxpayers, and instead purchase more expensive materials to help meet

the DBE goal. The Department did address this issue in the most recent rulemaking and indicated they did not intend to change this interpretation of the rule. So, again, this is an example of a significant divergence between the DBE program's implementation and the most efficient practices of the industry. We would ask for the Department to revisit this issue and make more of an effort to take the industry's customary business practices and efficiency into account as you implement this aspect of the DBE rule.

I think the Department and the industry share a common concern over DBE capacity – that is, the number of DBEs who are ready, willing and able to participate in transportation construction projects. With many states attempting to implement ambitious DBE program goals, lack of capacity becomes a major obstacle for prime contractors to surmount as they seek to build the best project possible while complying with a challenging array of regulations. These transportation builders are also most willing to help build capacity in the local DBE community in an appropriate manner. In fact, many ARTBA chapters offer discounted memberships to emerging DBE firms, and hold regular events so prime contractors and DBEs can meet and explore future business relationships. However, the program is often implemented in a way to discourage the assistance of prime contractors. Obviously, sham DBEs and “fronts” are unacceptable, but there is often severe disincentive for the prime contractors to assist – appropriately – in encouraging the success of these fledgling businesses. We see this as undermining the core purpose of the DBE program and hope that the Department will continue to work with ARTBA to correct this inconsistency. We would like to see DBE regulations and their implementation strike a balance that enables established industry professionals to provide appropriate assistance to emerging firms, hopefully helping them to achieve sustained success in their business.

The second issue I would like to address is the hours of service rule for commercial motor vehicle operators. My remarks reflect comments submitted by ARTBA to the Federal Motor Carrier Safety Administration a few weeks ago, so I will just summarize them now.

Transportation construction industry drivers are not long-haul operators who consistently spend many consecutive hours on the road in a given day. They are short-haul drivers who typically travel less than 20 miles one way. Many of our drivers spend substantial amounts of time off the road during the work day, loading and unloading materials or equipment, which allows for short breaks. Others may be responsible for positioning a piece of mobile equipment at the beginning of the work day, but may not be back behind the wheel until day's end, so that their daily drive time is actually minimal. Generally, transportation construction industry commercial drivers do not operate in a manner that leads to concerns over fatigue that are the focus of the hours of service rule.

At the same time, transportation project owners, the driving public and commercial shippers expect contractors to build projects in a timely and efficient manner, with minimal disruption to traffic. Transportation construction firms will often work very long hours to complete these projects expeditiously, especially in regions of the country where seasonal weather is a factor, such as in New York where my association is based. More and more, the industry is also using innovative techniques to replace a bridge or roadway by working intensively in a concentrated period of time, like over a single weekend. While windows of 10-11 hours of drive time and 13-16 hours of on-duty time may seem adequate in other cases, in fact those limitations can disrupt the efficient deployment of professionals and resources on the construction job site, without a demonstrable increase in safety.

Therefore, ARTBA reiterates its desire that FMCSA develop an exception relating to the drive-time and on-duty limits for transportation construction industry drivers. Any standard

tailored for the transportation construction industry should be based on clear facts that establish the degree to which – if at all – fatigue for these drivers is a factor that could lead to an increase in deaths and injuries on the nation’s roadways. We hope to work with the agency on this matter, while preserving the highest levels of safety and maximizing efficiency.

Also, I would like to reference ARTBA’s view on the use of proprietary products in highway construction. Last year, at the urging of Federal Highway Administrator Victor Mendez, ARTBA formed a task force with AASHTO and the Associated General Contractors of America to recommend policies that would accelerate the delivery of highway projects. The group made four primary recommendations, one of which was the better use of patented and proprietary products. The transportation construction industry is always seeking new, “cutting edge” technologies and products to build projects better and faster. However, as the task force’s report states, these innovations are often unable to enter the nation’s transportation market. There is a specific regulatory provision implemented by FHWA whose exceptions require voluminous documentation and are often narrowly interpreted.

The task force recommended that FHWA encourage innovation by better relying on the states to make decisions about the use of proprietary products, rather than putting the burden on the states to prove their need to FHWA. Accordingly, we would reiterate ARTBA’s desire for FHWA to revisit these regulations and related guidance materials.

Finally, while I realize today’s hearing is limited to those regulations which fall directly under the Department’s purview, I would be remiss if I did not mention the need for reforming the current approval process for federal transportation projects. With projects taking up to two decades to complete in some cases, the Department must do everything it can to reduce delay in the project planning and delivery processes, including working with natural resource agencies to ensure timely completion of environmental reviews.

Again, thank you for the opportunity to make a presentation today, and I would be happy to answer any questions. ARTBA also plans to submit written testimony for your use in this process and is available to offer further information on any of the issues I have covered today.