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**Task Force on Updating
The National Environmental Policy Act
Hearing on
NEPA: Lessons Learned and Next Steps**

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Good morning, Chairwoman McMorris and other members of the task force. Thank you very much for providing the American Road and Transportation Builders Association (ARTBA) the chance to present its views before this task force on the subject of updating and improving the National Environmental Policy Act (NEPA).

I am Nick Goldstein, staff attorney for ARTBA. ARTBA, whose eight membership divisions and more than 5,000 members nationwide, represent all sectors—public and private—of the U.S. transportation design and construction industry. ARTBA is based here in Washington, D.C., and has provided the industry’s consensus policy views before Congress, the executive branch, and the federal judiciary for 103 years. The transportation design and construction industry ARTBA represents generates \$200 billion annually to the nation’s Gross Domestic Product and sustains the employment of more than 2.5 million Americans.

Let me stress at the outset that ARTBA shares the task force’s goal of protecting the environment and minimizing the impacts of development. ARTBA also supports NEPA and realizes that it is an integral component of the transportation planning process.

ARTBA celebrates the commitment of the transportation construction industry to the environment every year when we hand out the association’s Globe Awards to those transportation construction professionals, firms and public agencies that do an outstanding job in protecting and/or enhancing the natural environment in the planning, design and construction of U.S. transportation infrastructure projects. Many, if not all of these projects would not have been so recognized were it not for the NEPA process.

NEPA Background

Madame Chairwoman, transportation infrastructure projects must navigate through an often time-consuming and complex planning process. In 1969, Congress passed NEPA, which is a process-guiding act of general applicability designed to ensure compliance with the many specific federal environmental laws, permitting and consultation activities that involve a number of federal agencies. NEPA establishes general policy, sets goals and provides a means for carrying out these policies.

NEPA is triggered any time an action by the federal government will result in an “environmental impact.” The White House Council on Environmental Quality defines “environmental impacts” as any impact on the environment or historic and cultural resources. Agencies such as: the U.S. Army Corps of Engineers (Corps) for wetland and water permits; the U.S. Fish and Wildlife Service (FWS) for Endangered Species Act compliance; the Advisory Council on Historic Preservation (ACHP) for historic preservation laws; the U.S. Environmental Protection Agency (EPA); and many other agencies are commonly involved in this process. NEPA does not mandate specific outcomes. It simply governs how the process must take place. NEPA is activated in the transportation construction planning process when federal funds are being used to finance the project.

NEPA establishes three classes of environmental reviews that must take place, based on the magnitude of the anticipated impact of the proposed transportation project:

- 1) Environmental Impact Statement (EIS). Projects where a significant environmental impact is anticipated must complete a full EIS. Many federal agencies, such as the Federal Highway Administration (FHWA), have developed their own policies to implement NEPA and to address the necessity of an EIS. For example, FHWA regulations mandate that an EIS be prepared where a new controlled access highway or road project with four or more lanes is going to be constructed on a new location.
- 2) Environmental Assessment (EA). In instances where neither NEPA nor FHWA's own regulations dictate that an EIS must be completed, a less strenuous EA must be completed. An EA will result in one of two results: there will be a "finding of no significant impact" (FONSI) to the environment; or the agencies will determine there will be a significant impact, thereby prompting them to conduct a full EIS. Widening or expanding the capacity of an existing highway is a typical highway project that would require an EA.
- 3) Categorical Exclusion (CE). Projects that neither individually nor cumulatively have a significant environmental impact can be treated as a CE. State agencies must provide FHWA with sufficient information on a case-by-case basis to demonstrate that environmental impacts associated with a project will not rise above the CE threshold. Road rehabilitation or bridge replacement projects are typical highway projects that would only require a CE.

An EIS is the most intensive and time-consuming of the processes described above. If an EIS is performed, the agency performing the review, i.e., the state department of transportation (DOT), must prepare a document that identifies each environmental impact of a proposed project, as well as alternatives that may have different impacts and the pros and cons of each. This document must be released in draft form to allow the public and other government agencies to submit comments. These comments must then be addressed when the EIS is published in its final form. In rejecting different alternatives, NEPA requires the agency to carefully document why other alternatives were not selected.

Delays in the Process

Madame Chairwoman, you don't have to be an expert to know that our transportation planning process has reached a state of gridlock. Today, it is almost as if one needs a global positioning system to keep track of where a transportation improvement project is in the review process. According to a recent report by the U.S. Government Accountability Office (GAO), as many as 200 major steps are involved in developing a transportation project from the identification of the project need to the start of construction. According to the same report, it typically takes between nine and 19 years

to plan, gain approval of, and construct a new major federally funded highway project. This process involves dozens of overlapping state and federal laws, including NEPA, state NEPA equivalents, wetland permits, endangered species implementation, clean air conformity, etc. Often times these procedures mask disparate agendas or, at a minimum, demonstrate an institutional lack of interagency coordination that results in a seemingly endless string of delays.

It is true -- according to FHWA -- that only about three percent of federally funded highway projects require the completion of an in-depth EIS. Since 1990, Interstate lane miles have only increased by about six percent. The fact is there are very few projects in terms of numbers that involve new construction, thereby requiring an EIS. However, most of these projects are very large in scope and account for a significant portion of each state's construction budget in any given year. Many of these projects, while small in number, are very large in terms of cost, often in the range of tens of millions of dollars and even in excess of a billion dollars each. These projects also have the most substantial potential benefits for public safety and mobility for the traveling public and are, therefore, frequently high priority projects for most states.

A recent study by FHWA found the time required to process environmental documents for large projects has doubled over the past two decades. In the 1970s, the average time for completion of an EIS was 2.2 years. Former U.S. DOT Assistant Secretary for Policy Emil Frankel recently reported that from 1999-2001 the median time for completing an EIS was 4.4 years. If federal Clean Water Act section 404 wetland permit issues or section 4(f) of the Department of Transportation Act of 1966 (Section 4(f)) historic preservation or parkland avoidance issues come into play, the average time period grows by an additional two years, on average.

However, delays in the transportation project environmental review and approval process are not only limited to large projects. While according to FHWA three percent of federally funded transportation improvement projects require an EIS, the remaining 97 percent require an EA, (6.5 percent) or CE (90.6 percent). A recent report conducted by the National Cooperative Highway Research Program (NCHRP) stated:

“[D]elays in completing [EA and CE] reviews are encountered frequently despite the minimal environmental impacts associated with such projects. Even if such project-level delays are individually small, their cumulative impact may be significant because most transportation projects are processed as CEs or EAs.”

According to the report, 63 percent of all state DOTs responding to the survey reported environmental process delays with preparation of CEs and 81 percent reported similar delays involving EAs. These delays triple average environmental review times for CEs -- from about eight months to just under two years -- and have more than doubled review times for EAs, from under 1.5 years to about 3.5 years. The most common reason for these delays: section 4(f) requirements (66 percent); section 106 of the National Historic Preservation Act (NHPA) (61 percent); and section 404 of the Clean Water Act (53

percent). These numbers are consistent with a survey ARTBA conducted in 2001 of 49 state DOTs on delays in the environmental review process.

Because of these lengthy delays, many state DOTs have simply assumed extended time periods in their planning schedules, giving the misimpression that the environmental review process is not taking an inordinately lengthy period of time. While many environmental groups state that delays are primarily due to funding issues, the complexity of the project or low priority of the project, just the opposite is true. State DOTs often withhold funding on projects until the environmental review process is complete, making it appear that funding is the reason for the delay.

NEPA was never meant to be a statute that enabled delay, but rather a vehicle to promote balance. While the centerpiece of that balancing is the environmental impacts of a project, other factors must be considered as well, such as the economic, safety, and mobility needs of the affected area and how the project or any identified alternative will affect those needs. When NEPA is used as a method of preventing a chosen outcome by those who disagree with that decision, its purpose as a balancing statute is defeated.

The basic problem is that the development of a transportation project involves multiple agencies evaluating the impacts of the project as required by NEPA. While it would seem that the NEPA process would establish a uniform set of regulations and submittal documents nationwide, this has not been the case. For example, the EPA, Corps, FWS and their companion state agencies each require an independent review and approval process, forcing separate reviews of separate regulations, and unique determinations of key benchmark issues--such as the purpose and needs of a project--and requiring planners to answer multiple requests for additional information. Also, each of these agencies issues approvals according to independent schedules.

The original intent of NEPA was to coordinate the federal decision-making process, rather than splintering it. However, in its current state, NEPA generates far more documents than it does actual decisions. Instead of spreading out the environmental review process among various agencies, NEPA should consolidate that process among the agency with oversight of that particular project. In the case of a highway project, the U.S. DOT should be the "lead agency" in the environmental review process. Also, NEPA should coordinate the different aspects of the environmental review process so that they can be done concurrently, and data generated can be used for multiple aspects of the environmental review process. ARTBA is pleased that reforms with this goal have been included in the recently enacted "Safe, Accountable, Flexible, Efficient Transportation Equity Act – A Legacy for Users" (SAFETEA-LU).

Even some environmentalists have admitted there are many needless delays in the environmental review process for transportation projects. In April 29, 1999, testimony before the U.S. Senate Environment and Public Works Committee, Roy Kienitz, then executive director of the Surface Transportation Policy Project said:

“There is no good reason for federal approval to take years if there are no major disagreements over the project being proposed. These delays are the most needless of all and are the easiest ones to attack.”

The Sierra Club has also recognized this, stating in a 2003 report concerning the effect of NEPA on transportation projects that “the NEPA process is not perfect, and there are methods to improve it.” One recommendation which the Sierra Club considered “the most promising” was the need for early collaboration among partners and stakeholders in the planning process. ARTBA wholeheartedly agrees. Issues need to be vetted as early in the process as possible so they may be resolved or, in the alternative, bad projects can be abandoned before great amounts of work are invested in them. Better coordination among the various agencies and stakeholders involved in the NEPA process is one area where all sides in this discussion believe positive changes can be made.

Delay Kills

Delays in the environmental review and approval process for transportation improvement projects can have tragic consequences. According to the U.S. DOT, almost 42,000 people are killed each year on the nation’s highways. One person in the U.S. dies from a traffic crash every 13 minutes and there is one crash-related injury every 10 seconds. Traffic crashes are the leading cause of death in the U.S. for people ages 6 to 33, and their economic cost is estimated to be \$230.6 billion each year in added medical, insurance, and other expenses. That’s about 2.3 percent of the U.S. gross domestic product. To put this figure in perspective, the total annual public and private health care expenditures caused by tobacco use have been estimated at \$93 billion annually.

Roadway safety is a huge public health crisis! The sad part is that, according to the U.S. DOT, approximately 15,000 of these annual deaths are in crashes in which substandard roadway conditions, obsolete designs or roadside hazards are a factor. These are accidents that we can prevent through improved transportation infrastructure. According to FHWA, for every \$100 million we spend on highway safety improvements, we can save over 145 lives over a 10-year period.

Updating and improving the NEPA Process

The area of the NEPA process which would yield the greatest reduction in project delay is frivolous and malicious litigation which subverts the NEPA process. This is not to say that all NEPA litigation needs to be curbed, or that NEPA litigation, as a whole, is a hindrance on the process. When used properly, litigation resolves disputes arising from the NEPA process that cannot be dealt with through any other method. However, when abused, NEPA litigation allows a small minority of individuals to hijack the NEPA process in an attempt to perpetually delay projects simply for the sake of delaying them.

This strategy of “delay for the sake of delay” has been described in numerous outlets by plaintiffs in NEPA litigation. One of the more graphic examples of this mentality is

evident in the following 1999 quote from Jay Kardan, Conservation Chairman of the Virginia Chapter of the Sierra Club regarding opposition to highway projects:

“Facts and reason are much less important than the amount of noise you can make...Officials who support [highway projects] should be mercilessly abused, shamed, ridiculed and otherwise made to suffer pain...The objective should be to cleave a division through the community so painful that people will remember it for decades afterward.”

The same mindset was echoed by Roy Kienitz in his aforementioned Senate testimony:

“In the struggle between proponents and opponents of a... [highway] project, the best an opponent can hope for is to delay things until the proponents change their minds or tire of the fight.”

Also, a “Grassroots Litigation” training manual prepared by the Community Environmental Legal Defense Fund states:

“In an area devoid of endangered species, impacts to waterways and floodplains, or of federal funding, NEPA may be the only tool that grassroots groups have [to fight highway projects].”

This approach to NEPA litigation undermines the entire process. It advocates using NEPA litigation when no legitimate environmental issues exist to be debated. Instead of allowing communities to make informed decisions, their power is usurped by small groups of well-funded project opponents. Worse yet, these project opponents are often based out of state and not part of the communities they purport to represent.

This type of NEPA litigation was recently illustrated in litigation involving a highway widening project on U.S. 95 in Las Vegas, Nevada. As a result of a lawsuit filed years after the final EIS for the project was completed, ongoing construction of the project was completely halted for almost one year. During that time, air quality and public safety improvements were delayed in the affected communities, the cost of project materials rose by millions of dollars, work plans were disrupted, and employees were out of jobs temporarily, and in some cases, permanently.

Using the Las Vegas case as an illustrative example, U.S. 95 is the primary north-south travel corridor in the northwest region of Las Vegas. By 1995, the corridor was operating at near capacity during peak periods and experiencing heavy congestion during certain times of the day due to the aforementioned population growth and the resulting demand for highway travel. According the FHWA travel and demand modeling and anticipated continuation of past growth trends, these conditions are projected to worsen, with U.S. 95 operating at 50 to 75 percent above capacity by 2020.

FHWA data shows the segment of U.S. 95 that was at issue in this case services some of the fastest growing neighborhoods in Las Vegas. An estimated 190,000 vehicles travel

through the portion of U.S. 95 to be widened each day, with peak hour traffic reaching as high as 11,900 vehicles. Currently, traffic congestion slows commuters to one-half of the 55 mile per hour speed limit on the corridor. Also, between 2000 and 2002 there were 3,535 motor vehicle crashes on one section of U.S. 95 that was scheduled for improvement.

As a result of these factors, a Major Investment Study (MIS) was begun in 1995 to provide a detailed evaluation of alternative strategies to address the deteriorating conditions of the area served by U.S. 95. One of the key improvements recommended by the MIS was to widen key portions of U.S. 95 from six to ten lanes. The NEPA process began shortly after the MIS was completed in 1997. A final Environmental Impact Statement (FEIS) was issued in 1999 with a Record of Decision (ROD) issued in 2000. Two years later, the Sierra Club filed suit in federal district court under NEPA claiming that an epidemiologic study not conducted in the Las Vegas area (rather, it was conducted in Las Angeles) was enough to re-open the NEPA process and warrant a supplemental Environmental Impact Statement. At this point construction had already started on significant portions of the U.S. 95 improvement project. Though the Sierra Club's complaint was dismissed at the district level, the United States Court of Appeals for the Ninth Circuit accepted the Sierra Club's appeal of the decision and issued an injunction halting construction, four years after construction was already underway, while litigation continued until a settlement was reached in late June of 2005.

NEPA Litigation Places Environmental Benefits at Risk

The improvements that make up the U.S. 95 widening project are needed in order to keep pace with the rapid population growth currently being experienced in the Las Vegas area and prevent the effects of traffic congestion from worsening. The widening of U.S. 95, once completed, will lead to enormous environmental, public health and safety benefits. Once finished, improvement of U.S. 95 will result in a significant reduction in so-called "greenhouse gasses."

Specifically, according to a study by Cambridge Systematics, Inc., there will be a 58.8 ton reduction in carbon monoxide emissions, a 54.3 ton reduction in volatile organic compounds (VOCs) and an 87.8 ton reduction in carbon dioxide emissions between now and the year 2025. Further, it is estimated that within that time span there will also be an 87.8 percent reduction in motor fuel usage by U.S. 95 commuters, which translates to 231,654,731 gallons of motor fuel saved (or 68.9 gallons per commuter over the life of the project). Also, the time Las Vegas commuters spend stuck in traffic will decrease by an average of 86.5 percent, which for commuters who use U.S. 95 twice per day, would mean 30 minutes of time saved per day while going through the area to be improved. Finally, the U.S. 95 improvements are projected to result in 3,524 fewer total motor vehicle crashes, 14 fewer fatalities, and 1,730 fewer injuries to commuters through 2025. This will undoubtedly lead to reductions in both health care costs and insurance rates for Las Vegas area residents (in addition to the emotional benefits of not having to deal with a friend or relative that has been in an automobile accident).

The EPA reported in September 2004 “between 1970 and 2003, that gross domestic product increased 176 percent, vehicle miles traveled increased 155 percent, energy consumption increased 45 percent, and U.S. population grew by 39 percent. During the same time period, total emissions of the six principal air pollutants (nitrogen dioxide, ozone, sulfur dioxide, particulate matter, carbon monoxide and lead) dropped by 51 percent.” The finding by the EPA that these pollutant levels have decreased *despite increased travel and an increased population* demonstrates there is little connection between any increased travel which would occur on U.S. 95 as a result of the widening project and a subsequent increase in pollutant levels, despite Sierra Club arguments to the contrary.

There are two primary reasons for these decreased pollutant levels. First, motor vehicle emission levels change with vehicle speed. Once vehicles reach a speed greater than 15 miles per hour, DOT data shows that both volatile organic compound (VOC) and carbon monoxide emissions decline dramatically. The congestion currently experienced on U.S. 95 causes vehicles to either remain at lower speeds or have to stop and start repeatedly during a commute. The United States Department of Transportation has acknowledged this, stating “[e]mission rates are higher during stop-and-go, congested traffic conditions than free flow conditions operating at the same speed.” By widening U.S. 95, commuters will be able to travel at a level where emissions of key pollutants will be greatly reduced. Second, pollutant levels continue to decline as cleaner and more fuel efficient vehicles make up a greater percent of the nation’s motor vehicle fleet. According to the U.S. DOT, today’s average motor vehicle produces 80 to 90 percent less pollution than it did in 1967. As technology develops even further, vehicle emissions will continue to go down as automobile usage increases.

A recent study by the Texas Transportation Institute at Texas A&M University concluded “congestion has grown everywhere in areas of all sizes. Congestion occurs during longer portions of the day and delays more travelers and goods than ever before.” Recent estimates show that congestion on the nation’s highways causes 3.5 billion hours of delay, 5.7 billion gallons of wasted fuel, and results in an overall cost to the U.S. economy of \$63.2 billion. Since 1982 the amount of free flowing traffic within the United States has decreased by over 50 percent. These delays caused by traffic congestion affect not only commuters, but also first responders--such as police, firefighters, ambulances, and other services--vital to Las Vegas and all communities in the United States. Taking this level of congestion and gridlock into account, it is important that new highway projects and capacity improvements are allowed to proceed without unnecessary delay.

It should also be noted that the costs of delay associated with this and other NEPA-related litigation are borne primarily by United States taxpayers. In the U.S. 95 case, the projects being delayed by the Sierra Club’s lawsuit comprise roughly \$85 million worth of work at the time the injunction to halt construction was granted (in August of 2004). The longer these projects are delayed, the more expensive the materials needed to complete those projects become. According to the FHWA, construction materials represented approximately 45 percent of total costs for federal-aid highway construction

contracts over \$1 million on the national highway system in 2003. In the case of the U.S. 95 project, this means an estimated \$38.25 million worth of construction materials were involved when construction was halted. Since then, the Producer Price Index (published by the Bureau of Labor Statistics) for highway and street construction has risen eight percent. Thus, equipment costs associated with the U.S. 95 project are estimated to have risen approximately \$3,060,000 during the time of the injunction. That means taxpayers could pay more than an additional \$3 million as a result of the delays caused by this NEPA-related litigation.

What does Frivolous Litigation Illustrate about the NEPA Process?

The U.S. 95 situation, unfortunately, is only one of the latest examples in what has become a myriad of NEPA litigation. There are currently in excess of 1,500 cases which “define” NEPA. Another such example can be found in Utah where the Legacy Highway project has been delayed for over five years at a cost of nearly \$1.5 billion. During this time, as with U.S. 95 in Nevada, air quality has worsened, commutes have become longer, and transportation-related public health and safety has declined.

NEPA has been transformed from a vehicle which once helped to mitigate the environmental impacts of development to a tool which enables special interest anti-growth groups to delay needed and environmentally beneficial transportation infrastructure through the use of unending litigation.

In the U.S. 95 situation, the project in question had already gone through extensive environmental review and complied with NEPA’s requirements. However, a single epidemiologic study discovered by U.S. 95 project opponents nearly two years after the fact was enough to completely halt construction while litigation was underway. This is unacceptable for a number of reasons. First and foremost, the government had, as part of the NEPA process, reviewed thousands of studies and other voluminous evidence of the environmental effects of the U.S. 95 project. Second, the NEPA process has to have an end point. Transportation planners, project officials, and state and local government need some point of finality in the NEPA process in order to provide enough certainty to allow the project to be planned effectively. The NEPA process, as illustrated in the U.S. 95 case, is far too easy to “re-open” and cause unnecessary delay to transportation projects. After a project has completed its NEPA requirements, the process should not be re-opened except in extreme circumstances which truly warrant such action.

This brings me to another flaw in the NEPA process. It does not consider the environmental benefits of fully completed projects. NEPA should not only be limited to the consideration of environmental impacts, but expanded to include environmental benefits. As I previously mentioned, the U.S. 95 project, once completed will yield significant reductions in mobile source emissions as well as reductions in traffic congestion and fuel use. This needs to be given proper weight and consideration by the NEPA process.

Also, the NEPA process needs to consider the environmental impact of not undertaking federal highway transportation projects. In the U.S. 95 case, part of the NEPA consideration should be the environmental consequences of continued congestion along the U.S. 95 Las Vegas corridor. As previously stated, vehicles stuck in congestion yield significantly greater emissions than vehicles in free-flowing traffic.

The litigation of the U.S. 95 project demonstrated that when court battles do arise over NEPA, many important issues often go unaddressed. When the federal government responds to NEPA claims, it is constrained to only addressing the statutory legal points raised by whichever group is challenging a project. Greater issues such as the project's environmental benefits or the potential effects of project delay on other highway projects and the nation's infrastructure as a whole are not considered—providing, at best, a lopsided perspective on environmental impacts. Had ARTBA not submitted a “friend of the court” brief in the U.S. 95 case, the project's environmental and public health benefits would have gone completely unaddressed in appellate litigation. Also, ARTBA was the only party to raise the question of what effect delaying the U.S. 95 project would have on the nation's highway system as a whole. Both of these issues can and should have been considered by the main parties in the U.S. 95 litigation, rather than having ARTBA raise them as a non-party.

NEPA should not operate in a vacuum in this way. When the environmental impacts of a project are considered, its benefits must be considered as well. Also, the term “environment” cannot be narrowly defined as the impact on the air quality of a region without also considering appropriate public health concerns. These concerns, which all factor into the state of an area's environment, should include other consideration such as traffic congestion. Also, related public health issues, such as the stress caused by lengthy commutes and traffic impact on first-responders, should be part of any analysis.

ARTBA's Recommendations for Changing the NEPA Process

As you can see, Madame Chairwoman, the NEPA process is in need of fine-tuning. For over a decade, reform to the environmental review process has been a top ARTBA priority. Indeed, ARTBA is extremely appreciative of the formation of this task force and its goal of taking a hard look at NEPA and its effects on local environments and economies.

The goal of these efforts is not—as some have suggested—to undermine the environmental review process. Rather, it is to coordinate the process in order to more effectively deal with the transportation needs and congestion issues facing the nation. If handled appropriately, improving the delivery of transportation projects would increase the efficiency of the transportation network, and ensure the traveling public receives the full benefit of the user fee-financed transportation system. We are not seeking changes that are outcome determinative; we are seeking process improvements that would generate quality decisions in a more timely manner.

Particular changes to the NEPA process ARTBA recommends are:

- A set time limit on project related NEPA lawsuits. The recently enacted “Safe, Accountable, Flexible and Efficient Transportation Equity Act – A Legacy for Users” includes a provision setting a 180-day time limit for lawsuits involving highway projects.
- Consideration of the environmental benefits of proposed projects as opposed to just their impacts. Also, the environmental consequences of not undertaking a project should also be considered.
- NEPA litigation should be limited to only those issues that have been fully raised and discussed during the public comment period for a project. This will help insure that litigation over projects is a last resort, rather than a first stop for opponents of a project.
- Establishment of a dispute resolution process as part of NEPA. This would further ensure that only those issues which are truly not resolvable proceed to litigation.
- In compliance with President Bush’s executive order on environmental streamlining, the NEPA review process must be shortened and coordinated among the various federal agencies that take part in it.
- Where possible, duplicative review and analysis should be eliminated. Studies done as part of the transportation planning process should be acceptable in the NEPA review process and vice-versa, as proposed by the Bush Administration.

Once again, Madame Chairwoman, ARTBA thanks you not only for the opportunity to participate in this hearing, but also for the establishment and work of this task force. I would be happy to answer any questions you or the other members may have.