Statement Of The
International Union, United Automobile,
Aerospace, and Agricultural Implement
Workers of America (UAW)

On The Subject Of
Regulatory Improvement Act of 1999
(S.746)

Before The
Committee on Governmental Affairs
United States Senate
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I am Dr. Franklin E. Mirer, Director of the Health and Safety Department of the UAW. I am a toxicologist and certified industrial hygienist. I speak today on behalf of nearly 1.3 million active and retired UAW members and their families.

The UAW strongly opposes the proposed "Regulatory Improvement Act of 1999" (S. 746). We appeared here a year ago to oppose the Regulatory Improvement

Act of 1998, and for the same reasons. We believe this legislation imposes a "one-size fits all, one style suits all" procedural mandate which would undermine OSHA's ability to protect working men and women against workplace health and safety hazards.

Next week, the AFL-CIO, the UAW and other unions will observe Worker Memorial Day to remember victims of occupational injury and disease. The UAW and its local unions will fly flags at half mast and read the names of the six victims of the Ford Rouge Powerplant explosion, two other UAW members killed by work in 1999, and 11 victims in 1998. But the names of most victims of occupational hazards are unknown. Occupational disease is estimated to cause ten times as many deaths as occupational injury does and over 100,000 UAW members suffer an occupational injury or illness each year. UAW members are among the best protected of American workers, and yet we sustain these losses year after year.

Our members and their families will not tolerate an erosion of health and safety protections at work. Most of the fatalities recorded in our facilities, and virtually all of the occupational disease identified among our members by research, arose from conditions not covered, or exposures permitted by existing OSHA standards. Our members want Congress to expand and strengthen health and safety protections by making it possible for OSHA to set more comprehensive and more protective standards.

The UAW opposes S. 746 because it contains not a single provision that would facilitate improving OSHA standards, or any other public health or consumer protections. From a worker perspective, the most significant problem with agency regulations is delay in responding to documented hazards. This bill does not pretend to cure the problem of

delay. Instead, it makes the delays worse and erects further barriers to new health and safety rules for our members and for all American workers. Specifically, S. 746 would:

- add additional time consuming steps to the standard setting process;
- give industry representatives a special seat at the table and an inside track to oppose a new standard;
- provide many new grounds for industry to challenge standards in court;
- eat up OSHA resources with complex analyses irrelevant to the OSHA law;
- shift the balance in standard setting decisions from worker protection to industry costs.

The legislation tilts the playing field further in favor of those who wish to block new protections. Like all recent regulatory legislation, S. 746 seems based on the assumption that public health agencies order overly protective limits too fast and too frequently, based on extreme interpretations of science. Claims that the bill would add transparency and consistency to the public health process are incorrect. Real world experience suggests just the opposite.

The UAW urges this Committee to take into account actual experience with specific public health statutes before entangling them all in this single net of complex procedural requirements. The history of the metalworking fluids standard furnishes a real world example of the current obstacles at OSHA and the ways in which the requirements proposed in S. 746 would adversely affect OSHA standard setting procedures.

About a million American workers are exposed to metalworking fluids in factories that make engines, transmissions, bearings and many other machined products. The National Institute for Occupational Safety and Health (NIOSH) has concluded that these materials pose respiratory, skin and possibly cancer hazards under current conditions of use. UAW efforts to protect our members from these dangerous materials started with two cancer studies in bearing plants in New Britain, and Bristol, Connecticut in the early 1980's. These studies found increased cancer due to exposures that were within or not covered by OSHA limits. Since then, the UAW and the auto manufacturers have conducted several million dollars worth of jointly directed research into cancer, respiratory effects, toxicology and control technology for metalworking fluids. We have demonstrated respiratory illness not previously found in the scientific literature. We have shown that the standard ventilation systems actually increased some exposures.

The respiratory effects of metalworking fluid exposures can be devastating. And yet there is not, to date, an OSHA standard adequate to protect workers. Consider the situation of UAW Local 72 members at Chrysler's Kenosha, Wisconsin Engine Plant. In August of 1995, the first employees at this facility developed hypersensitivity pneumonitis (HP), a rare, severe condition of the deep lung. HP presents with fever, chills, shortness of breath and loss of weight. With recurrences, acute HP may become chronic HP, resulting in lung scarring, progressive loss of breath and even death. The UAW and Chrysler were aware that no exposure in the facility remotely approached OSHA's Permissible Exposure Limit for oil mist, and that OSHA required no medical

examinations or tests for employees with such exposures. Nevertheless, Chrysler took vigorous joint action in cooperation with the UAW to respond to this problem.

The UAW and Chrysler together called in the Wisconsin Division of Health in March of 1996 and provided funding to the government agency to conduct an investigation. By September 1996, the study had identified 20 employees with HP and nearly 40 others with other significant respiratory conditions. According to our local union representatives, a significant number of these HP victims are unable to return to work, even under dramatically improved conditions. They are suffering the devastating psychological as well as physical consequences of an occupational illness.

The UAW and Chrysler could not sit back to wait for OSHA or for more research. When the HP risk was identified, ventilation in the plant was immediately improved. The facility was designated a pilot plant for best control technology in the 1996 collective bargaining agreement. Enclosures and local exhaust ventilation were installed on existing and new equipment and truly remarkable reductions of exposure were achieved. No new HP cases have appeared since 1997, and other respiratory complaints are down drastically.

With more time, we could have brought victims, local union representatives and management representatives to today's hearing to tell the whole story. It would take a day to do the story justice.

UAW, Chrysler and NIOSH sponsored a national workshop on HP and metalworking fluids at the UAW-Chrysler National Training Center in Detroit in January 1997. The workshop examined similar outbreaks of metalworking fluids-related respiratory illness in UAW eight represented facilities in the US and Canada. Since then, at least four other outbreaks have been identified. Proceedings of the workshop, as well as research papers from the investigation, were published in scientific journals

Where has OSHA been during all of this? OSHA did not react to the cancer studies published in the middle 1980's or to the respiratory effects studies. The UAW petitioned OSHA for a new standard for metalworking fluids in November 1993. After four years, OSHA finally put together a Standards Advisory Committee of health professionals and representatives of labor, management and state agencies, on which I serve. We have met eight or nine times, visited plants, heard from victims and considered testimony of experts. NIOSH issued a criteria document that warned of respiratory, dermatitis and possible cancer effects, and recommended an exposure limit one tenth of the current OSHA standard. NIOSH also has visited about 80 plants to assess the feasibility of the proposed new limit. The Advisory Committee is trying to complete a final report and recommendation before our charter expires.

The bad news is that OSHA has yet to summarize the known health effects, carry out the existing requirements for an economic feasibility analysis, or draft and justify regulatory text. I would estimate at least a year's work for that, after the Advisory Committee completes its task. Then there is the review required under the Small Business Regulatory Enforcement Fairness Act (SBREFA), the OMB review and who knows what other review! And that's all before OSHA can issue a proposal and hold the

public hearing. After the public hearing, the record has to be summarized and a whole new round of reviews must take place before a final standard can issue. After that, Congress has the opportunity to "veto" the rule through Congressional disapproval or, failing that, an appropriations rider. That is a real life example of the present situation.

Now, if S. 746 were to become law, even if the Metalworking Fluids Advisory Committee members were to reach complete agreement about every issue in the standard, OSHA would still have to conduct a new formal risk assessment, a different cost benefit analysis, a substitution risk analysis and a comparative risk analysis. Then OSHA would be subject to so-called "peer review." I remind you, this is still before the proposal is formally issued for public comment. These extra steps would, I predict, add years of additional delay. Meanwhile, those workers who are not union members and could not negotiate protections would still suffer dangerous exposures to metalworking fluids. S. 746 makes a bad situation worse.

The UAW has the following specific objections to the provisions in S. 746:

1. The so-called "peer review" provisions close the standard setting process, open the way for industry special pleading, and delay action for no benefit.

The bill's sponsors state that one of their goals is greater transparency for the regulatory process. But a comparison of the bill's peer review provisions to current OSHA procedures shows that enactment of S. 746 would actually result in a process that is less transparent and open.

OSHA procedures require that proposed standards must be presented in a public hearing if any affected party requests the hearing. OSHA must present evidence supporting the proposed standard, including witnesses and documents explaining the health risks, control measures, cost analyses and every detail of the rule. Any participant in the rulemaking may ask questions of OSHA and its witnesses, as well as present their own evidence and comments. In turn, any participant may ask questions of the others, and OSHA staff may ask questions as well. This round robin process is open, on the record and exhaustive. Scientific experts, representatives of unions and employers and government officials take their turn. Workers who are exposed to the hazards also testify. Finally, OSHA must explain and defend the final rule, addressing all the comments and criticisms. This process has been recognized as equivalent to "peer review."

By contrast, the additional "peer review" process envisioned by S. 746 is closed and participation is limited. Before the public gets to participate directly, the agency would be required to appoint a panel of experts. Workers, who know the most about exposures and how to control them, would be shut out of the process. Likewise, all agency employees would be prohibited from participating. The bill specifies that the panels are to be "broadly representative." Presumably they would include representatives of the industry interests that oppose change. Thus, conflict of interest is not only permitted, but practically required. The "peer review" panel may be required to sign confidentiality agreements, which would permit decisions on public health protection to be made -- or

not made -- based on secret information. The peer review groups are exempt from the Federal Advisory Committee Act (FACA), which requires balance and open meetings. Thus, the basis for a standard would be subjected to closed-door review, possibly off the record and undocumented, before the standard goes public.

The bill's requirement that panels be "broadly representative" can be interpreted to be contrary to requirement for "balance" in FACA. S. 746 fails to define what "representative" means -- is the issue scientific views or the interests of persons to be protected by the proposed public health action?

I predict there will be extensive litigation over this issue if the bill's peer review process is allowed to remain subject to judicial review.

Obviously, the extra peer review step mandated by the legislation takes extra time and extra OSHA and stakeholder resources, which could be better spent addressing additional hazards. Quite frankly, this extra step is just one more foothold for interests who simply want no change and whose only goal is to stop any new regulation.

The UAW submits that "peer review" is simply not a model for public health decision making. Traditionally, "peer review" is a set of practices for evaluating research funding proposals and articles submitted to scientific journals. For research funding decisions, discussions are completely confidential, reviewers with institutional conflicts must leave the room when projects are discussed, and reviewers written comments are physically destroyed. For many scientific journals, the authors' names are withheld from the reviewers, and the reviewers are anonymous. The term has been loosely extended to expert panels brought together to justify science-based public policy decisions. Advocates of peer review in the regulatory setting are often those who do this as a large part of their activities. It is true that the National Academy of Sciences advocates peer review, but the NAS is in the peer review business.

2. The bill's detailed specifications for risk assessment and cost benefit analysis are inappropriate, wasteful and will likely lead to prolonged litigation.

The bill's detailed specifications for analyses are designed for exposure to cancer causing chemicals, and perhaps some other chemical hazards. The bill requires comparative risk analysis and substitution risk analysis, which multiplies the amount of paperwork to be done. Each of these elements may provide grounds for a legal challenge to block a protection.

The bill's analytical framework is much less appropriate for safety (acute injury prevention) standards and is difficult to implement for program standards such as a requirement for safety and health programs. It is completely inappropriate for provisions implementing workers' rights. For example, the Occupational Safety and Health Act requires employers to give chemical exposure monitoring results to the workers whose exposure was measured. S. 746 would subject provisions implementing these rights to economic analysis.

In addition, the bill's rigid quantitative framework excludes exactly the kind of experiential knowledge that workers and front line management possess. This knowledge is usually called "common sense."

The Committee should also recognize that cost calculations are much less reliable than health risk assessments. These analyses usually wildly overstate the expense of complying with OSHA's standards. This is because OSHA and other agencies generally must depend on cost data generated by the industry to be regulated. Industry usually stonewalls on such simple issues as who is exposed to chemicals at what levels, what specific engineering changes really cost and what process alternatives are available.

As a practical matter, the data to conduct such analyses are potentially available for chemical exposure standards. After the long delay of meeting the specifications in this legislation, a few chemical standards would emerge intact. The protections most damaged would be safety standards, such as for forklift trucks, and program standards.

It is important to stress that the cost benefit analysis required by this legislation runs counter to the provisions of the OSHA statute, as interpreted by the Supreme Court and numerous Courts of Appeals. The terms set by Congress and the interpretation given by the courts are that OSHA health standards must eliminate significant risks and be economically feasible, while other rules must be reasonably necessary and appropriate. OSHA is prohibited by law from using cost benefit analysis as a justification for raising the levels of permitted exposure and increasing the injuries or diseases expected. This begs the question: why should OSHA be required to conduct the analyses proposed in the bill?

Finally, the argument advanced by some that labor unions representing affected workers try to impose needless costs on employers is not credible in the current climate. Workers are worried by threats of plant closure, of work leaving to low regulation havens like Mexico, and are constantly barraged with arguments for increased productivity and efficiency. Costs are a concern. Efficiency and quality are concerns. But health and safety comes first. NAFTA has devastated American manufacturing, but the dire economic predictions for OSHA standards have never been borne out. No OSHA standard has caused the economic disruption predicted by the industries that have created the hazards.

3. This legislation imposes burdensome requirements on even the most minimal, practical and routine regulations to protect employees.

A major rule under this bill could be any rule that costs each US employer, on average, $85 a year.

Virtually any OSHA standard could be a "major rule" subject to the detailed analytical requirements of the legislation. OSHA attempts to protect employees of over six million employers. Divide this into the $500 million dollar level for a "major rule," and you find that any standard that costs the average employer $85 a year is a "major rule." This is the cost of lighting a few exit signs. You can maybe sweep the floor for $85 a year. In

other words, the simplest actions could be delayed by complex analyses and peer review if they apply to a broad range of employers. If this were not enough, the bill empowers OMB to reach down below $85 to designate additional standards for review.

4. The history of OSHA standards shows that the goal of regulatory reform should be speeding the process, not slowing it down.

The UAW's real life experience with OSHA standard setting is simple: OSHA standard setting is stalled. The standard setting process is failing to protect workers. Recent rules on energy lockout, formaldehyde and methylene chloride, championed by the UAW, were completed only after decade long campaigns, including lawsuits to compel action and to toughen standards.

For example, the UAW petitioned for the energy lockout standard in 1979, after an industry consensus standard had been completed. A proposed standard was not issued until 1988, a final standard for general industry not until 1989. At the time, OSHA promised to extend this protection to workers in construction. But as of today, the agency has been unable to extend this protection to construction workers, who remain at increased risk.

The need to increase the pace of safety and health standard setting at OSHA is generally recognized by those in the public health community, including many observers associated with industry. There is a long list of rules already promised but not delivered by OSHA, a few of which I will briefly summarize.

A standard for ergonomics programs would address the largest single cause of pain and disability among American workers today. Musculoskeletal disorders are over half of all disabling injuries in all industry, and nearly 2/3 of all injuries in automobile plants. In August 1990, Secretary of Labor Elizabeth Dole announced that OSHA would develop a standard for ergonomics programs. A pre-proposal version, not yet scheduled for public hearing, is now in SBREFA review. Opponents are using the inside track of SBREFA review to organize opposition and try to block even a public hearing.

Likewise, OSHA has been unable to issue a proposal for a long-promised requirement that employers establish basic safety and health programs. Such a program requirement would mirror several state regulations dating back to the 1970's and '80's. OSHA placed the safety and health program rule on its regulatory agenda in 1993. It has widespread, long-standing support from industry. It is just now emerging from SBREFA review, decades late.

A standard for airborne tuberculosis is urgently needed to protect healthcare workers and patients. A proposal to codify the Centers for Disease Control's 1994 voluntary guidelines has been issued years after this grave threat to health care workers was identified, but an enforceable requirement that health care employers protect their workers is still years away.

The Permissible Exposure Limit Update project, originally started in the Reagan Administration, would adopt consensus recommendations to lower chemical exposure limits for about 400 of the most common industrial chemicals to which workers are exposed. OSHA's current limits for these materials were established in 1968 and have never been revised.

The standard for silica has not been addressed since an Advance Notice of Proposed Rulemaking issued in the Ford Administration. According to OSHA, MSHA and NIOSH the current standard permits more than 250 workers a year to die from silicosis and leaves more than 100,000 workers at high risk of developing lung disease.

The time and resources OSHA must spend on economic analyses limits the progress the agency can make on new standards. For each regulatory action, OSHA already engages in an extensive effort at "costing out" rules, even when cost is not the source of significant opposition. Limited staff and the absence of industry data make regulatory analysis the main obstacle to OSHA issuing even a proposal. The analysis has to be done even before the proposal is issued, and becomes a straight jacket for changes in the rule in response to public comment.

The burden has shifted to the agency to prove that a regulation to protect human life and health is not only feasible, but cheap. Industry and its allies may stall action by nit-picking the methods and economic data without even having to argue the significance of the outcome. As OSHA and proponents of safety and health rules have become more efficient about collecting data and doing such analyses, opponents now want to raise the bar by adding net benefits analysis, regulatory flexibility analysis, comparative risk analysis and substitution risk analysis.

5. True Regulatory Reform would go in the opposite direction from S. 746.

Based on my 25 years experience in the UAW's health and safety department, I believe the main problem in updating protections at OSHA is the lengthy time spent in the pre-proposal, pre-hearing stages of the process. This legislation loads even more of the process into the pre-proposal stages. It is exactly the opposite of what needs to be done.

Once a proposed standard emerges onto the public stage in the open hearing process, things begin to move. Industry sees what is really required, labor and public health advocates see who is left unprotected and the real costs finally emerge. Each side marshals its evidence, tests its arguments and has its "day in court." Practitioners speak, not lobbyists and lawyers.

The productivity problem at OSHA is not simply the duration of the standards process. The problem is that the agency has resources to deal with only a few issues at a time, and each of these takes over a decade.

My specific recommendations for regulatory reform are:

- Clarify that the existing OSHA hearing process exceeds the transparency, openness and balance of the proposed new peer review process and existing regulatory oversight.
- Move the SBREFA review and pre-proposal OMB review entirely into the open record of rulemaking, and into the OSHA public hearing where these views can be questioned by all participants.
- Provide the same access to judicial remedies for parties who wish to challenge the agency's failure to act to protect as to those who would oppose action.
- Adequately fund OSHA so that it is able to carry out its statutory mandate to protect America workers from work-related injuries and illnesses.

Conclusion

No one who looks at OSHA's dismal rulemaking record over the past decade can reasonably argue that the agency has been too zealous in the protection of the American worker, or has taken regulatory action that poses an economic threat to American industry or our economy. To the contrary, OSHA's regulatory process has been too slow and unresponsive, even when confronted with serious hazards to the safety and health of our members and workers in general. Recognized threats to health and safety are being ignored, and American workers suffer death, injury, illness and disability at a shamefully high rate as a result. The absence of a comprehensive approach to workplace health and safety threats places our nation's economic health in jeopardy: workers who are injured or made ill or killed on the job are a drain on our economy; unsafe work sites are inefficient.

The provisions in S. 746 are imposed on public health agencies, but the burden is borne by the working people exposed to the hazards and suffering the consequences. Our members cannot understand why it takes 10 or 15 or 20 years to change a standard after science or common sense shows it is not protective. That's a time when government is telling our members something is safe when it is not safe. Now our members are asking why legislation is being considered to make it even more difficult to get new protections against hazards that put their lives, limbs and health in danger.

For all of these reasons, the UAW strongly opposes the proposed "Regulatory Improvement Act of 1999" (S. 746). We urge the members of this Committee and the entire Senate to reject this legislation.