INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA - UAW

RON GETTELFINGER, President ELIZABETH BUNN, Secretary-Treasurer

VICE PRESIDENTS: GENERAL HOLIEFIELD • BOB KING • CAL RAPSON • JIMMY SETTLES • TERRY THURMAN

IN REPLY REFER TO

1757 N STREET, N.W.
WASHINGTON, D.C. 20036

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TO oira_submission@omb.eop.gov
Office of Information and Regulatory Affairs
Records Management Center
Office of Management and Budget
Attn: Mabel Echols
10th Floor NEOB
725 17th Street N.W.
Washington, D.C. 20503

Re: Comments Regarding Executive Order on OMB Regulatory Review

In these comments, the International Union, UAW responds to the request by the Acting Administrator of the Office of Information and Regulatory Affairs (OIRA) for assistance in developing recommendations for how to improve the process and principles of federal regulation for the purpose of developing a new executive order on federal regulatory review[1]. Our comments follow closely the bulleted points in the request. We focus largely on the implications of the executive order for occupational safety and health.

The relationship between OIRA and the agencies

OSHA and other agencies have faced far too many analytical requirements, including those imposed by OIRA. These requirements squander already stretched agency resources and distract agencies from focusing on their regulatory missions. This results in delaying regulations. Such delay has real cost. For example, each year that goes by without an OSHA metalworking fluid standard results in more than 2100 preventable cancer deaths[2]. This does not count non-fatal

[1] 74 FR 8819 (Feb. 26, 2009).

[2] In his 2003 affidavit in INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW; UNITED STEELWORKERS OFAMERICA, Petitioners v. ELAINE CHAO, SECRETARY OF LABOR; OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, Dr. Franklin Mirer estimated the following numbers of attributable cancer deaths per 1000 workers exposed to metalworking fluids over a forty-five year working lifetime:

Pancreatic cancer – 30	Bladder cancer – 16	Laryngeal cancer – 0.75
Stomach cancer – 25	Esophageal cancer – 1.8	Prostate cancer – 90

Total excess cancer mortality risk – 163.5 deaths per 1000 workers exposed over a working lifetime.

cancer cases, nor does it count fatal or non-fatal cases of respiratory diseases such as asthma and hypersensitivity pneumonitis. Because of the cost of delay in human life and health, w***e strongly recommend the removal of all analytical requirements imposed on the agencies by the executive branch.*** The remaining congressionally and judicially imposed requirements should be more than adequate to insure that all important issues are considered in rulemaking.

OIRA's small staff has made it impossible for the office comprehensively to conduct meaningful review of most of the federal regulations proposed each year. As a result, the office has been used as a political tool to examine primarily the rules that are opposed by the most vociferous industries. Rather than viewing its job as ferreting out allegedly excessive regulation, OIRA's role should be redesigned so that it is centered on ensuring that agencies are able to fulfill their regulatory missions in a timely and effective manner. The office should identify sources of delay in the regulatory process and ways to eliminate delay wherever possible.

In addition, OIRA can serve as an advocate for regulatory agencies, helping them to explain to the President and Congress the agencies' budgetary needs and priorities. OIRA can work with regulatory agencies to ensure that they have sufficient resources and personnel to carry out their regulatory missions. In particular, OIRA should work with agencies to help them develop analyses that lay out all of the money an agency would need to fully perform its mandated duties. These analyses would include the funds necessary to make current programs function effectively, to implement newly mandated programs, and to keep up with changing circumstances. An analysis for OSHA, for example, would include the funding necessary to increase the number of workplace inspectors needed to ensure each employer that the probability of being inspected is high enough that there is a risk to non-compliance. It would also include the funding necessary to regulate the hundreds of chemical hazards that are scientifically recognized as posing a significant risk, but which have outdated exposure limits or no limits at all. A complete analysis of OSHA's need for resources is likely to show that its current half billion dollar budget is woefully inadequate.

Moreover, OIRA should help agencies to develop strong regulatory agendas that allow them to meet long-neglected needs and to anticipate and respond to emerging issues. In this process, economic efficiency must be treated as only one of many important considerations. OIRA's role should also reflect a greater emphasis on interagency coordination and dispute resolution. It can work with agencies to minimize conflict or overlap in regulations. When conflicts do arise, OIRA should work to help the agencies reach a mutually agreeable resolution.

Disclosure and Transparency

We commend the Administration for making it possible for all stakeholders to meet with OIRA to discuss their concerns and for making the records of such meetings available on public web sites. In addition, we believe that all communications between OIRA and the agencies regarding a particularly rulemaking should go into the public docket and be part of the rulemaking record. It

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This means that each year, approximately 3.6 workers die of cancer per 1000 exposed. If we make the conservative assumption that a metalworking fluid standard would cut that rate in half, it would prevent 1.8 cancers per 1000 workers exposed annually. OSHA's Metalworking Fluids Standards Advisory Committee (http://www.osha.gov/SLTC/metalworkingfluids/mwf_finalreport_ch1.html) estimated that at least 1.2 million American workers are exposed to metalworking fluids. $(1.2 \times 10^{6})\ (1.8 \times 10^{-3}) = 2160$ cancer deaths prevented annually.

should not be possible for OIRA to suggest modifications or request supporting evidence without the record of that communication being public.

Encouraging public participation in agency regulatory processes

The Occupational Safety and Health Act of 1970 (OSH Act) has very robust public participation procedures. Nothing more is needed to encourage participation in the agency's regulatory process.

The role of cost-benefit analysis

Our preference is that there be a small role for cost-benefit analysis (CBA). Cost-benefit analysis is inconsistent with many public health, safety, and environmental statutes. In the OSH Act, cost plays a role in determining feasibility and its role should be limited to that. Some administrations have used CBA to slant regulatory analysis in opposition to protective regulations. The current Administration has a much greater commitment to using good science to protect health, safety, and the environment. It should rely on CBA only to the extent required by statute.

Frequently, cost-benefit analysis fails fully to capture the benefits of proposed regulations. For example, an appendix to *After the Rights Revolution*[3] purports to provide costs per life saved for selected regulations. However, it is frankly acknowledged that the figures for OSHA are limited to cancers prevented, thus systematically understating the benefits accruing due to prevention of non fatal and/or non-cancerous conditions. In 2008, the House Labor and Education Committee issued a report documenting that up to 70% of occupational injuries are not reported to the Bureau of Labor Statistics annual survey.[4] Hence any cost-benefit analysis for an occupational safety standard that relies on BLS data will vastly understate the benefits.

Further, it has been stated that "cost-benefit analysis requires a full accounting of the consequences of an action, in both quantitative and qualitative terms. Officials should have this accounting before them when they make decisions."[5] It has been further stated that "In a situation of uncertainty, when existing knowledge does not permit regulators to assign probabilities to outcomes, it is exceedingly hard to do cost-benefit analysis. In such circumstances, other decision rules may be useful, such as the maximin principle (choose the policy with the best worst-case outcome)."[6] We believe that, taken together, these two statements should be understood to exempt almost all toxic substance regulation from cost-benefit analysis. Toxic substance regulation is almost always done in a situation of uncertainty. There are many more substances for which we have animal health effects data than for which we have human health effects data. Regulating based on animal data is inherently done under uncertainty rather than risk, because, without adequate human data, it is impossible to have certainty as to how close animal dose-response curves are to human dose-response curves. Where there are human data, exposure assessments are rarely adequate to develop dose-response curves with anything approaching certainty. Where dose-response curves are adequately developed, they are usually developed for one outcome, such as cancer. Since cost-benefit analysis requires a full accounting of consequences, all the additional benefits of a standard in terms of non-cancer morbidity and mortality prevented would be lost. For

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[3] Sunstein (1990): Harvard University Press

[4] http://edlabor.house.gov/publications/20080619WorkplaceInjuriesReport.pdf

[5] 150 U. Pa. L. Rev. 1498

[6] *Id.* note 37

these reasons, we find CBA to be particularly inapplicable to the case of toxic substances and, as indicated above, in the case of occupational safety.

Even, if the full benefits of a regulation could be calculated, considerations other than CBA should influence which regulations are promulgated. For example, chronic exposures to carbon monoxide, at levels below that at which acute health effects occur, can cause atherosclerotic heart disease over time[7]. Let us suppose it costs half as much per life saved to keep automatic external defibrillators (AEDs) in workplaces as to control carbon monoxide. This would still not mean that AEDs should be put in workplaces instead of, rather than in addition to controlling carbon monoxide. This is because the lives saved are not truly comparable. The AED delays the final death of someone who already has a weakened heart (and perhaps by less than a year). Controlling carbon monoxide prevents damage to the heart in the first place.

The role of distributional considerations, fairness

Fairness means that at the end of an eight hour work day one goes home as whole and healthy as when one arrived at work. It also means that at the end of a working lifetime, work should have taken no impact on one's health other than that of aging. In the area of occupational health and safety, the term "distributional considerations" is, for the most part inapplicable. It would not make much sense to refer to expenditures that are necessary to make in order to preserve the employees' health and bodily integrity as "redistribution of wealth." This should be understood simply as the cost of doing business in the only way that is moral and perhaps someday, this will also be the only way that is legal.

The role of concern for the interests of future generations

This question has to do not only with future generations, but more generally with valuing the future. Even a small discount rate, used in a CBA leads to a greatly diminished value for the future as compared to the present. A 10% discount rate means that benefits accruing one decade from now have less than 40% of the value of those that accrue now. With a 5% discount rate, benefits that accrue in two decades have less than 40% of the value of current benefits. Even with a 2% discount rate, benefits that occur in 35 years have only half the value of those that occur now. These may be appropriate rates to use for things that can be replaced. I may truly value the opportunity to acquire a dining room table a decade from now at only 40% or less than the opportunity to acquire it now. However, it is unlikely that I value my life or a functional right arm a decade from now that little. Nor is it appropriate to deduce the value that people place on their lives or health in the future from their current behavior, for reasons recently well articulated[8].

We believe that, where regulated activities involve potentially irretrievable losses, such as loss of life or permanent disability, cost-benefit analysis should not be used because the victim can not acquire life or a healthy set of lungs in the market. Hence it is meaningless to price those things. If CBA is to be used, we strongly oppose the use of discount rates that are normally used in the valuation of fully tradable goods and services. If discount rates are used at all in placing a value

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[7] Stern, F.B.; et al.: Heart Disease Mortality Among Bridge and Tunnel Officers Exposed to Carbon Monoxide. *Am. J. Epidemiol.* 128:1276–1288 (1988).

[8] Thaler RH and Sunstein CR (2008). *Nudge: Improving Decisions About Health, Wealth, and Happiness.* Yale University Press.

on future irretrievable losses, they should be low enough to place a substantial value on a person's health through the end of natural life, which may be 50-60 years after entering the workplace.

Methods of ensuring that regulatory review does not produce undue delay

As indicated above, ***we strongly recommend the removal of all analytical requirements imposed on the agencies by the executive branch.*** The remaining congressionally and judicially imposed requirements should be more than adequate to insure that all important issues are considered in rulemaking.

The role of the behavioral sciences in formulating regulatory policy

The behavioral sciences have a role in formulating regulatory policy to the extent that a particular statute permits or requires such a role. If the statute is silent, the burden of proof is on the agency to demonstrate, through evidence in the rulemaking record, that its use of behavioral science is appropriate to the goals of the rule and of the statute under which the rule is promulgated. The use of behavioral sciences should neither be imposed on agencies via executive order nor by mandate from OIRA.

The best tools for achieving public goals through the regulatory process.

The best tools for achieving public goals through the regulatory process are traditional regulatory mandates. The President's memorandum[9] referred to tools such as warnings, disclosure requirements, public education, and economic incentives. We think it is possible that any of these tools might be marginally helpful adjuncts to traditional regulatory mandates. However, under no circumstances should they be considered acceptable substitutes for traditional regulatory mandates. Industrial hygiene, the art and science of recognizing, evaluating and controlling workplace hazards, has long recognized that substitution, elimination or reduction of a hazard and/or the use of engineering controls is much more effective at preventing injury or illness than warnings, disclosure or education[10]. Similarly, in the field of injury control and prevention, it is recognized that strategies that use engineering to eliminate or reduce hazards or to provide physical or temporal separations between hazards and people are the most effective[11]. Moreover in the field of occupational health and safety, economic incentives do more to prevent injury reporting than to prevent injury[12]. The President's promise to restore integrity to the role of science in the regulatory process[13] demands that his Administration rely on this well established science rather than on untested ideas of behavioral economists as to how to remake the regulatory process.

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[9] President Obama's Memorandum for the Heads of Executive Departments and Agencies on Regulatory Review (January 30, 2009), 74 FR 5977-58 (Feb. 3, 2009), available at: http://www.reginfo.gov/public/jsp/EO/fedRegReview/POTUS_Memo_on_Regulatory_Review.pdf.

[10] Harris RL (2000) *Patty's Industrial Hygiene*. Fifth Edition. Wiley InterScience.

[11] Haddon W (1980). The basic strategies for preventing damage from hazards of all kinds. *Hazard Prevention* 16:8-12.

[12] Pransky G.; Snyder T.; Dembe A.; Himmelstein J (1999). Under-reporting of work-related disorders in the workplace: a case study and review of the literature. *Ergonomics* 42(1): 171-182.

[13] President Obama's Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity (March 9, 2009), available at: http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/.

A review of fatalities among UAW members in 2008 illustrates how inadequate alternative regulatory "tools" would be to protect health and safety. One member died in an electric arc fault explosion that occurred after he followed established procedures placing the disconnect switch in the off position. Unfortunately, the fusible switch bucket that he was working on is an older design which does not have visible switch blades for positive identification of their position. A regulatory mandate to replace all of these with the newer switch buckets could have saved his life. A general communication about the hazards of arc fault explosions would not have been likely to, since he followed established procedure.

A second was working alone. He was checking the torque on a nut in the fan assembly at the base of a bell furnace, located in an 11 foot deep pit. Due to a reduction in preventive maintenance resources, it had become necessary to check the torque prior to each loading of a 17 ton roll of steel. As he tightened the bolt, an overhead trolley crane positioned and lowered the roll of steel on top of him. This death could have been prevented if OSHA's enforcement policy applied the lockout standard to this situation and if fines were high enough to make employers comply. If strict enforcement and stiff fines count as "economic incentives," within the meaning of the request for comments, then "economic incentives" could have prevented this fatality. Otherwise not. The case is similar for another member who was crushed in a transfer press while changing dies.

Yet another member died due to an unguarded fall hazard. Proper enforcement of existing standards could have prevented this. Warnings or communication would be unlikely to. Another was struck by a car while doing road work in an area in which the work safety zone plan was inadequate. The work zone was condensed, traffic control devices such as barricades and barriers were not in use and workers assigned to roadway operations received little or no training. Again, proper enforcement could have prevented this fatality, but it is unlikely that warnings or education would have.

Toxic substances provide yet another illustration of the likely ineffectiveness of alternative regulatory tools. At the present time, 5 parts per million (ppm) 2-ethoxyethanol is the non-enforceable exposure limit recommended by a voluntary committee of scientific experts know as the American Conference of Governmental Industrial Hygienists®, Chemical Substances Threshold Limit Value® Committee (ACGIH® TLV®). The OSHA permissible exposure limit (PEL) is 200 ppm. The science says the following:

- Maternal toxicity and excess mortality in rabbit embryos due following maternal inhalation of 160 ppm 2-ethoxyethanol 7 hours per day for the first 18 days of gestation.

- Excess mortality in rat embryos following maternal inhalation of 202 ppm 2-ethoxyethanol seven hours a day, five days a week for three weeks prior to mating and each of the first 19 days of gestation post-mating.

- Reduced sperm counts in adult human males exposed at 88 ppm or lower.

The current OSHA PEL of 200 ppm, adopted as a consensus standard when the OSH Act was first implemented, is clearly illegally high (as are many others) under section 6(b)(5) which states:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the

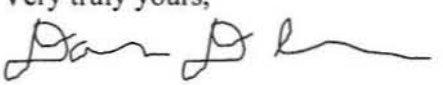
> extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.

It is difficult to see how anything other than a regulatory mandate promulgated in accordance with the Act could fix this.

Although it would not be difficult to formulate a disclosure to male employees that would successfully communicate the risk, we believe that it would be immoral in addition to being illegal to force male employees to choose between income and fertility. For female employees, it is difficult to see how a disclosure could be made that would permit a woman who is not a trained toxicologist to make an informed judgment as to whether she wanted to assume the risk. Even if such a disclosure could be made, we believe it would be both immoral and illegal to require the woman to choose between income and fertility rather than lowering the legal exposure limit. We believe that the examples above amply demonstrate that the use of these alternative tools for occupational safety and health, except as adjuncts to traditional regulatory mandates would be impractical, ineffective, immoral, and illegal.

Thank you for the opportunity to submit these comments. We would be happy to answer any questions, provide additional material and otherwise assist the President and Director in this important matter.

Very truly yours,



Darius D. Sivin, Ph.D.
International Representative
Legislative, Governmental and International Affairs
International Union, United Automobile, Aerospace
& Agricultural Implement Workers of America (UAW)

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