American Federation of Labor and Congress of Industrial Organizations

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Honorable Ron Johnson
Chairman
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Honorable Thomas R. Carper
Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Johnson and Ranking Member Carper:

Thank you for the invitation to provide my views on the costs and benefits of regulations and how the regulatory process can be improved to provide more timely and effective regulations.

I am Director of Safety and Health for the AFL-CIO where I have worked for more than three decades on safety and health regulations and regulatory policy issues. During that time I have participated in dozens of rulemakings on important OSHA standards including rules to protect workers from asbestos, lead, hazardous chemicals and safety hazards like confined spaces. A benefit of my long tenure is that I have witnessed first-hand how these rules have made a difference, changing conditions and practices in workplaces, significantly reducing exposures, preventing injuries and illnesses and saving workers' lives.

At the same time, over the past three decades, I have seen the system and process for developing and issuing worker safety rules devolve from one that worked to produce needed rules in a relatively timely manner to the current broken and dysfunctional system which is failing to protect workers and costing workers' lives.

My comments on the regulatory process focus on my experience in the development of regulations under the Occupational Safety and Health Act, but many of the problems with the regulatory process outlined below extend to other government agencies as well.

The Occupational Safety and Health Act and its Regulations and Enforcement Have Significantly Reduced Job Fatalities, Injuries and Illnesses.

The Occupational Safety and Health Act of 1970 was enacted more than 40 years ago with the purpose and promise of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." Since that time, great progress has been made. The job fatal injury rate has been cut by more than 80 percent from 18 deaths per 100,000 workers to a rate of 3.3/100,000 workers according to the latest BLS statistics (2013).[1] Reported job injury rates have declined by 70 percent. This progress has been seen across all sectors of the economy, with the most hazardous industries, including construction, where regulatory and enforcement activities have been focused, experiencing the greatest reductions in fatality and injury rates. And while data on occupational diseases remains limited and inadequate, significant reductions in workplace exposures to hazards like asbestos, lead, benzene, and blood-borne pathogens as a result of OSHA health rules, have been well documented.

Individual OSHA regulations have had a major impact in reducing injuries, illnesses and deaths. For example, OSHA's 1993 construction lead standard significantly reduced the number of workers experiencing lead poisoning and elevated blood lead levels. According to surveillance data collected by NIOSH, ten years after the issuance of the lead standard, the rate of lead poisoning among US workers had been cut in half. [2] OSHA's blood-borne pathogens standard to protect healthcare workers against HIV, Hepatitis B and other pathogens has had similar results. Following the issuance of the 2001 amendments to the standard requiring the use of safer needle devices, the rate of needle stick injuries experienced by healthcare workers was cut in half. [3]

The Cost Impacts of Job Safety Regulations Have Been Lower than Predicted.

In order to set safety and health standards, OSHA is required to set standards that protect worker safety and health to the extent that is economically and technologically feasible. As part of all of its rulemakings OSHA conducts detailed cost estimates of its proposed rules. In most rulemakings, industry groups challenge OSHA's cost estimates and feasibility analyses, claiming that proposed rules will cost many times estimated by OSHA and shut down industries and costs

[1] Bureau of Labor Statistics, Census of Fatal Occupational Injuries and Illnesses, 2013.
[2] NIOSH, Adult Blood Lead Epidemiology and Surveillance Data, 1994 – 2001 and 2002-2005. www.cdc.gov/niosh/topics/ABLES/data.html
[3] CDC Guidance for Evaluating Health-Care Personnel for Hepatitis B Virus Protection and for Administering Postexposure Management, Recommendations and Reports, Morbidity and Mortality Weekly Report, December 20, 2013 / 62(RR10);1-19

jobs. In the 44 years since the enactment of the OSH Act, none of these industry claims or predictions have been borne out.

Indeed retrospective studies on the impacts of OSHA rules have found that the rules routinely cost less than estimated by OSHA or the industry. A 1995 review of major OSHA rules by the Office of Technology Assessment found that for most of the rules examined, the costs were overestimated because the agency had not adequately considered advances in technology. The report stated that "the actual compliance response that was observed included advanced or innovative control measures that had not been emphasized in the rulemaking analyses, and the actual cost burden proved to be considerably less than what OSHA estimated."[4] For some standards, such as OSHA's cotton dust standard and vinyl chloride standard, not only were the rules less costly than predicted, the rules led to technological innovations in the covered industries that made them more productive.

The comprehensive retrospective "look-back" reviews that OSHA has conducted of its rules under section 610 of the Regulatory Flexibility Act have made have also found that OSHA, and the industry groups, have routinely overestimated the costs of rules. Experience has shown that after rules are issued, employers develop technologies to comply with rules that were not even considered during the rulemaking.

The Toll and Cost of Workplace Injuries, Illnesses and Deaths Remains Enormous.

Despite the progress that has been made in improving workplace safety, the toll of workplace injury, illness and death in the United States remains enormous. In 2013, the BLS reports that 4,585 workers were killed on the job and more than 3.8 million workers were injured. But research has shown that the BLS survey fails to capture many injuries due to limitations in the BLS survey and the underreporting of injuries.[5,6] The real toll of job injuries is likely two to three times greater than the number reported – 7.6 million to 11.4 million a year. These data do not reflect the toll of occupational disease, which NIOSH and other health researchers estimate result in 50,000 deaths a year.

Some groups of workers, including Latino workers and immigrant workers, are at much greater risk of job fatalities and injuries because of their concentration in dangerous jobs and vulnerability to employer exploitation and retaliation. In 2013, according to BLS, there were 817 fatal injuries among Latino workers and 879 fatalities among immigrant workers, with both these

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[4] Office of Technology Assessment, Gauging Control Technology and Regulatory Impacts in Occupational Safety and Health; An Appraisal of OSHA's Analytical Approach, Washington, DC, OTA, 1995.
[5] Boden, L.I. and A. Ozonoff, "Capture-Recapture Estimates of Nonfatal Workplace Injuries and Illnesses," *Annals of Epidemiology*, Vol. 18, No. 6 (2008).

[6] Rosenman, K.D., Kalush, A., Reilly, M.J., Gardiner, J.C., Reeves, M. and Luo, Z., "How Much Work-Related Injury and Illness is Missed by the Current National Surveillance System?," *Journal of Occupational and Environmental Medicine*, Vol. 48, No. 4, pp. 357–367, April 2006.

groups experiencing fatality rates greater than the national average. In 2013 the fatality rate for Latino workers increased from 3.7/100,000 to 3.9/100,000, at the same time the number and rates of fatalities for all other groups of workers declined or stayed the same.

Hazards to young and inexperienced workers are a significant problem and there are growing concerns about safety and health challenges for older workers as more workers are staying on the job to an older age. Long recognized hazards such as silica, noise, and confined space hazards in construction remain serious problems, and ergonomic hazards, infectious diseases and most toxic chemicals have not been adequately addressed.

The growth in the oil and gas industry in recent years has come at a high cost to workers. The number and rate of fatalities in this industry have increased dramatically. Oil and gas extraction is more dangerous than coal mining.

The cost of job injury, illness and death is staggering. A 2012 study by Dr. J. Paul Leigh estimated the total annual cost at $250 billion a year, similar to estimates by the National Safety Council and the Liberty Mutual Safety Index when both direct and indirect costs are taken into account.[7] This does not include the cost of pain and suffering to workers and their families. This is similar to, or greater than, the cost of other common diseases including cancer, diabetes and coronary heart disease.

Workers' compensation, which is supposed to be the main source of payment for medical costs and wage replacement for workers who suffer job injuries and diseases, only covers a small proportion of the costs – less than 21 percent according to recent research. The vast majority of the costs are borne by workers themselves (50 percent) or society as a whole (29 percent), shifted to private health insurance, Medicare, Medicaid and Social Security Disability.[8]

The failure to regulate and control workplace hazards is falling squarely on the backs of American workers and their families. Unfortunately, these cost impacts are rarely taken into account in any of the economic analyses that are conducted on regulations. The only costs that are considered are the impacts on regulated entities. Any examination of regulations and the regulatory process needs to start with a full review and accounting of the costs of failing to regulate are having on American workers and the public.

Layers and Layers of Regulatory Requirements Have Crippled the Regulatory Process.

The OSHA law requires that health and safety standards be set to protect workers against significant risk of material impairment of health or loss of functional capacity to the extent that is

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[7] Leigh, J. Paul, "Economic Burden of Occupational Injury and Illness in the United States," *The Milbank Quarterly*, Vol. 89, No. 4, 2011.

[8] Leigh, J. Paul and James P. Marcin, "Workers' Compensation benefits and Shifting Cost for Occupational Injury and Illness," *Journal of Occupational and Environmental Medicine*, Vol. 54, No. 4, pp. 445-450, April 2012.

technologically and economically feasible. Standards are to be based on the best available evidence, and established through an open, public process that goes well beyond the requirements of the Administrative Procedure Act. In addition to calling for public comments, the OSH Act requires that, upon request, a public hearing be conducted, where under OSHA regulations all interested parties have the opportunity to present testimony and ask questions of the agency and other witnesses. This process has produced good rules that have stood the test of time. Virtually all major OSHA standards have been subject to legal challenges, with the reviewing courts upholding most rules or ordering OSHA to make them stronger.

During the first decade of OSHA, promulgation of rules from start to finish took one to three years. Major rules were produced on asbestos, vinyl chloride, cotton dust, lead, and other hazards under both Republican and Democratic administrations. There were industry challenges and objections to most rules, but these objections were largely about how stringent the rule should be, not over the issue of whether regulation was needed at all.

But over the years, industry opposition to regulations increased. There were calls for more analyses and consideration of impacts of rules, particularly their costs, and more requirements were added to the rulemaking process through legislation, executive orders and other directives. Congress, the Paperwork Reduction Act, the Regulatory Flexibility Act, the Unfunded Mandates Reform Act, and the Small Business Regulatory Enforcement Fairness (SBREFA) all imposed new requirements and restrictions on agency rules. SBREFA imposed special requirements on OSHA and EPA to subject rules with significant impacts to review by a small business panel even before the rule was proposed, adding months to the regulatory process.

From the Executive Branch, there were directives for more analysis, starting with executive orders requiring inflationary impact statements and economic impact statements during the Nixon and Ford administrations. These executive directives were expanded during the Reagan administration to require more comprehensive regulatory impact analyses and centralized review, which has continued, and currently operates under the requirements of Executive Order 12866, issued by President Clinton in 1993.

EO 12866 gives the Office of Information and Regulatory Affairs (OIRA) at the Office of Management and Budget the responsibility to oversee regulatory planning and review for the federal government. It calls for executive branch agencies to develop detailed analyses of the costs and benefits of economically significant rules, and to the extent permitted by law, adopt a regulation only upon a reasoned determination that the benefits justify the costs. EO 12866 also provides for OIRA to review all significant draft proposed and draft final rules to ensure compliance with the requirements of the order. The review is supposed to be completed within 90 days with the possibility of one 30 day extension at the request of an agency. Advance notices of proposed rulemaking or other preliminary regulatory actions may be reviewed, but only for a period of ten working days.

The executive order includes some modest transparency measures, requiring a log to be kept of all meetings with outside parties along with the subject matter of discussions to be disclosed. It also requires that all documents exchanged between OIRA and the agencies, including changes in draft rules, to be made publicly available after the proposed or final rule has been published in the Federal Register.

But OIRA has routinely ignored the requirements of the executive order, second guessed agencies which have the authority and expertise to develop and issue rules, attempted to impose its judgment and held rules well beyond the maximum 120 day review period. During these lengthy reviews OIRA has welcomed and held many meetings with industry groups, both on draft proposed rules, when industry groups try to stop or weaken regulations, and then again when draft final rules are reviewed, giving opponents of rules yet another chance to try to delay, weaken or block needed rules.

It is important to point out that all of the communications with OIRA take place outside of the normal rulemaking process and are not subject to the terms of the Administrative Procedure Act, which governs rulemaking procedures for federal agencies. There is no record made of discussions that take place, nor any requirement that OIRA justify, based on evidence or fact, the positions it takes on agency rules. The process is one that is one sided - totally dominated by industry groups and regulated parties who have Washington representatives with ready access to the process. It is one of the worst forms of industry capture and corporate political dominance over our government. Citizens, including workers, who need these government protections simply have no voice.

Delays in the Regulatory Process are Harmful and Costing Workers' Lives.

The result of all of the additional requirements for regulatory analyses and review is a regulatory process that is dysfunctional and paralyzed and results in needless and harmful delays in regulations. In my view, these additional requirements are not producing rules that are better or more effective than the process that was in place 30 to 40 years ago. The process substitutes questionable analyses for common sense, ignoring industry practice and public health recommendations that have traditionally been the basis for recommended safety and health guidelines and voluntary safety standards. It is certainly not producing rules in a timeframe that is efficient or protective for workers' safety and health.

In 2012, GAO conducted a study of the OSHA standard setting process. That review found that for major rules issued between 1981 – 2010 the average time for developing and issuing a major safety or health rule was about 8 years.[9] This average included rules that were mandated by

[9] Workplace Safety and Health: Multiple Challenges Lengthen OSHA Standard Setting, GAO-12-330, April 2012, www.gao.gov/products/GAO-12-330.

Congress and issued as a result of litigation and court ordered deadlines, which took much less time.

Moreover, the GAO report only covered rules that had been completed. It does not reflect those rules which are stuck in the regulatory process, many of which are taking much longer than the eight year timeframe calculated by GAO. For example, it did not include the confined space entry rule for the construction industry that was promised by OSHA after a confined space rule to protect workers in general industry was put in place in 1993 - more than 20 years ago. This rule requires atmospheric testing and protective measures when workers are entering enclosed tanks and other confined spaces. A draft rule for confined space entry in construction underwent SBREFA review in 2003, and a proposal was issued in 2007. After years of further delay, the final confined space construction rule will be issued next week. The GAO report also did not include the OSHA silica rule, which OSHA first considered for rulemaking back in 1974. The present rulemaking on silica, discussed more fully below, began in 1997, more than 18 years ago.

The impact of these delays is inadequate protection for workers and leads to unnecessary deaths, injuries and illnesses. Here are two examples of how a broken system is costing workers their lives:

Cranes and Derricks

In 2002, in response to a 1999 recommendation of the Advisory Committee on Construction Safety and Health – a group comprised of labor, management and public representatives, OSHA initiated a rulemaking to update and strengthen its construction safety standard for cranes and derricks. Since there was broad agreement that a new standard was needed, OSHA proposed to develop the rule through a negotiated rulemaking process with representatives of major interested parties participating. After a year of intensive work, in July 2004, the negotiated rulemaking committee produced a recommended draft proposed standard that had unanimous support from labor, management, and public and government representatives. Despite this support, the rule was still subject to all the analytical and review requirements for significant safety and health rules. OSHA had to prepare a full economic analysis and the rule had to undergo review by a SBREFA panel to get input from small business entities before it could be proposed. The SBREFA review was completed in October 2006, after which activity on the rule came to a halt.

But then in 2008 a series of deadly crane accidents claimed a dozen lives. On March 15, 2008, a crane collapsed at a high-rise construction site in Manhattan- killing 4 people and injuring more than a dozen. Less than 2 weeks later, two workers died in a Miami crane collapse. In May, another New York City crane collapse killed 2 more workers, and in July of that year 4 workers were killed when a crane collapsed at a Houston, Texas refinery. In response to these disasters, the Bush administration finally proposed the rule in October 2008. But the final rule was not

completed and issued until August 2010, more than 11 years after the recommendation of the OSHA construction advisory committee, eight years after the rulemaking was initiated and seven years after a negotiated rulemaking committee unanimously agreed upon the text of a rule.

It is inexcusable and shameful that even where there was broad agreement that the cranes and derricks standard was needed and about what the rule should require, that the regulatory system failed to protect workers. In this case, according to OSHA, during the eight year rulemaking, 176 workers died in crane accidents that would have been prevented if the crane and derricks standard had been in place.

Silica

Silica is a serious workplace health risk that causes the disabling and deadly lung disease silicosis. Its hazards have been recognized for centuries, and in 1991 it was determined to cause lung cancer. More than two million workers are exposed to silica, with bricklayers, cement masons, road workers, sandblasters, foundry workers and glass workers among the workers at greatest risk from exposure to this deadly dust. Public health experts estimate that there are 3,600 to 7,300 new cases of silicosis occurring in the United States each year.

The current OSHA silica standards for general industry and construction adopted back in 1972 are out of date and fail to protect workers. The standards set permissible exposure limits based upon the percentage of quartz that is present and allow exposures of up to 100 – 250 ug/m^3. The construction standard is so out of date that the sampling equipment and technology that the standard is based on no longer even exist.

OSHA first started working on a new silica standard in 1974, more than 40 years ago, after NIOSH recommended that permissible exposure be reduced to 50 ug/m^3 to protect workers from silicosis. The current rulemaking on silica began in 1997. In 2003, the Bush administration designated the silica standard as a high priority for regulatory action and in that same year draft silica standards for general industry and construction underwent SBREFA review, which concluded in December 2003. Then progress came to a complete halt for the remainder of the Bush administration.

When the Obama administration took office in 2009, the AFL-CIO was hopeful that the OSHA silica standard and other needed rules that were also long overdue would move forward. And for two years, that was indeed the case. The required risk assessments and peer reviews for the silica rule were completed and in February 2011, the draft proposed silica standard was sent to OMB for review under Executive Order 12866. OMB held the draft proposed silica rule for two and one half years, in clear violation of the executive order which limits the time for review to no more than 120 days.

The OSHA proposed rule on silica was finally issued in September, 2013. Three weeks of public hearings were held on the proposed rule last spring, and the public was given a year to provide comment on the rule. OSHA is now working to finalize the rule, and expects a final standard to be issued some time in 2016.

This failure to regulate silica has allowed uncontrolled exposures and more unnecessary disease and death. According to OSHA's risk assessment prepared for the proposed rule, a new silica standard of 50 ug/m^3 would prevent 688 deaths and 1,600 cases of silicosis a year. This translates into 12,384 deaths that could have been prevented since the rulemaking began in 1997, if the standard had been in effect.

There is No Tsunami of Workplace Safety Regulations.

Many industry groups have claimed that under the Obama administration there has been a "tsunami" of regulations. No one familiar with regulation at the Occupational Safety and Health Administration can honestly claim that this is the case for workplace safety and health regulation in recent years.

Over the past decade few OSHA rules have been issued. For eight years, the Bush administration shut down OSHA rulemaking. Only three significant final OSHA rules were issued between 2001 and 2008 (electrical equipment installation, employer payment for personal protective equipment and hexavalent chromium), two of them a result of litigation by the unions. Under the Obama administration there has been one significant final OSHA health standard issued – the globally harmonized system for hazard communication – and four final safety rules, including the confined space entry standard for construction scheduled to be issued on May 4, 2015. All of these rules were years, if not decades in the making.

Indeed over its entire 44 year history, OSHA's regulatory activity has been fairly limited. Since 1971, there have been 36 significant health standards issued (some of these updates and revisions for the same hazard), and about 54 significant safety standards put in place by the agency. (Attachment 1). For many serious hazards there are no regulations or regulations are woefully out of date.

The majority of OSHA regulations that are on the books today come from industry consensus standards that were adopted right after the passage of the Act at Congress' direction. Many of these consensus standards were developed in the 1950's and 1960's and based on science and technology that is outdated and more than 60 years old. These standards do not protect workers.

As the regulatory process has become more lengthy and complex, fewer and fewer rules have been issued, and OSHA has fallen further and further behind in issuing needed rules to protect workers. The list of hazards that need regulatory action is long, and far exceed OSHA's capacity to address them. The AFL-CIO's top priorities for OSHA regulatory action are rules on silica,

beryllium, combustible dust, chemical process safety management, infectious diseases and chemical exposure limits and stronger rules to prohibit retaliation against workers who report job injuries.

Pending Regulatory Reform Legislation Would Make it Virtually Impossible to Issue Needed Worker Safety Protections.

Numerous bills have been introduced in the Senate and House to "reform" the regulatory process. All of these measures would bring standard setting for worker safety to a grinding halt and make it impossible for OSHA to issue needed worker safety and health protections. The Regulation from the Executive in Need of Scrutiny Act (REINS Act) – S. 226, H.R. 427, would require both houses of Congress to approve every major rule within a 70 day time period. If Congress failed to act, the rule would be null and void.

The Regulatory Accountability Act (RAA) - H.R. 185- would override the Occupational Safety and Health Act, the Clean Air Act and other laws, and make costs and impacts on business, not protecting health and safety, the primary consideration in setting rules. It would also add additional requirements for regulatory analysis and risk assessment and give opponents of regulations more opportunities to object to and challenge rules.

Other bills which would add more analytical and review requirements, delaying the issuance of needed rules, include the Small Business Regulatory Flexibility Improvement Act (H.R. 185), and the Unfunded Mandates and Information Transparency Act (H.R. 50)

What Can Be Done to Fix the Broken Regulatory Process?

It's taken more than 30 years to create the dysfunctional regulatory system that we have today. Fixing the process will not be easy or quick. But there are some things that can and should be done to improve the process and speed up the promulgation of needed rules.

The first order of business is to do no more harm. Most of the regulatory reform proposals that have been introduced in this Congress would further delay or cripple the promulgation of needed rules. These proposals should be opposed and rejected.

Second, there must be a renewed commitment, both from the Congress and from the administration, to implement the laws that have been enacted. Protecting the safety and health of workers and the public must be a priority. Without political leadership and support for needed rules, corporate opposition coupled with the quagmire that is the regulatory process will make it impossible to complete and issue these safeguards.

Congress must hold agencies and OIRA accountable for their failure to act. This can be done through ongoing monitoring and oversight, demands for timetables and action on rules and

justification when deadlines are missed. Publicly highlighting the delays in rules and holding agencies accountable can help force action. If oversight does not produce action, Congress should introduce and enact legislation that mandates action on specific rules. Such legislation was enacted for OSHA's standards on blood-borne pathogens, lead in construction, and needle sticks and should be utilized again to ensure the adoption of priority rules.

Congress through the appropriate committees should also conduct a comprehensive review of the existing regulatory system, all the requirements that have been added through legislation and executive action, the costs and feasibility of meeting these requirements and whether these requirements have added any worthwhile benefit to improving regulations or have simply served to delay and thwart the issuance of rules. Over the many decades that requirements have been added to the regulatory process, there has never been a thorough evaluation of the usefulness of these measures and the impact of these requirements on the ability of government agencies to do their jobs. If requirements are found to be of minimal or no value for the burden they impose, they should be eliminated or reduced.

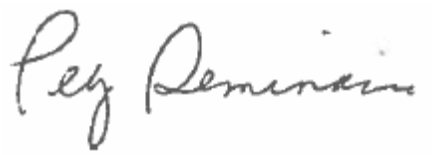
Congress should look to ways that the regulatory process can be streamlined. Where there is broad agreement on rules or rules are adopting existing practices that are well accepted and in place, requirements for regulatory analyses and review should be reduced.

Congress should provide adequate funding to the agencies to develop sound rules and to conduct the required analyses. All of the additional regulatory analysis and review requirements have been added without regard to their costs and without accompanying funding to meet these requirements. Agencies have fewer and fewer resources to meet greater responsibilities and growing obligations.

In the executive branch, OIRA must respect the authority and expertise of agencies and not attempt to substitute its judgment or policy views. Executive Order 12866 should be amended to allow agencies to proceed with rules if OMB fails to conclude its review within the required timeframe. The EO should provide for much greater transparency of the review of rules. It should not allow, and in fact should prohibit, meetings of OIRA with outside parties to prevent industry dominance and undue influence over the regulatory process. For communications between executive branch agencies, the order should mandate greater transparency and should require a public docketing by OIRA and agencies of all communications and notations of all changes made in rules during the review process.

In conclusion, the regulatory process is broken and dysfunctional. It is failing to protect workers and the public, with delays costing lives, limbs and health. It's time for the Congress and the executive branch to fix this broken system and work for a regulatory process that serves the workers' and the publics' good.

Sincerely,



Peg Seminario, Director
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