CHEMICAL MANUFACTURERS ASSOCIATION

WRITTEN STATEMENT OF

THE CHEMICAL MANUFACTURERS ASSOCIATION

BEFORE THE

SUBCOMMITTEE ON LABOR

OF THE

SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

REGARDING S.79

HIGH RISK OCCUPATIONAL DISEASE

NOTIFICATION AND PREVENTION ACT

MARCH 9, 1987

BOR 014771

2501 M Street NW • Washington DC 20037 • Telephone 202:887 1100 • Telex 89617 (CMA WSH)

EXECUTIVE SUMMARY OF THE TESTIMONY SUBMITTED BY
THE CHEMICAL MANUFACTURERS ASSOCIATION ON S.79

March 9, 1987

The Chemical Manufacturers Association and its member companies fully support the goal of identifying and notifying employees at significant risk of occupational disease. While we recognize that S.79 represents an improvement over legislation introduced in the last session of Congress, the bill remains flawed in significant respects. Senator Quayle has recently introduced legislation that addresses many of our concerns. The Subcommittee should consider Senator Quayle's approach.

We believe that any risk notification plan should provide for:

-- scientific determinations of worker populations actually at risk, based upon the recommendations of an expert peer review panel and considering all applicable medical, health, and epidemiological principles;

-- determinations of the appropriateness of notification, in view of scientific evidence of an actual health hazard and the intensity and duration of individual employees' exposure;

-- notifications that include the nature and magnitude of possible health effects; the role of contributing risk factors; and appropriate types of beneficial medical surveillance;

-- exclusion of the notification and supporting findings from claims for workers' compensation and tort damages; and

-- a recognition of existing statutory and regulatory authorities, particularly OSHA's hazard communication standard.

(continued on reverse)

STATEMENT OF THE CHEMICAL MANUFACTURERS ASSOCIATION
ON S.79, THE HIGH RISK OCCUPATIONAL DISEASE
NOTIFICATION AND PREVENTION ACT OF 1987

Submitted to the Subcommittee on Labor
of the Senate Committee on Labor and
Human Resources

March 9, 1987

INTRODUCTION AND SUMMARY

The Chemical Manufacturers Association ("CMA") welcomes the opportunity to submit this statement on S.79, the High Risk Occupational Disease Notification and Prevention Act of 1987. CMA is a non-profit trade association whose member companies represent more than 90 percent of the productive capacity of basic industrial chemicals in the United States.

CMA and its member companies share the Subcommittee's commitment to reducing the incidence of occupational disease and to providing workers with safe and healthful workplaces. Indeed, the chemical industry has an outstanding record in workplace health and safety. Our member companies have pioneered the establishment of comprehensive programs to communicate hazard information to their workers and to protect workers from harmful effects of chemicals in the workplace. Many of CMA's member companies also have major on-going programs in toxicology,

2. The determination of worker populations actually at risk, for purposes of notification, should rest upon sound scientific principles, and should be based upon the recommendations of an expert peer review panel for each substance in question.

3. Determinations of risk should consider all applicable medical, health, and epidemiological principles, including consistency of association; specificity of association; strength of association; dose-response relationships; biological plausibility; temporal relationships; statistical significance; significance of conflicting and negative studies; the role of contributing causal factors; and the extent and seriousness of risk.

4. A decision to notify should be a two-step process. First, there must be strong scientific evidence that human exposure to a substance is likely to result in disease. Second, notification should be applicable only to employees determined to be at significantly increased risk in light of both the intensity and the duration of their exposure.

5. Based upon these scientifically sound determinations, employers should have the option to notify employees who are subject to a real and

-- rests on an inaccurate perception of the scope of the occupational disease problem;

-- contains a trigger mechanism that may misidentify persons at risk of occupational disease, and hence result in the notification of many workers who are not in fact at risk;

-- contains a statutory quota that has no scientific basis, and hence threatens to politicize the identification of worker populations to be notified;

-- fails to provide the Risk Assessment Board with the best available expertise;

-- does not offer adequate procedural controls to ensure that the Risk Assessment Board's determinations are based on all relevant scientific evidence, and does not provide for adequate judicial review of those determinations; and

-- fails fully to account for existing statutory and regulatory provisions, such as those in OSHA's hazard communication standard, which provide a means of furnishing significant information about workplace hazards and risks to employees.

occupational causes of cancer and other diseases must certainly be reckoned with, they pale in comparison to such other factors as smoking, diet, and alcohol as contributors to the nation's health problems.

Accordingly, while CMA supports the goal of notifying workers who are at significant risk due to exposures in the workplace, we also believe that it is important to recognize the limited nature of the problem. The findings section of the bill in particular exaggerates the threat that workplace hazards present to the health of the American public.

II. THE BILL WILL MISIDENTIFY EMPLOYEES AT RISK, AND HENCE WILL RESULT IN UNNECESSARY AND UNHELPFUL EMPLOYEE NOTIFICATIONS.

A number of bills introduced in the last Congress would have required notification of a population of employees on the basis of a specified percentage overincidence of a disease associated with workplace hazards.[3/] CMA and others argued that percentage trigger criteria by their nature are arbitrary and unscientific, and we applaud the abandonment of such criteria in S.79. As it presently stands, however, the bill will lead to the notification of substantial numbers of employees who are not in fact at risk. An overestimation of occupational health hazards of this magnitude may in turn produce a serious misallocation of resources.

3/ E.g., S.2050, 99th Cong., 2d Sess. (1986).

equal those used in the study, either in intensity or in duration. These provisions overlook some fundamental scientific principles.

First, extrapolation from animal or in vitro studies to live human populations is a notoriously risky business. It is not good science to rely on a single animal experiment for making precise estimates of disease risk.[4/]

Second, the provision that a study need show only that an agent may cause health effects largely vitiates the requirements that the study be conducted in accordance with established scientific principles and that the results be statistically significant. It is entirely possible, for example, that a properly conducted study might show, at a suitable level of significance, that a particular agent has only a remote possibility of contributing to a particular disease. Another study might show that some other agent unmistakably causes that same disease. Under the present language of the bill, these two findings would have much the same effect, yet their consequences for notification should properly be quite different.

4/ See e.g., Gulf South Insulation v. United States Consumer Product Safety Comm'n, 701 F.2d 1137, 1146 (5th Cir. 1983). Witness also the controversy over whether the results of animal studies on the safety of sugar substitutes can properly be extended to the consuming public.

individually at a significant risk. While S.79 qualifies the effect of the definition, by requiring that employee exposures be at intensities or for durations comparable to those in the triggering study, the qualification nevertheless fails to render the definition suitable for the purposes of S.79, for the reasons explained above.

In short, while notification on a showing of clear risk is certainly appropriate, S.79 would provide for the notification of employees even in the absence of reliable evidence that those employees are at any risk of an occupational disease. We recognize that the Risk Assessment Board is authorized to consider additional factors as well, including "estimates of increased risk of death or disease in exposed human populations relating to . . . duration and intensities of exposure." The role of such factors in the Board's decision-making process, however, is not spelled out. Moreover, while the Board must take as its "first priority" the designations of populations "likely to benefit from medical surveillance or health counseling," the bill otherwise fails to take into account "the potential effects of failing to provide notice . . . and of providing incorrect notice"[5/] -- in short, whether notification "would be medically beneficial and ethically appropriate."[6/] Just as there are disadvantages to

---

5/ S.638, 133 Cong. Rec. S2703, S2703 (March 3, 1987).

6/ 133 Cong. Rec. S1982, S1983 (Feb. 5, 1987) (proposal of Sen. Quayle).

C. The Bill Fails to Assure Adequate Expertise on the Board and Fails to Provide Procedural Controls on the Decision-Making Process.

Risk Assessment Board. The bill requires that all members of the Risk Assessment Board be drawn from career or commissioned Public Health Service employees. Without intending to question either the competence or the dedication of those in the Public Health Service, we nevertheless believe that this limitation on the composition of the Board is unduly restrictive: It is essential that the Board have available to it the best possible expertise, from whatever source. Accordingly, the most qualified experts should be eligible for appointment to the Board, whether they come from industry, labor, or the academic community. We suggest that the bill require the Secretary to seek recommendations on Board membership from an independent body that is both well-informed and disinterested. Even so, however, no five-member panel can possibly have ready access to all of the complex, technical information that the Board's deliberations will require. We therefore further suggest that additional ways be found for the Board to tap outside expertise on a regular basis. For example, the board should be able to appoint expert panels to study specific substances to assure that the best scientific judgment is brought to bear on each one.

Hearings. The facts to be established by the Risk Assessment Board are highly specific in nature. As a rule, the

as specified in the bill, are drawn from among those in the Administrative Procedure Act ("APA"). 5 U.S.C. § 706(2). The bill includes most of the APA grounds that are generally applicable to administrative notice-and-comment rulemaking. Missing from the bill, however, are any grounds that would enable the reviewing court to pass directly on fact-finding by the Board, particularly a provision that the reviewing court may set aside agency action "found to be . . . unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2)(E). In view of the Board's fact-finding mission, the failure to provide any provision under which a reviewing court might consider the factual basis for the Board's conclusions would render judicial review an empty exercise. Accordingly, we urge that the section on judicial review include a "substantial evidence" test.

D. Indiscriminate and Overly Extensive Notification Can Also Be as Detrimental as Insufficient Notification.

Both in its imposition of a quota and in the notification criteria discussed above, the bill seems to have been drafted on the assumption that, if some notification is good, then more must be better. We must respectfully disagree.

Unnecessary notification carries its own harmful effects. When a worker is notified of risks that do not exist, the consequences are likely to include unnecessary distress and anxiety to the employee and his or her family, as well as effects

legal basis for damages or for any compensation award, nor shall be admissible as evidence in any legal action with respect to any matter or in any proceeding relating to workers' compensation.[7/]

In addition, so long as the trigger criteria in S.79 -- and the statutory quota -- empower or require the Risk Assessment Board to notify workers who are not actually at risk, frivolous claims and unjustified awards are all but inevitable. Such claims and awards will constitute an unnecessary and unproductive burden on state administrative bodies, workers' compensation funds, tort defendants, and the courts -- and hence, on society as a whole.

E. Contents of Notification Should Include Contributing Risk Factors and Appropriate Medical Surveillance.

Notification is most useful when it can result in a worker taking affirmative steps to protect his or her health. In many cases, the contents of the notification itself can offer potentially life-saving advice. Following exposure to asbestos, for example, a worker who smokes can improve his or her chances for survival just by abstaining from tobacco. We suggest that the bill be amended to require that notifications include information on contributing risk factors that may bear upon the degree of risk, where there is medical evidence to support such information.

7/ See S.638, 133 Cong. Rec. S2703, S2704 (March 3, 1987).

addressing the issue, both by lowering exposure levels and by providing information to workers about risks and protective measures. We urge the Sucommittee not to duplicate existing regulation, but rather to build upon the OSHA activity and employer responsibilities that are already in place.

For example, OSHA has recently promulgated a generic hazard communication standard which imposes extensive obligations on all chemical manufacturers and importers, and on all employers in the manufacturing sector, to communicate information on workplace hazards to employees, including information on the risk of occupationally-related diseases. The hazard communication standard specifically requires chemical manufacturers and importers to identify hazardous substances that they produce or distribute, on the basis of the best available scientific data, and to develop material safety data sheets (MSDSs) that include comprehensive information on the nature of hazards presented and appropriate protective measures against those hazards. Among their other obligations, employers must implement training and education programs to inform their workers about the hazards to which they may be exposed.

One instance of the bill's duplication of existing authority arises in the definition of "occupational health hazard." That provision currently includes substances that result in acute health effects, such as agents that damage the skin or

OSHA has also promulgated or proposed specific standards for substances such as cotton dust, acrylonitrile, asbestos, lead, ethylene oxide, benzene, and formaldehyde. These standards have specific labeling provisions related to occupational disease risks, and include provisions for surveillance, monitoring, and testing. OSHA and NIOSH have access to MSDSs, lists of hazardous chemicals, and exposure and medical records, and can use this information to develop additional health standards, including surveillance and testing requirements.

Finally, through the National Toxicology Program and other programs, the Federal Government itself is involved in conducting, sponsoring, and evaluating research, including toxicological and epidemiological studies, on the effects of chemicals used in the workplace. The appropriate government agencies have ample means by which to convey the results of that research to affected worker populations, as the need arises.

Existing authorities are far-reaching. The hazard communication standard in particular will result in the flow of extensive additional information to workers; and its requirement that employers institute and maintain a comprehensive hazard communication program will lead even more employers to adopt effective overall occupational health programs for their employees, including medical surveillance and testing. These authorities should not be ignored, as they offer a sound base upon which to

-- findings that realistically take into account the "substantial progress . . . made in controlling the exposure of individuals to [hazardous] substances and agents";

-- a provision that would go a long way toward properly insulating tort suits and workers' compensation proceedings from the notification process; and

-- a balancing test that expressly considers the suitability of notification in light of a broad range of relevant factors.

In short, CMA and its member companies support efforts to arrive at an appropriate, scientifically-based worker notification plan. To help advance that goal, we stand ready to assist the Subcommittee in addressing the concerns raised in this testimony.