The Honorable Fred Thompson, Chairman
Senate Governmental Affairs Committee
Room SD-340
Washington, D.C. 20510

Dear Mr. Chairman:

The following comments respecting The Regulatory Improvement Act of 1999, Senate Bill S. 746, represent the personal views of Ronald A. Cass, Dean and Melville Madison Bigelow Professor of Law at Boston University School of Law. I have practiced in the fields of Administrative Law and Regulation for more than twenty-five years and have taught and written about these fields for more than twenty years. I have represented regulated entities and have served in government as an attorney and as a Presidential appointee. I have served as both a Public Member and a Government Member of the former Administrative Conference of the United States, as well as a consultant to that agency, and I currently am Chair of the Section of Administrative Law and Regulatory Practice of the American Bar Association. These comments reflect my own experience and judgments. Last year, the Section of Administrative Law and Regulatory Practice submitted comments on behalf of the American Bar Association. My remarks build on that submission, but today's comments are solely on my own behalf and have neither been submitted to nor approved by the American Bar Association.

Overview: Rulemaking Process Requirements

The bill before your Committee, S. 746, would improve the efficiency and fairness of the regulatory process and would help align administrative decisions with the public interest. Those are the essential goals of administrative process. There are ways in which the bill might be improved--specific suggestions are offered below--but the overall contribution of this proposed legislation is significant and positive.

With the passage of the Administrative Procedure Act of 1946, Congress endeavored to lay out a framework for agency decision-making that provided uniformity across agencies at a general level, while allowing some variations to account for differences across agencies, decisions, and circumstances. Over the past five decades, the scope of agency authority has expanded, the number of statutory instructions has grown, and the number of settings in which agencies have been called upon to make legislative-type decisions in order to implement congressional directives has increased.

Agency rulemaking has become the principal mechanism for instituting new initiatives within an agency's legislative authority, for articulating the contours of that authority as the agency sees it, for announcing and for altering agency policy. Agencies turned to rulemaking because it allows them to gain information from an array of parties affected by agency policy setting rather than the few parties who might be directly represented in an adjudication. For rulemaking to serve its intended function, it should be conducted in a manner that gives fair notice to those who will be affected by the agency action, that produces accurate information on the important issues relevant to the regulatory decision in question, and that facilitates sound analysis of the information.

As agency reliance on rulemaking has grown--and as the impact of agency rulemaking on the economy and our society have increased--we have paid greater attention to problems that can be created if agency rules are insufficiently attentive to particular effects. Periodically, Congress has specified ways in which agency rulemaking could be improved at least with respect to a given consideration. Sometimes legislative instructions have been directed to a single agency or program; sometimes they have been directed to all agencies.

The natural fear of new legislation seeking to correct perceived defects in current regulatory (especially rulemaking) processes is that, by adding yet another set of requirements, it will so encumber the rulemaking process as to frustrate beneficial rulemaking. That might occur because the legislation would require procedures that are unduly costly or because the legislation would require procedures that tilt determinations away from socially beneficial results.

Although such fears no doubt will be raised by this legislation as by other process reform efforts, I do not believe that the fears are well grounded here as the provisions of S. 746 generally should make agency rulemaking correspond more closely to public interest. The changes S. 746 would effect primarily ask that agencies attend to considerations that should be relevant to regulatory rulemaking, that agencies assess critically information pertinent to their rulemaking decisions, and that agencies allow these assessments to be open to the sort of comparative evaluation common in other venues for similar analysis. While a few specific changes would improve the legislation, S. 746 should make government work better, respond to problems more thoughtfully, and strike an appropriate balance between the concerns regulatory interventions address and the costs such interventions impose on our society.

Rulemaking Improvements: Contributions of S. 746

General Considerations. S. 746 appears well-designed to improve rulemaking procedures and to assure that the information on which rulemaking decisions rest is appropriate to the decision-making task. The legislation would make incremental, not sweeping, changes, building on approaches to rulemaking that are familiar to administrative lawyers.

Some of the provisions in S. 746 duplicate requirements already in place to a significant extent. For example, many programs for cost-benefit analysis and risk assessment already are in place for major agency rulemakings as a result of legislative mandates, executive orders, or agency choice.

S. 746, however, both would increase uniformity of such analyses across agencies and promote improvements in some agency analyses. Other principal reforms of the regulatory process contained in S. 746--provision for systematic review of agency rules and the codification of oversight functions in the Office of Management and Budget's Office of Information and Regulatory Analysis (OIRA)--also should improve the regulatory process.

These changes do not alter the basic structure of rulemaking or eliminate the allocation of responsibility to agencies to exercise judgment in individual rulemaking decisions within parameters of their particular legislative mandates. S. 746 generally does not, and should not, change the assignment of judicial responsibility to see that agencies stay within the limits of the law and that agency decisions meet minimal requirements of reasonableness.

By its very nature, rulemaking--like legislating--frequently will be controversial. It spells out the terms of agency policy on a range of issues including many on which knowledgeable persons have divergent views of what action will best advance the public interest. Some criticism of agency rulemaking is predicated on simple disagreement over where public interests lie and how various policies would affect them.

Some agency rulemaking, however, legitimately can be criticized for failing to gather, evaluate, and integrate information into a decision that meaningfully weighs the factors that should inform an administrative action. Some agency programs seem destined to produce little public benefit at great cost (private as well as public); other programs might appear too modest, generating large benefits at low costs and seemingly offering the prospect that more could be obtained with little additional investment.

The variance among agency regulatory decisions emerges clearly in estimates of the costs of various government health and safety programs that are intended protect human life relative to their life-saving effects. As Supreme Court Justice Stephen Breyer observed in his Holmes Lectures, the 1992 compilation of *The Regulatory Program of the United States Government* shows estimates of cost per premature death avoided that range from one hundred thousand dollars ($100,000) for regulations such as the passive restraint-seat belt rule adopted by the National Highway Traffic Safety Administration in 1985 to five trillion-seven hundred billion dollars ($5,700,000,000,000) for the Environmental Protection Agency's 1990 rule on hazardous waste listing for wood-preserving chemicals.

No analytical tool can provide comfort in specifying what investment is appropriate to protect life and health. That is why Congress has not directed administrative agencies to draw precise lines, such as imposing regulatory requirements only if their expected annual cost per life is less than the median annual income of Americans that year. S. 746 does not substitute such nostrums for sound judgment. Instead, it addresses procedures that can facilitate such judgments. The principal provisions of S. 746--by requiring explicit attention to the costs and benefits of major regulations, by providing guidelines for risk assessments, and by encouraging peer review of risk assessments and cost-benefit analyses--should improve rulemaking decisions without imposing unnecessary costs on the process or undue impediments to needed rules.

Regulatory Analysis. The regulatory analysis mandated by S. 746 for major rules appears to be designed appropriately to encourage agency attention to the questions of cost and benefit that should be asked whenever agencies act.

Critics of cost-benefit analysis routinely express their concerns that cost-benefit analysis overemphasizes readily quantified variables and slights variables, like environmental quality, that are less readily subject to quantitative valuation. Insofar as that is true, it certainly is a legitimate source of concern.

Yet, there is nothing in the nature of cost-benefit analysis that makes this assertion true. Some cost-benefit analyses may at times undervalue less readily quantified variables, but others may at times *over*value such variables. What is true is *not* that cost-benefit analysis leads to undervaluation of what often are referred to as "soft variables"--rather, it is that rightly done, cost-benefit analysis must be sensitive to comparing costs *or* benefits that can be quantified with

relative certainty to costs or benefits that cannot. Moreover, the greater the variance is estimates (again, of costs *or* benefit), the more important it is to assure that decisions are based on "apples-to-apples" comparisons. Comparing a mid-point estimate of costs to *either* an upper-bound or a lower-bound estimate of benefits plainly will skew the result in a cost-benefit analysis. But when a key variable cannot be quantified reliably, the best a decision-maker can do is to assure that he has examined the *relevant ranges* of costs and benefits carefully, based on the best information available to him.

Cost-benefit analysis is a useful tool for asking the question that is inevitably presented in assessing contemplated government actions. The form in which the question is asked may vary, but any action must be predicated on an understanding of the gain and loss associated with it. S. 746 does not make formal cost-benefit analysis the sole input to agency decision-making, and the bill properly cautions attention to nonquantifiable as well as quantifiable variables. The regulatory analysis called for by S. 746, in sum, seems well designed to help frame issues relevant to the agency's decision. Further, analysis similar to that required by S. 746 already is required by law or by Executive Order for many of the actions that would be subject to S. 746's regulatory analysis mandate, and much agency rulemaking not subject to those requirements has been informed by analytic exercises that are roughly comparable to the cost-benefit analysis required here. In significant measure, S. 746 codifies and unifies current agency practice, while slightly expanding the scope of actions subject to such practice.

If there is residual concern about the cost-benefit analysis required by S. 746, two explanations seem plausible. One is that the concern is not with the formal structure of cost-benefit analysis but instead is focused on the sincerity with which cost-benefit analyses will be done. That concern, however, is truly independent of the *mode* of regulatory analysis. It is a concern over the regulatory decision-makers. But S. 746 leaves the locus of regulatory decision-making where it presently is assigned. Hence, this cannot be a concern that should impede passage of the legislation.

The other possible concern over cost-benefit analysis might be that a focus on costs of regulation relative to benefits will frustrate some regulation that otherwise would be adopted. If that is so, it must be because the costs will be seen demonstrably to outweigh the benefits of the particular regulation. Of course, that is the point of a cost-benefit analysis: to make certain that regulation is not imposed when its benefits are plainly less than its costs. It is worth emphasizing again that this function is entirely symmetrical: cost-benefit analysis *also* makes it more likely that regulation will not abjured when its costs are plainly less than its benefits. Here, too, the concern with S. 746's cost-benefit analysis requirement seems misplaced.

Risk Assessment. Concerns similar to those addressed to cost-benefit analysis also have been expressed with respect to risk assessment. Here, the concerns have somewhat greater force because the common subjects of risk assessment--health, safety, and environmental risks--frequently require judgments on matters of science that divide the scientific community and on values that lack ready market-based reference points.

Concerns should be muted, however, by the modesty of S. 746's requirement with respect to risk assessment. Risk assessments are required in only quite limited circumstances, and those are the circumstances most apt to be enlightened by this form of analysis. The risk assessment principles

in S. 746 are fairly general; they do not handcuff regulatory agencies but merely promote better informed decision-making. No analytical process can assure that agency decisions will be sound or that all of the most interested and informed parties will approve of them. But the requirement of thoughtful risk assessments, including explanations of the critical assumptions behind the agency's analysis of scientific evidence, is designed to improve the information relied on by agency's and the communication of agency decisions to the interested public.

Peer Review. In general, S. 746's basic framework for peer review of regulatory analyses appears sensible and desirable. Peer review can help assure that regulatory analyses and risk assessments are performed in a competent, professional manner, but it is important that peer review not become in effect a trial *de novo* on the issues analyzed by the agency. That would risk extending what already is often a too-lengthy rulemaking process and also would raise legitimate concerns respecting the power conferred on individuals who are not selected in the same manner as public officials. Peer review is best seen as a very modest check that the analyses performed by regulatory agency officials conform to basic professional standards.

Judicial Review. The judicial review provision in S. 746 seems well-tailored, neither insulating considerations that make regulatory analysis sound or unsound from review nor allowing judicial review to become a strategic tool of interests opposed to agency action. The relevant section, § 627 (in combination with §§ 622 and 634), provides: (1) that regulatory analysis and risk assessment are subject to judicial review only in the context of final review of agency action, (2) that regulatory analysis and risk assessment are not evaluated separately on review but are part of the overall record, (3) that OIRA decisions respecting a rule's status as a "major rule" are not subject to judicial review, (4) that, in reviewing an agency determination whether a rule is a major rule, the party challenging the agency decision bears the burden of persuasion, and (5) that court action based strictly on the regulatory analysis or risk assessment is limited to a finding whether the analysis or risk assessment was performed, not whether it was performed in the way a judge believes best. These judgments seem sound, and the legislation--with one minor exception--seems well-designed to implement them.

The one minor amendment I would recommend is to § 627(e). The intent of this subsection appears to be this: to provide an avenue for courts, where appropriate, to instruct an agency that has failed to comply with the regulatory analysis requirements of this legislation that the law applies and that the agency must conduct the specific regulatory analysis mandated; but not to provide an avenue for review of the substance of the regulatory analysis *apart from the substantive review already authorized by law*. This meaning is evident when § 627(e) is read together with § 627(d). That reading is reinforced by § 622.

The problem with § 627(e) as drafted comes from the second sentence of the paragraph, which states "The adequacy of compliance with the specific requirements of this subchapter shall not otherwise [referring to the prior sentence respecting agency failure to perform the required analysis or to allow for peer review] be grounds for remanding or invalidating a rule under this subchapter." This phrasing could allow confusion, perhaps causing some courts to wonder whether § 627(e) in some way changes the instruction in § 627(d) that the regulatory analysis becomes part of the rulemaking record and is evaluated along with the record as a whole in

determining whether the rule meets the legal standard set out in § 706 of the Administrative Procedure Act.

This confusion could be avoided by adding at the end of the sentence quoted from § 627(e) the words: "except as provided in § 627(d)." That would make plain that, so long as an agency complies with the requirement that it perform a given regulatory analysis, the adequacy of that analysis is not subject to judicial scrutiny *separate from* the court's consideration whether the rule is sufficiently supported by the record *including* the regulatory analysis to pass muster under the applicable standard of review for the rule--the standard that would apply before enactment of S. 746 and that would apply to rulemaking efforts in general.

Executive Review. Finally, the provision for Presidential review through the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget, provides a basis for assuring that agencies attend to the concerns of all segments of society and do not slight some interests that might be less likely to be voiced effectively at the agency than at a bureau more closely overseen by the President. Currently, the functions assigned to the Administrator (and those assigned in the first instance to the President or to the Director of the Office of Management and Budget) are largely performed under the auspices of Executive Order 12866 (and previously under Executive Orders 12291 and 12498). The Executive Order, however, applies only to agencies in the Executive Branch and not to what normally are denominated "independent agencies" (those formally established outside direct presidential supervision). S. 746 would put all federal agencies onto the same footing, excepting only specific exercises of rulemaking power the outputs of which are excluded from the definition of "rule" in § 621 (10).

Conclusion

I believe strongly that this bill would improve the administrative process and strengthen the basis on which agency rulemaking actions are taken. There may be some additional cost to agency action from this legislation, as process requirements often do generate added cost. It is not apparent, however, that any added cost is a net increase over what *should* be incurred at present, as this legislation principally makes explicit requirements for obtaining reliable information and testing it to assure its reliability that should be implicit in current regulatory requirements. Insofar as making those requirements express increases cost, it must do so by inducing greater attention to exactly the sorts of information we should all want agencies to consider.

Thank you for your consideration. I hope these comments will be of use.

Sincerely,

Ronald A. Cass