IV. WHEN CONSIDERING VALIDATION STUDIES, OMB MUST NOT STACK THE DECKS AGAINST PUBLIC PROTECTIONS.

It is gratifying that OMB has finally heard the complaints from the public interest community that agencies’ *ex ante* estimates of the costs to industry of complying with proposed regulations are consistently overblown. The result—the section of OMB’s report discussing validation or look-back studies that compare *ex ante* estimates and *ex post* results—does not, unfortunately, inspire confidence that OMB will be moving in the right direction. OMB has provided a skewed bibliography of existing look-back studies that excludes most of the rich literature on this subject and includes studies of dubious merit.

A. OMB is distorting the record with a limited and biased sampling of look-back studies.

OMB appears poised to draw all the wrong conclusions from the research, because it appears not to have selected the full range of available research. Given the rich body of research available already, particularly with regard to systematic overstatement of cost estimates in OSHA rulemakings, it makes no sense for OMB to present a bibliography concentrating almost entirely on NHTSA rulemakings, unless OMB-OIRA chief John Graham is planning to draw on his years of experience in opposing auto safety regulation. The following studies are conspicuously absent from OMB’s mini-bibliography of look-back studies; many of these glaring omissions have been brought to OMB’s attention before.128 OMB should do its homework and incorporate the findings of these studies in its final report:


---


Many of the findings from the studies listed above are summarized in Appendix A to these comments.

Moreover, in the course of preparing the major study listed above, the now-defunct Office of Technology Assessment contracted original research papers that do precisely what OMB envisions: compare actual *ex post* compliance costs with an agency’s *ex ante* estimates. Given that the American taxpayer has paid for these reports, OMB should consult them before spending money on new studies. The reports are as follows:

- Mark A. Borrough, “Hazard Control Responses and Economic Impacts in Selected OSHA Health and Safety Standards: Expectations vs. Outcomes” (July 1995)
- David Butler, “OSHA’s Brethren: Safety and Health Decisionmaking in the U.S. and Abroad” (Sep. 1995)
Finally, OMB should eliminate two deeply flawed studies from its list: a piece published by the industry-funded think tank AEI-Brookings, 129 and one co-authored by John Graham and other researchers at the industry-funded think tank Harvard Center for Risk Analysis. 130

**AEI-Brookings Study**

The industry-funded AEI-Brookings Joint Center for Regulatory Studies published a paper by Si Kyung Seong and John Mendeloff that purports to assess the accuracy of OSHA’s pre-regulation estimates of the benefits from proposed safety standards. Although the authors purport to have discovered that OSHA overestimates the benefits of its safety rules, one caveat to their findings calls into doubt the generalizability of their conclusions: “We are not able to distinguish here between overestimates due to lack of compliance and overestimation due to the overstated effectiveness of the standard.”131 In other words, they cannot determine if OSHA truly did overestimate the benefits to be provided by safety standards, because they cannot weed out the number of cases in which

---


employers simply failed to obey the standards. The standards themselves might well be as beneficial as OSHA anticipated; they only need to be fully implemented for us to know.

Additionally, the authors appear to have gone out of their way to alter the sample of rules they examined in order to increase the probability of finding a variance between *ex ante* benefits estimates and actual *ex post* benefit results. The authors

- started with all safety rules promulgated since 1990 (thus starting with eleven rules),
- then whittled away the three most recent, making the sample those rules issued between 1990 and 1996 (and bringing them down to eight rules total),
- then eliminated two which were projected to prevent small numbers of deaths every year (leaving now six rules),
- and finally excluded yet another rule because the number of deaths to be prevented represented “only about a 15% reduction” from the baseline number of deaths per year.

All the way from eleven to five. The authors concede that the “omission of these [last] 3 standards and the focus on standards with relatively large projected effects may make it less likely that [they would] find cases where the effects are underestimated.” The fact is that they have so thoroughly manipulated the universe of cases studied that they appear to have rigged the facts in order to reach a conclusion of the sort that AEI-Brookings is always looking to publish.

This study appears to have been biased at the outset to reach a conclusion counseling against reasonable protections of the public interest. It should therefore be excluded from the final report.

**HCRA Study**

Public Citizen’s comments will more fully detail the problems of the Thompson/Graham article purporting to compare *ex ante* estimates and *ex post* benefits in the case of air bags in automobiles. The key problem is that Thompson and Graham are misattributing the deaths caused by the first wave of air bags to the National Highway Traffic Safety Administration’s failure to estimate benefits accurately, without accounting for the intervening malfeasance of the automakers. People who died from air bag deployment in the period Thompson and Graham study “were killed by cut-rate air bags

\[132. \textit{Id.} \text{ at } 3.
\]  
\[133. \textit{Id.}
\]  
\[134. \textit{Id.} \text{ at } 4 \text{ (emphasis added).}
\]  
\[135. \textit{Id.}
\]
that manufacturers installed years ago to save money” even though technology had existed for years that could have prevented injury to children and small-statured adults in low-speed crashes. Automakers could have used but failed to use technology such as “dual-inflation air bags (which inflate at lower intensities in low-speed crashes while inflating at higher intensities to protect occupants involved in high-speed crashes); top-mounted, vertically deploying air bags; telescoping steering columns; pedal extenders for shorter drivers; deep-dish steering columns that move the air bag away from the occupant; air bag suppression; tethers to control air bag extension; higher thresholds for deployment; and energy absorbing structures.” If anything, this study makes the case for exactly the kind of “command-and-control” that OMB dismisses, instead of the “flexibility” that OMB irrationally embraces.

Moreover, the Thompson/Graham article depends on data from an earlier article by Graham. Those data are highly questionable. As Public Citizen has observed, Graham’s study “failed to distinguish between different models of air bags and types of air bag release systems—a failing which threatens the validity of the results because, for example, top-mounted, vertically deploying air bags hit the windshield before impacting with occupants and had not caused any fatalities at the time the study was completed.”

The Thompson/Graham article is a flawed study built upon yet another flawed study. It should be removed from the list in the final report.

B. OMB can and must take steps to avoid any further distortions of the record.

OMB implies that it is considering conducting further studies (or contracting with others) to add to the rich literature identified above. OMB should first avail itself of the rich array of material already identified above, much of which the American taxpayer has already paid for. Any additional studies should avoid the kinds of methodological problems with which John Graham and John Morrall are already familiar, if they are to be worth spending taxpayer dollars. They should above all be empirical, conducted with the rigor of any credible disinterested social science inquiry, provided however that they fully account for the methodological challenges identified by the GAO in its 1999 study, in which it concluded that industry ledger books simply do not account for costs attributable to regulations.

Any additional validation studies ordered by OMB should also be conducted by disinterested and independent scholars. OMB’s call for comments on individuals and organizations well positioned to conduct such studies is a worthwhile occasion to advise OMB on sources it should avoid:

---


137. *Id.*

138. *See MacCleery, supra* note 9, at 61.
• **Harvard Center for Risk Analysis**: Although housed in the Harvard School of Public Health and accordingly granted the prestigious Harvard name, HCRA is not held in high esteem as a source of disinterested scholarly inquiry. Instead, it is an industry-funded think tank, with a checkered history of taking big donations from big corporations and producing studies that support industry positions against strong protections of the public interest. HCRA’s interest in the anti-regulatory positions of corporate special interests has been exhaustively and carefully documented in the Public Citizen report *Safeguards at Risk*. HCRA’s independence from the White House is also questionable, given that HCRA founder John Graham heads OMB’s Office of Information and Regulatory Affairs. Neither HCRA nor any “scholar” affiliated with HCRA should be permitted to take taxpayer money for new validation studies.

• **Mercatus Center**: The Mercatus Center is another industry-funded think tank. As befits an organization whose name means “market,” Mercatus has pushed aggressively for deregulation. Mercatus’s obvious bias against regulatory policy in the public interest should preclude the organization and its affiliated “scholars” from contributing to OMB’s quest for new look-back studies.

• **AEI-Brookings Joint Center for Regulatory Studies**: AEI-Brookings is yet another industry-funded think tank that appears to specialize in producing reams of paper dedicated to the arguments that the public is irrational in its desire for public protections; that it is acceptable to view potential protections from the perspective not of a culture of life but, instead, of a culture of cash; and that regulatory policy is a blight to be cured by the most noxious of tonics. Neither AEI-Brookings nor its affiliated scholars should be entrusted with any commission for conducting look-back studies.

• **National Academy of the Sciences**: The NAS is the nation’s premier scientific authority, but recent revelations undermine confidence in its ability to conduct a completely disinterested assessment with sufficient independence from the political interventions of the White House. Although required to ensure that its advisory panels are balanced, the NAS has repeatedly stacked panels about the need for regulation with representatives from the very industries that would be regulated. Aside from questions of disinterestedness, the NAS is also vulnerable to questions about its independence from the White House. The NAS has recently been revealed to have allowed White House political

---

139. One example of a problematic NAS panel is the Committee to Study Mine Placement of Coal Combustion Wastes, which is charged with addressing the environmental consequences of dumping toxic wastes in mines. Nearly half of the provisional panel consisted of individuals with clear ties to the mining and utility industries, but only one scientist who has documented damage from CCW was appointed. Membership on this panel was later adjusted, after the biased composition was exposed in the press. Other recent panels that the NAS stacked with biased industry representatives include a committee to investigate the health consequences of perchlorate ingestion and one assessing plants genetically modified for pest protection. Get more information online at <http://www.ombwatch.org/article/blogs/entry/250/18>.
appointees to edit or suppress NAS scientific assessments of important topics with high stakes for the public interest. Until these questions can be addressed more systematically, it makes sense to avoid empaneling the NAS to conduct new look-back studies.

Finally, OMB should examine the extensive taxpayer resources already expended on look-back studies, consider the rich literature already existing on this topic, and conclude that any new studies should be considered expendable extras. In no case should any new studies, as welcome as they may be, divert agency budgets away from the agencies’ vital missions to protect the public. Agencies such as OSHA, FDA, and EPA are already straining to meet the public’s needs given reduced budgeting and the White House’s aversion to public protections. One agency, OSHA, appears to have abandoned its mission altogether. Any new studies should come from new resources, such as OMB’s own budget, and not from the limited budgets of the agencies; agency budgets should instead be dedicated to the more important goal of protecting the public.

V. THE REGULATORY PROCESS NEEDS REFORMS TO STRENGTHEN AND NOT WEAKEN PUBLIC PROTECTIONS.

Although it seems premature from the limited bibliography of validation studies OMB provides, OMB has invited the public to comment on regulatory reforms that follow from our improved knowledge about the costs and benefits of regulations. Given the body of knowledge that we do have already, which is much larger than OMB’s micro-bibliography, we can safely conclude that regulatory protections of the public interest serve not just the public interest goals that regulations are intended to target but also the economy itself. Regulatory safeguards help America; we should therefore embrace reforms that make it easier for the federal government to develop new protections of the public interest and strengthen the protections we do have, and we should accordingly reject any reforms that would constrain regulatory policy.

A. OMB and Congress should adopt reforms that facilitate rulemaking in the public interest.

Given what we know and what we are likely to learn from an inquiry into the literature validating cost and benefit estimates (provided, however unlikely, that the inquiry is above-board and even-handed), we should immediately reform the regulatory process to remove unnecessary roadblocks and cease wasting time and scarce resources on diversionary navel-gazing. OMB has already received numerous suggestions from organizations such as the Competitive Enterprise Institute, the U.S.

140. For example, the NAS allowed the White House to edit a scientific report on the health effects of mercury, with changes that downplayed the risks of mercury, replaced specific enumerations of mercury-related harms with bland, general references, and introduced additional emphasis on uncertainty to make the science of mercury’s neurotoxic effects seem less reliable. More recently, the NAS suppressed a scientific assessment of the dairy industry’s vulnerability to bioterror, after the administration requested the paper be delayed. More information is available online at <http://www.ombwatch.org/article/articleview/2134/1/132?TopicID=1> (mercury); <http://apnews.myway.com/article/20050607/D8AJ0COG1.html> (bioterror).