March 31, 2009

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Federal Regulatory Review
Request for Public Comment
74 FR 8819, February 26, 2009

Advocates for Highway and Auto Safety (Advocates) and Public Citizen's Auto Safety Program provide this response to the recent notice by the Office of Management and Budget (OMB) requesting public comment on ways to improve the process and principles governing regulation. The President has asked OMB to develop recommendations to be used in a new executive order on regulatory review. We appreciate the public notice, request for comments, and the nature of the review that OMB is undertaking to reassess the current regulatory process and procedures. Public participation regarding the internal procedures used by government to review and revise agency rules is essential and as important to the development of sound public policy as the public's right to comment on the substance of the rules themselves. These comments address certain aspects of the recommendations the President has requested—in particular, the relationship between OMB's Office of Information and Regulatory Affairs (OIRA) and federal administrative agencies, and the role of benefit/cost analysis.

Advocates is an alliance of consumer, health, law enforcement and safety groups and insurance companies and agents working together to make America's roads safer. Founded in 1989, Advocates encourages the adoption of federal and state laws, policies, and programs that save lives and reduce injuries. Advocates seeks to reduce a mortality scourge as serious and devastating as most major diseases. Each year, more than 40,000 people die on U.S. highways. "[T]he increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield."[1] In fact, between 1899 and 2008, nearly 3.5 million deaths on American

[1] *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957); *see also Perez v. Campbell*, 402 U.S. 637, 657 (1971) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars.") (Blackmun, J., concurring in part and dissenting in part).

roads and highways in traffic incidents have been recorded.[2] In addition, millions more people have been seriously injured in traffic crashes, incurring long-term medical, health care, employment, and other societal expenses that adversely affect our national economy. NHTSA has estimated that the total cost of motor vehicle crashes in the nation in 2000 was $230.6 billion,[3] a figure that now is far larger, and a cost that is incurred each and every year.

Public Citizen is a national consumer advocacy organization founded in 1971. Its auto safety program advocates before Congress, administrative agencies, and the courts for strong and effective auto and truck safety regulation and for better fuel economy standards for motor vehicles. Public Citizen's auto safety program has been actively involved in developing new legislative mandates for auto and truck safety and fuel economy and has served as a watchdog group for the implementation of these mandates. Public Citizen has long been critical of OMB's intrusion into the agency regulatory process.[4]

Our organizations have significant experience interacting with federal agencies, expertise in the development of federal regulations, and an understanding of OIRA's oversight of proposed agency rules. Because Advocates and Public Citizen's auto safety program are both integrally involved in surface transportation safety policy and regulations promulgated by the U.S. Department of Transportation (DOT), these comments focus on regulatory issues addressed by DOT agencies. Based on our experience, we have identified several significant problems in the current method of regulatory review. These examples underscore that OIRA regulatory review, as undertaken during the past few administrations, is not a valuable addition to the regulatory process. Instead, OIRA should undertake regulatory oversight, if at all, solely to ensure that federal agencies adopt clear and coordinated regulatory policies and follow rulemaking procedures.

Relationship Between OIRA and the Agencies

Congressional authorizations for regulatory action regarding transportation safety are assigned to the Secretary of Transportation or the Secretary's appointed designee. Under the 1966 National Traffic and Motor Vehicle Safety Act (Safety Act),[5] it is the

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[2] The actual total is 3,451,554 fatalities, according to historical data published by the Fatal Analysis Reporting System (FARS), NHTSA.
[3] *The Economic Impact of Motor Vehicle Crashes 2000*, NHTSA Technical Report, DOT HS 809 446, Department of Transportation (May 2002).
[4] *See, e.g., Public Health Research Group v. Tyson*, 796 F.2d 1479 (D.C. Cir. 1986) (presenting but not deciding challenge to the legality of OMB's participation in rulemaking proceedings); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way to Write a Regulation*, 99 Harv. L. Rev. 1059 (1986).
[5] Pub. L. 89-563, 80 Stat. 718 (Sept. 9, 1966) (codified at 15 U.S.C. § 1381 *et seq.*), repealed and reenacted by Pub. L. 103-272, 108 Stat. 1169 (July 5, 1994) (recodified at 49 U.S.C. § 30101 *et seq.*).

DOT Secretary who is empowered to "prescribe motor vehicle safety standards."[6] The Secretary is further required to consider certain specific requirements in proposing and adopting safety standards.[7] Statutory provisions authorizing specific actions regarding motor vehicle safety are assigned to the Secretary, or, in turn, to a designee, because of DOT's unique position and subject matter expertise. DOT, with the assistance of the appropriate expert agency (within DOT called modal administration), is legally obligated to use its judgment in making determinations regarding the development of proposed and final rules regarding motor vehicle safety. In so doing, it also has occasion to interpret the statutory charges given to it by Congress. Although the Secretary or designee may consult with others inside[8] and outside[9] the federal government, the Secretary or designee lack statutory authority to delegate or yield their own authority either to interpret DOT's governing statutes or to make final determinations regarding safety regulations.

Nevertheless, OIRA has now in essence become the final arbiter of the content of proposed and final rules issued in the DOT Secretary's name. The relationship between OIRA and the federal agencies is out of balance, resulting in unsafe rules and illegal practices. In some instances, major sections of proposed rules, final rules, and both preliminary and final regulatory and economic analyses are directly authored or heavily influenced by OIRA. It is one thing for OIRA to advise and actually suggest policy considerations, but it is quite another for OIRA to dictate substantive policy decisions that directly interfere with agency determinations and with the execution of duties entrusted by law to the Secretary or the Secretary's designee. Because of the overarching control that OIRA has exerted in rulemaking actions in recent years, OIRA's decisions on the specific content of regulatory actions are regarded not merely as helpful suggestions that can be declined, but as marching orders by the agencies within DOT. Because decisionmaking authority for motor vehicle safety is expressly conferred by Congress on the DOT Secretary in the Safety Act and other legislation, the substitution of OIRA's views and policy choices for those of the DOT Secretary is unlawful. The power that OIRA wields to make substantive changes in proposed and final rules regarding safety standards usurps the rightful decisionmaking role Congress accorded to the DOT Secretary. There is no basis in law to allow OIRA to supplant regulatory decisions and interfere in the proper execution of the duties of the Secretary.

The problems with the intrusion of OIRA into the lawful exercise of agency authority are exemplified by NHTSA's regulatory proceedings in promulgating a tire pressure monitoring system (TPMS) standard. Section 13 of the Transportation Recall Enhancement, Accountability, and Documentation (TREAD) Act[10] required, among other

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[6] 49 U.S.C. § 30111(a).
[7] *Id.* § 30111(b).
[8] See id. § 30111(c); 49 C.F.R. § 1.42.
[9] *See* 49 U.S.C. § 30111(b)(2).
[10] Section 13 states as follows:

> Not later than 1 year after the date of the enactment of this Act, the Secretary of Transportation shall complete a rulemaking for a regulation to require a

things, that the Secretary of Transportation issue a rule requiring a device to warn drivers when "a tire is significantly under inflated." Operating vehicles with underinflated tires can have both safety consequences (decreased driver control of the vehicle and potential catastrophic blowout from overheating) and economic effects (reduction in vehicle fuel economy). The TPMS rulemaking was properly assigned to the Administrator of NHTSA,[11] the agency within DOT given jurisdiction for issuing motor vehicle safety standards under the Safety Act.[12]

In response to the TREAD Act, NHTSA issued a proposed rule and received public comment. NHTSA then prepared a draft final rule. NHTSA had determined that the performance of technology known as a "direct" TPMS system was superior to "indirect" TPMS technology[13] and would result in greater numbers of lives saved and injuries prevented than indirect systems.

The draft final rule included a phase-in period during which either of two alternative performance standards would apply: a four-tire, 25% alternative (which could be met using existing direct TPMS systems, but not by indirect systems) and a one-tire, 30% alternative (which could be met using either system). The draft final rule would have demanded that, after completion of the phase-in period, the permanent or "long-term" performance standard would require systems that could identify 25% underinflation in one or more tires.[14] NHTSA concluded that this standard best satisfied the statutory mandate "because it would require TPMSs that warn drivers about all combinations of significantly under-inflated tires and provide more timely and effective warnings."[15]

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warning system in new motor vehicles to indicate to the operator when a tire is significantly under inflated. Such requirement shall become effective not later than 2 years after the date of the completion of such rulemaking.

TREAD Act, Pub. L. 106-414, 114 Stat. 1800 (Nov. 1, 2000) (codified at 49 U.S.C. § 30123 note).

[11] 49 U.S.C. § 105.

[12] 49 C.F.R. §1.50(a) (reference to 15 U.S.C. § 1381 *et seq.* is anachronistic since the transportation statutes were recodified by Pub. L. 103-272, 108 Stat. 1169 (July 5, 1994), which transferred those sections to title 49 U.S.C. § 30101 *et seq.*).

[13] The "direct" system warns a driver when any one tire or any combination of tires is 20 percent or more underinflated as compared to the auto manufacturer's recommended tire pressure. It functions as soon as a motor vehicle's ignition is engaged, operates effectively on any type of road surface at any speed, and can be installed in any new motor vehicle. In contrast, the "indirect" system relies on a vehicle's anti-lock braking system, warns a driver when any single tire is underinflated or when three tires are 30 percent or more underinflated as compared to the other tires. It cannot, however, detect when all four tires are underinflated or when two tires on the same side or the same axle are underinflated to the same extent. It does not initially function until the vehicle has been driven for up to 10 minutes; it does not function at speeds above 70 miles per hour, it can become inoperable in extreme temperatures, and it may not function on bumpy or gravel roads. The system cannot detect 30 percent underinflation in half of the instances in which it occurs. Also, after a tire change, the indirect system can take an extended period of time before being recalibrated to full functionality. *Public Citizen v. Mineta*, 340 F.3d 39, 45-46 (2d Cir. 2003).

[14] *Id.* at 49-50.

[15] 67 Fed. Reg. 38704, 38718, 38722 (June 5, 2002).

In accordance with E.O. 12866, NHTSA submitted its draft final rule to OIRA for review.[16] OIRA subsequently returned the draft and directed the agency to reconsider its determination.[17] OIRA did not disagree with NHTSA's determination that direct systems are more effective than indirect systems in detecting underinflated tires.[18] However, OIRA pushed NHTSA to maintain the one-tire, 30 percent standard for the long term, thereby allowing indirect TPMSs to be used indefinitely. OIRA's rationale was that allowing long term use of indirect TPMSs would encourage manufacturers also to install anti-lock braking systems (ABS), which OIRA said provided additional safety benefits as compared to conventional braking systems.[19] (Notably, the TPMS rulemaking record shows that automobile manufacturers were pushing for a standard that allowed them to use the less effective indirect systems because those systems would be cheaper for them to produce and install.) Further signaling its resistance to Congress's determination of a need for a TPMS requirement, OIRA asked NHTSA to provide additional explanation of the technical foundation for the agency's safety benefits estimates and to subject the estimates to sensitivity analysis.[20]

NHTSA then issued a final rule that adopted the two alternative performance standards—the four-tire, 25 percent alternative and a one-tire, 30 percent alternative—during a four-year phase-in period, but deferred issuing the long-term standard that would apply thereafter.[21] NHTSA assumed that the automakers, who preferred the slightly cheaper indirect systems, would comply during the phase-in using those systems, and by omitting the long-term standard, NHTSA gave manufacturers no incentive to do otherwise.[22] Thus, the NHTSA standard allowed use of a technology that did not satisfy the requirements of the TREAD Act and did not provide the higher level of safety and effectiveness that the agency recognized was feasible.

Although NHTSA was the expert agency specifically authorized by Congress and directed by the DOT Secretary to determine what technological approach best met the TREAD Act mandate for a TPMS, the OIRA Return Letter undermined and effectively superseded the agency's original decision. As a result of OIRA's interference, the performance standard that NHTSA had determined was reasonable, practicable, and appropriate[23] was not required by the 2002 final rule.

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[16] The draft final rule was submitted to OIRA on December 18, 2001. *Public Citizen*, 340 F.3d at 49. Highlights of the history and background of the TPMS rulemaking proceeding are set out in *id.* at 42-52.
[17] 67 Fed. Reg. at 38711-12.
[18] *Id.* at 38718.
[19] *Id.* There was ample evidence of record in previous NHTSA rulemaking actions, however, demonstrating that, in fact, contrary to OIRA's reasoning, no specific safety advantage can be found for passenger motor vehicles equipped with ABS. NHTSA, as a consequence, terminated a rulemaking that would have mandated ABS on all new passenger motor vehicles.
[20] *Id.* at 38712.
[21] The alternative TPMS would have been able to detect underinflation of 30 percent or more in any one tire, but not necessarily able to detect underinflation when it exists in more than one tire.
[22] *Public Citizen*, 340 F.3d at 55-56.
[23] The criterion the Secretary must consider under the Safety Act. 49 U.S.C. § 30111(b).

After a lawsuit by Public Citizen and others, a federal court of appeals determined that the final rule violated the TREAD Act's express mandate that the standard provide a warning to drivers when "a tire" was under inflated and, hence, was arbitrary and capricious.[24] Following remand, the agency issued a revised rule that reinstated the long-term standard originally contained in the 2001 draft final regulation sent to OIRA.[25]

The interaction between OIRA and NHTSA in the TPMS case resulted in a regulation that not only interfered with the reasonable outcome of a technically complex safety determination that was appropriately left to the expert agency, but also usurped the agency's role in interpreting its statutory mandates. NHTSA's interpretation of section 13 of the TREAD Act and its understanding of its safety obligations under the Act were, as a practical matter, countermanded by OIRA through its Return Letter. In sum, OIRA impermissibly interfered with the expert agency's authority to make both legal and technical determinations under the TREAD Act.

In addition, substantive review of agency regulations by OIRA facilitates an additional layer of lobbying contacts and communications that appear to have a chilling effect on the regulating agency. Because it is well known that OIRA exercises *de facto* authority to force agencies to make important substantive, procedural, and technical changes in proposed and final regulations that can alter or reverse the intended effects of a rule, special interests routinely meet with OIRA officials in an effort to influence the regulatory end-product. These meetings can occur after public comment periods have ended. This practice is bad for both policy and management reasons. First, it essentially allows for the creation of a confidential OIRA docket that stands separate and apart from the agency's public docket. Information sent to OIRA is not subject to the same public disclosure or review before the rule or proposal is published as are submissions to agency dockets. Unless OIRA makes the documents public or places them in the agency's public

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[24] The court found that indirect TPMS technology could not meet the statutory mandate because indirect TPMS cannot warn drivers when all four vehicle tires are significantly underinflated. The court stated that

> It is contrary to [section 13 of the Tread Act] to read the phrase, "when *a* tire is significantly under-inflated," to mean "when *one* tire, and *only* one tire, is significantly under-inflated," thereby excluding "approximately half" of the instances in which tires are significantly under-inflated . . . .

Public Citizen, 340 F.3d at 55. The court's construction of the TREAD Act provision was in harmony with NHTSA's view in the draft final rule that "[b]ased on the record now before the agency, NHTSA tentatively believes that the four-tire, 25 percent option would best meet the mandate in the TREAD Act[,]" 67 Fed. Reg. 38722, a conclusion that was further bolstered by the agency's reference to the comments of Congressman Markey, the sponsor of the TPMS amendment, regarding the issue of whether direct or indirect TPMS was needed: "Congressman Markey said that the intent of the provision was to require TPMSs that provide warnings in all instances of under-inflation, thus suggesting a preference for direct TPMSs, which can provide such warnings, over current indirect TPMSs, which cannot." *Id.* at 38723.

[25] 67 Fed. Reg. 18136 (April 8, 2005).

electronic docket, these communications remain private until after the issuance of a final rule.[26]

Second, private meetings of special interests and OIRA officials in the presence of agency staff effectively countenances *ex parte* contacts with the agency during rulemaking. Beyond that, such meetings have a highly coercive effect on agency staff if OIRA officials indicate any agreement with the complaints, criticism, or positions taken by the private interests during the meeting.

Although a record that a private meeting took place is posted on the OIRA website,[27] that posting does not obviate the problem. Communications with OIRA during ongoing agency rulemaking proceedings are often a direct appeal to OIRA to intervene to change a pending regulatory proposal, sometimes in the face of agency expertise and the weight of public comment and scientific research. Even if such meetings are not coercive, they still can have a chilling effect on the conduct of agency rulemaking. Because agencies are required to conduct rulemaking pursuant to the notice-and-comment requirements of the Administrative Procedure Act, OIRA should not maintain a parallel or shadow information-gathering and review process, especially while agency rulemaking is pending.

Abuse of Benefit/Cost Analysis

"Chilling Effect" of Benefit/Cost Analysis

Benefit/cost analysis (BCA) is intended to be used as a tool to assist agency policymakers in determining which policies are reasonable from an economic standpoint in providing optimal benefits in relation to predicted costs. Although we agree that BCA remains a potentially useful tool, the application of BCA has changed dramatically over the years. Instead of serving as a mechanism to provide useful information regarding policy choices and to make comparisons between options, BCA has been turned into an economic litmus test, and its status has been elevated to the point where it is often viewed as the decisive factor in determining whether safety and health policies and regulations can be issued. BCA has been leveraged by OIRA to justify sub-optimal safety benefits in the name of reducing "costs" for special interests—with the determination of such "costs" often based on data supplied by these same special interests. We do not believe that this outcome reflects Congress's intent in enacting various statutes protecting public health and safety or the original purpose of including BCA reporting in E.O. 12866.

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[26] In fact, E.O. 12866 §(6)(b)(4)(D) requires OIRA to make public only "documents exchanged between OIRA and the agency during the review[,]" not communications or submissions between OIRA and non-governmental interests.

[27] E.O. 12866 § (6)(b)(4)(C) requires that OIRA publicly disclose the status of regulations, a notation of all written communications forwarded to an agency, and the date(s), subject matter, and names of participants involved in substantive oral communications with non-executive branch officials, but does not require that minutes or transcripts of meetings be made available to the public.

The Safety Act authorized federal regulation of motor vehicle safety to protect the public. The Act does not require the Secretary of Transportation to conduct a BCA prior to issuing a regulation. Rather, it requires that safety regulations must be reasonable, practicable, and appropriate, not that their monetized benefits surpass monetized costs. Although Congress intended the term "reasonable" to require consideration of regulatory cost,[28] it never required a brightline BCA, where benefits exceed costs, to be exceeded in order to justify safety regulations. In fact, Congress recognized in passing the Safety Act that although economic costs were a factor, advancing motor vehicle safety was the overriding consideration in issuing motor vehicle safety standards.[29] This point was reaffirmed in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*,[30] the Supreme Court's definitive review of the Safety Act's balance between safety standards and cost considerations. Although the Court indicated that the Secretary must look at costs as well as benefits, it admonished that NHTSA must "bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act."[31] In fact, the Court directly stated that in balancing safety benefits and economic costs, the agency is required to favor safety in making its decision.[32]

Commercial motor vehicle safety regulation shares a similar history. The Motor Carrier Safety Act of 1984 (MCSA)[33] authorizes the establishment of minimum safety standards for many aspects of the operation of commercial vehicles (trucks and buses).[34] Although the MCSA directs the Secretary to consider costs and benefits[35] before issuing safety standards and regulations, it does not dictate that economic costs and BCA constitute the critical or determinative factors. Indeed, a decade and a half later, in establishing a separate agency within DOT to regulate and improve the safety of commercial vehicles, the Federal Motor Carrier Safety Administration (FMCSA),[36] Congress expressly made safety the new agency's highest priority.[37] The MCSA made

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[28] *Public Citizen*, 340 F.3d at 58 ("This qualifying language was added to ensure that NHTSA would 'consider reasonableness of cost, feasibility and adequate lead time.'") (citations omitted); S. Rep. No. 1301, at 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2709, 2714.

[29] S. Rep. No. 1301, at 6, 1966 U.S.C.C.A.N. at 2714.

[30] 463 U.S. 29 (1983).

[31] *Id.* at 54; *see also Public Citizen*, 340 F.3d at 58.

[32] As the Second Circuit put it: "*State Farm* instructs the agency [NHTSA] to place a thumb on the safety side of the scale." *Public Citizen*, 340 F.3d at 58.

[33] Pub. L. 98-554, Title II (Oct. 30, 1984).

[34] *See* 49 U.S.C. § 31136(a).

[35] 49 U.S.C. § 31136(c)(2) states: "Before prescribing regulations under this section, the Secretary shall consider, to the extent practicable and consistent with the purposes of this chapter—(A) costs and benefits[.]"

[36] Motor Carrier Safety Improvement Act of 1999, Pub. L. 106-159, Title I (Dec. 9, 1999).

[37] Section 101(a) of the 1999 Act provides:

> Safety as highest priority.—In carrying out its duties, the Administration shall consider the assignment and maintenance of safety as the highest priority, recognizing the clear intent, encouragement and dedication of Congress to the furtherance of the highest degree of safety in motor carrier transportation.

costs and benefits factors that must be considered in the rulemaking process, but the 1999 Act made clear, in a manner similar to the 1966 Safety Act discussed above, that safety would be the paramount factor guiding the agency's regulatory activities.

Despite the congressional prioritization of safety in these and other statutes, BCA has been used both by agencies and OIRA as a club to strike down safety regulations where economic costs (often based on data provided by the regulated industries) are argued to be unacceptably large and to justify the issuance of unsafe rules when economic benefits are asserted to overwhelm negative safety results. Over the years, important health and safety regulations have been killed or diluted both because OIRA has elevated the status of BCA as a determining factor and persistently required agencies to provide a clear economic justification for issuing safety standards, and because the agencies themselves now believe that their regulatory activities must be predicated on a positive BCA result before safety regulations can be issued. This ratcheting up of reliance on BCA as the primary if not exclusive means of regulatory analysis and justification has occurred incrementally to the point where it has now become the determining factor governing adoption of final rules.

Although E.O. 12866 requires agencies to submit benefit and cost information to OIRA, nothing in the E.O. itself warrants the use of BCA as the decisive factor in evaluating safety regulation. Section 6, *Centralized Review of Regulations*, sets forth the explanatory information that agencies must submit for significant regulatory action including agency assessments of benefits and costs and the underlying analysis and quantification of costs. The E.O. does not state that OIRA should use BCA in a manner that reverses agency decisions or that challenges, on a policy basis, the agency determination of safety benefits and costs. Indeed, Section 9 of E.O. 12866 states that "Nothing in this order shall be construed as displacing the agencies' authority or responsibilities, as authorized by law."

Nevertheless, agency proposed safety rules have taken a minimalist approach in recent years, in part, we believe, to accommodate BCA concerns and to satisfy OIRA oversight. One example is NHTSA's proposed rule on roof crush resistance.[38] Although rollover crashes constitute only about 3 percent of highway crashes, they account for almost one third of all occupant fatalities in light vehicles and more than 60 percent of occupant deaths in the SUV segment of the light vehicle population.[39] More than 10,000 vehicle occupants are killed and 24,000 are seriously injured annually in 273,000 non-convertible light vehicle rollover crashes that occur each year.[40] The deaths are largely due to partial or full ejection from the vehicle, but a sizeable proportion of victims are killed or injured due to trauma inflicted by roof crush and intrusion. In the recent rulemaking proceeding, NHTSA's analysis indicated that of this affected population,

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Codified at 49 U.S.C. § 113(b).
[38] 70 Fed. Reg. 49223 (Aug. 23, 2005).
[39] *Id.* at 49226-27.
[40] *Id.* at 49224.

about 596 deaths and 807 serious injuries annually, are related to roof crush.[41] To increase roof crush resistance, NHTSA proposed to amend the test protocol in the roof crush resistance standard by increasing the test from 1.5 times the weight of the vehicle (1.5 strength-to-weight ratio (SWR)), to 2.5 SWR. However, the potential safety benefits of the alternative options proposed by the agency would have been marginal at best, preventing only 13 of the 596 fatalities and 793 of the 807 serious injuries (39 equivalent lives saved annually),[42] or just 44 of the 596 fatalities and 498 of the 807 serious injuries (55 equivalent lives saved annually).[43] The fact that the calculated marginal safety benefits of the proposed rule are so limited is the result of the weakness of the proposal. The agency admitted that the proposed rule barely altered the status quo—7 of 10 current models tested by the agency already passed the 2.5 SWR test.[44] Because the majority of the vehicle fleet already meets the proposed standard, benefits would be minimal, but costs would also be small. The agency estimated a modest total cost to industry of between $88 and $95 million, with the cost to strengthen the roof of a noncomplying vehicle of only $10.67 per unit for the 30 percent for the minority of the fleet that would not already have passed the 2.5 SWR test.[45]

Although other aspects of NHTSA's analysis, and the assumptions governing it, may legitimately reduce the population of vehicle occupants that could benefit from the proposed rule, in this instance NHTSA proposed a rule that would offer limited potential safety benefits, apparently to ensure that costs would be kept low. This type of proposal demonstrates the problem that arises when safety agencies are primarily concerned with holding down costs rather than maximizing safety. In part, however, the proposal was a result of OIRA's insistence that agencies rely so heavily on BCA in adopting regulations, which encourages agencies to engage in this type of cost accounting rather than developing vigorous safety rules that can significantly contribute to reducing fatal and serious injuries. OIRA's preoccupation with an acceptable BCA that relies overwhelmingly on the cost side of the exercise, trumping safety improvements, induces agencies to limit the degree and range of safety benefits agencies believe they can propose. Put bluntly, agencies are intimidated to produce rulemaking proposals that impose only marginal cost increases on special interests and thus fail to fulfill their statutory obligations.

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[41] *Id.* at 49229. In comments to the agency public docket, safety and consumer groups disagreed with NHTSA's analysis of the roof crush problem and how many fatalities and serious injures could be prevented by a more stringent roof strength standard.
[42] *Id.* at 49242.
[43] *Id.* at 49243.
[44] *Id.* at 49231.
[45] Safety groups also believe that the proposed replacement of the existing 10-inch headroom requirement, *i.e.*, that at 1.5 SWR there must not be more than 10 inches of roof crush, with a no residual headroom requirement that fails to limit roof crush but requires only no contact by the roof with the head of the test dummy, further reduces the potential safety benefits of the proposed 2.5 SWR test protocol.

Unquantified Benefits

In conducting BCAs, agencies also generally include in the analysis issues that are not readily subject to quantification, such as quality of life and personal fulfillment. Our experience has shown that unquantified or unquantifiable items in standard BCAs are devalued or disregarded because agency and OIRA economists are unable to reduce those concerns to a monetized figure or range of specific economic values to balance against the costs claimed by the regulated entities. Quite frequently, the unquantifiable issues are benefits that would favor public safety or consumer positions in rulemaking situations. The fact that such matters are not given equal status or treatment with other items that can be quantified is a major flaw in OIRA's heavy reliance on BCA.

This problem played a prominent role in the protracted (and ongoing) confrontation over the truck drivers' hours of service (HOS) rulemaking conducted by the FMCSA. The final HOS rule adopted in 2003 dramatically increased the overall hours that truck drivers could drive and work during either a 7- or 8-day work cycle, as well as per driving shift, as compared to the previous HOS rule, last revised in 1962.[46] Although the agency is responsible under the 1984 Safety Act for ensuring that "the operation of commercial motor vehicles does not have a deleterious effect on the physical condition of the operators[,]"[47] FMCSA made no effort to quantify or even discuss the health effects on truck drivers of driving and working increased numbers of hours, leading the U.S. Court of Appeals for the D.C. Circuit to vacate the 2003 HOS rule.[48]

The court found that FMCSA was legally bound to consider factors, such as truck-driver health, that Congress required as part of the agency's deliberations. FMCSA had argued that the statutory language did not obligate the agency to protect the health of truck drivers "to the exclusion of other considerations such as the costs and benefits of the proposed regulation."[49] The court found, however, that including health considerations would not have forced the agency to exclude other factors. In this instance, the agency did not just fail to quantify the impact of its rule on the health of truck drivers; it ignored the issue completely.[50]

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[46] 68 Fed. Reg. 22456 (Apr. 28, 2003). The rule increased permissible driving hours in two ways—first, by extending the maximum consecutive driving limit from 10 to 11 hours per shift, and second, by allowing drivers who used up their complement of weekly driving hours, 60 hours in 7 days or 70 hours in 8 days, to return to driving after as few as 34 consecutive hours off duty when previously, drivers had to remain off duty until the end of the 7th or 8th day. In addition, the "34-hour restart" allows drivers to engage in significantly more non-driving work hours in 7 or 8 days than under the previous HOS rule.

[47] 49 U.S.C. § 31136(a)(4). The statute also specified allied concerns regarding the agency's need to ensure that "the responsibilities imposed on operators of commercial vehicles do not impair their ability to operate the vehicles safely[,]" *id.* § 31136(a)(2), and that "the physical condition of operators of commercial motor vehicles is adequate to enable them to operate the vehicles safely[.]" *Id.* § 31136(a)(3).

[48] *Public Citizen v. FMCSA*, 374 F.3d 1209 (D.C. Cir. 2004) (*HOS I*).

[49] *Id.* at 1216.

[50] *Id.* at 1217.

In its second HOS rulemaking, in 2005, FMCSA did not ignore issues of driver health. The preamble to the rule discussed a number of driver health-related topics, but FMCSA came to no specific conclusions about any of them and offered no monetized consideration of the benefits and costs of health impacts on drivers working and driving far longer hours was offered for public comment.[51] Many studies reviewed by the agency indicated that there are health problems associated with the type of shift-work performed by truck drivers.[52] FMCSA did not assert that health effects were nonexistent or not credible, but downplayed their importance. In fact, the agency argued not that health impairments may not occur, but rather that, because they are uncertain—strict dose-response data was not available—the real costs of such impairments were difficult to determine and hard to quantify. Because the agency would not or could not quantify the health effects of the HOS rule, it felt free to discard the health issues on the safety side of the BCA ledger, leading to a sharply skewed assessment of the benefits and costs of the regulatory options and allowing the agency to rationalize a decision in 2005 to adopt an HOS rule that again increased truck drivers' permissible driving and other working hours.[53]

The failure or inability of an agency to quantify a relevant factor can lead to downgrading that factor in the agency's policy analysis and ultimate determinations. For instance, a reduction in fatigue-related truck crashes could result in a lower level of anxiety for drivers of passenger vehicles each time they encounter a truck on a highway. A safer rule would also safeguard the well-being of family members of both truck drivers and other highway commuters who might otherwise suffer not-readily-quantified emotional harm from the death of or injury to a loved one. These "benefits" of a rule that maintains or reduces truck-driver hours were not considered by FMCSA and probably would not have been quantified had the agency done so. Yet issues that are not subject to monetary quantification can be the most important ones to the affected population. However, when an issue is not quantified and plugged into a cost analysis, economists and others give it little or no weight when evaluating a potential rule. OIRA should consider asking agencies to perform or submit a separate "Quality of Life" analysis that would provide a review of all the issues, or at least the unquantified issues, before the agency. OIRA must give such an analysis equal status with BCA as an analytic tool if agencies are to take unquantified issues seriously in the future.

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[51] 70 Fed. Reg. 49978 (Aug. 25, 2005).
[52] *Id.* at 49982-49992.
[53] Indeed, FMCSA did not include any driver health-related costs in its regulatory impact analysis. *See Regulatory Impact Analysis and Small Business Impact Analysis for Hours of Service Options*, FMCSA-2004-19608-2094 (Aug. 15, 2005). The same holds true for FMCSA's latest regulatory impact analysis accompanying the 2008 HOS rule, 73 Fed. Reg. 69567 (Nov.19, 2008). *See Regulatory Impact Analysis for Hours of Service Options*, FMCSA-2004-19608-3510 (Nov. 2008).

OIRA Review: Two-Way Mirror, One-Way Street

Finally, the HOS rulemaking proceeding provides a case study in the often unfair and unhelpful manner in which OIRA exercises its power to review agency rules. Although the HOS rule has been subject to OIRA review no less than five separate times, OIRA has not raised questions or concerns about the wisdom of the agency rule. Even though the Court's ruling in *HOS I* turned on the issue of driver health, a glaring failure by FMCSA to address a statutory factor specifically mandated by Congress, OIRA never pointed this failing out to the agency prior to its issuance of the initial final rule. The Court went on in *HOS I* to raise concerns about the final rule regarding the increase in the maximum consecutive hours of driving from 10 to 11 hours, the lack of logic to support the sleeper-berth exception, the failure to deal with on-board recorders, and the 34-hour restart provision.[54] Some of these issues raised obvious questions regarding the agency's failure to reconcile its prior statements and research with the positions taken in the final rule, to employ sound logic, or to properly explain its positions. Yet OIRA evidently did not provide suggestions or advice to improve the rule or to warn the agency about these concerns.

In the second HOS case, the court struck down the 2005 HOS rule, holding that FMCSA had committed "serious procedural error" in denying the public an opportunity to comment on the new model it used in its regulatory impact analysis to evaluate the costs and benefits of increased driving hours.[55] The court went further, however, explaining that our critique of the model demonstrated that FMCSA had failed to provide an adequate justification for its decision to adopt the 11-hour consecutive driving limit and the 34-hour restart provision.[56] Although OIRA provided assistance in drafting portions of the agency justification for the rule in the regulatory impact analysis,[57] OIRA did not notify the agency of the potential problems with the proposed final rule in its second review of the HOS rule. There was no return, prompt, or review letter to FMCSA making these important points.[58]

The conclusion to be drawn from these examples is clear: OIRA review does not add value to the regulatory process. Its appropriate role, however, should be equally clear. OIRA review should be used, if at all, solely to ensure that agencies adopt coherent and coordinated regulatory policies and follow rulemaking procedures. OIRA review should not be used as an instrument for advancing the aims of special interests or to ensure the success of positions that could not be secured from the agency during the normal course of agency rulemakings proceedings. OIRA's advocacy for special interests often usurps congressional prerogatives by substituting ad hoc judgments and

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[54] *HOS I*, 374 F.3d at 1217-1223.
[55] *Owner-Operator Indep. Drivers Ass'n v.* FMCSA, 494 F.3d 188, 199-203 (D.C. Cir. 2007) (*HOS II*).
[56] *Id.* at 203-206.
[57] *See Regulatory Impact Analysis and Small Business Impact Analysis for Hours of Service Options*, FMCSA-2004-19608-2094 (Aug. 15, 2005), and FMCSA-2004-19608-2118 (redlined version).
[58] *See* databases available at http://www.whitehouse.gov/omb/inforeg_regmatters/#rr.

determinations by OIRA acting as a super-agency willing openly to subvert the fulfillment by the expert agencies of their statutory responsibilities to protect public health and safety.

Sincerely,

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Advocates for Highway
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Bonnie I. Robin-Vergeer
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