Letters

We welcome letters from readers, particularly commentaries that reflect upon or take issue with material we have published. The writer's name, affiliation, address, and telephone number should be included. Because of space limitations, letters are subject to abridgment.

Economic Impact Statements

TO THE EDITOR:

James Miller's charitable assessment of the Economic Impact Statement Program (*Regulation*, July/August 1977) makes a number of sound points. But the article overstates the program's impact on regulatory decision-making and ignores some of the serious implementation problems inherent in requiring agencies to assess the economic impact of their new regulations.

Mr. Miller fails to document the "substantial effects" on regulatory decision-making he attributes to the program. For example, Barry Bosworth, current director of the Council on Wage and Price Stability, noted in testimony before the Senate Committee on Banking (December 1976) that although the requirement "has merit in concept, . . . in practice there has been little value to these statements. In almost every case . . . inflationary impact statements have been issued after the regulations have already gone into effect."

Mr. Miller also appears to ignore the inherent opposition any superimposed impact statement program will face. No less an experienced authority than former CWPS Director William Lilley has recognized this problem. He noted in testimony to the House Banking Committee (December 1976) that CWPS encountered "enormous opposition . . . the most bitter kind of resentment" among agencies. "It took us over a year to get the agencies simply to agree on what criteria were necessary to determine a major regulation as opposed to a nonmajor regulation. Since then we have had, depending on the agency, more or less degrees of cooperation. Some have been terribly bitter and hostile. . . ."

Recognition of such problems is crucial if any improvements in the program are to be made. For example, Miller's suggestion for reviewing existing regulations is a reasonable idea in theory, and indeed this proposition is embodied in the fashionable proposal for "sunset" review of regulatory agencies. But real problems must be faced in getting agencies to implement such reviews. As William Lilley pointed out when asked if sunset reviews were possible: "I don't know how you would get at that. If I were head of a line agency, I could make an awfully compelling case . . . that this would be a license to bring me to a stop . . . such a power . . . would have to be used justly and carefully."

Rather than reviving the Economic Impact Statement Program, the effect of which was tenuous at best, CWPS might instead concentrate its efforts on its statutory authority to intervene in formal rulemaking, ratemaking, and licensing proceedings. CWPS has exercised considerable clout in a number of these interventions: FDA withdrew shellfish regulations, CPSC revised its matchbook regulations, and William Coleman's original airbag decision was revised, all in response to CWPS statements in the regulatory proceedings or before Congress. Such selective intervention in major regulatory matters is likely to have greater impact with fewer bureaucratic snafus than the requirement of "boilerplate" economic impact statements.

Kathryne L. Bernick,
American Bar Association

JAMES C. MILLER III responds:

Ms. Bernick and I have an honest difference of opinion concerning certain aspects of the Economic Impact Statement Program—and this is troubling since I know she has just completed a thorough assessment of it for the ABA. But I conjecture that our differences are more apparent than real. To wit:

(1) The "substantial effects" of the program often did not flow from the agency's relying on the analysis at the proposal formulation stage, but rather from the agency's knowing it eventually would have to expose its proposal to the sunshine of such analysis.

(2) That we experienced opposition was, in many cases, seen as an indication that the program was having an effect. ("A hit dog hollers.")

(3) CWPS spent a much larger portion of its resources on intervening before regulatory agencies than on monitoring Economic Impact Statements. But agency impact statements often enabled CWPS's filings to be of higher quality and to have more impact than otherwise.

Change at the ICC?

TO THE EDITOR:

In his discussion of President Carter's regulatory reform program (your October/November issue), David Gergen unduly slights the efforts of Chairman Daniel O'Neal of the Interstate Commerce Commission and gives insufficient credit to the agency's Staff Task Force Report, *Improving Motor Carrier Entry Regulation* [see *Regulation*, September/October, p. 41].

The notion that reform of trucking regulation cannot be achieved without legislation is preposterous. The fatal flaw in the Ford administration's proposed Motor Carrier Reform Act, as in several of its predecessors, was that it addressed alleged abuses of motor carrier regulation that for the most part are within the ICC's power to correct. Whether it be rate bureaus, aircraft exemptions, private carriers, contract carriers, commercial zones, new plants, entry, common carrier rate suspension or what have you, all are appropriate areas for the commission to address and perhaps take action.

That the ICC now proposes to grapple with these subjects should have evoked plaudits from Mr. Gergen. To be sure, so far the commission has only initiated rulemaking proceedings and has yet to adopt any significant reforms. And, of course, a commission empowered to act wisely in effecting motor carrier regulatory reform has no less authority to act unwisely at some later time.

However, recent congressional enactments in the area of transpor-

tation regulation give little encouragement that the legislative process is any more likely to achieve effective regulatory reform than is administrative action. If Chairman O'Neal and a majority of the commission now are prepared to take a go at it, they merit every encouragement.

Fritz Kahn,
Partner—Verner, Liipfurt, Bernhard, and McPherson

The Products Liability Storm

TO THE EDITOR:

Professor Epstein's incisive article, "Products Liability: The Gathering Storm" in the September/October issue of *Regulation* is an important contribution to understanding the products liability dilemma faced by American business.

It is apparent that there are those who believe that redefining tort liability will lead to a risk-free consumer environment. In the process, society will experience enormous costs in both dollars and personal freedom.

I might add that for many manufacturers the products liability burden has advanced *beyond* a gathering storm. A recent survey of American manufacturing firms found that the number of products liability claims increased 440 percent in the last five years. Meanwhile, the cost of those claims rose over 700 percent, from an average of $434,000 per firm to more than $3.5 million. In contrast, the cost of living rose 43 percent during the same period!

The estimated cost to the nation arising from products liability suits, insurance, and litigation approached $20 billion in 1975, and according to The Conference Board, will exceed $30 billion by 1980. What sort of claims are we all paying for? Let me cite an example.

A jury recently awarded $2.5 *million* to a man who was injured when he was near an FMC crane that was rammed into a high voltage line. The crane had been built and delivered *in 1957, according to detailed specifications of the customer.* For thirteen years it was operated without a complaint in a major metropolitan area. At the time of the accident, the crane was in use far from its usual location and its operator *admitted* he was working without customary safety precautions. Nevertheless, FMC was found liable for the accident.

In short, products liability has become a harsh reality which is extracting a significant toll in the form of less competition, fewer product innovations, and lost jobs.

Robert H. Malott,
Chairman,
FMC Corporation

TO THE EDITOR:

In his article, Richard Epstein asserts that "products liability law as fashioned generally through the late 1960s represented a mature and sophisticated set of judgments about appropriate liability rules. If those rules were still operative today, there would be no popular concern, no expert studies, and no cry for legislative reform." And yet the 1970 report of the National Commission on Product Liability (based on the situation prevailing in the late 1960s) characterized the products liability insurance system as one where "most injuries to consumers [from manufactured products] go uncompensated"; thus, "to advise a battered consumer to sue," said the commission, "may simply add insult to injury." Other studies indicate not only that payment is scanty, but that it is long delayed, with most of the money being chewed up in insurance overhead and legal fees. And to crown all this, a sophisticated study commissioned by the Consumer Product Safety Commission concluded that "products liability litigation usually has little direct impact on product design or warning decisions."

So much for Professor Epstein's "mature and sophisticated liability rules" which, if operative today, would dispel any concern. And what has happened since the 1960s? Professor Epstein would have the reader believe that we now have an indiscriminately generous system showering undeserving claimants with largesse. But according to the just completed report of the Interagency Task Force on Product Liability, (1) defendants win 72 percent of all cases that go to verdict, (2) the average payment dollar for both settled and litigated cases is for a claim that takes sixty-nine months to close, and (3) litigation expenses of plaintiffs and defendants consume 75 cents of every dollar of benefits. The reason for this continuing nightmare is that the claimant must still prove the defendant's *product* faulty (defective), even though it is no longer necessary to prove the defendant's *conduct* faulty (negligent).

Professor Epstein is right to focus on the weakness of the present products liability system and the burdens it causes. His mistake is to focus so disproportionately on the burdens imposed on industry, whether now or in the 1960s. In fact, the burdens on injured parties were and are, if anything, much greater. This explains the basic problem with the legislative package formulated by the American Insurance Association in consultation with Professor Epstein: it contains six fundamental proposals, each of which would reduce or deny benefits to injured parties and none of which, as a practical matter, would aid the injured. In an age of burgeoning consumerism, legislators are unlikely to leave the solution of the ills of insurance to those who see hope only in narrowing—not broadening—insurance protection. . . .

Nor is it very helpful when Professor Epstein says, "A comprehensive system of first party insurance [such as health insurance] that compensates each person in accordance with the severity of injury seems clearly preferable if 'needs' alone are to be taken into account." Even assuming we get and want national health insurance, it will cover only 21 percent of personal injury losses in product liability cases; the rest of those losses come from lost wages (74 percent) and other expenses (5 percent).

Why not try to make use of product liability dollars under a no-fault scheme as we do with workers compensation and no-fault auto insurance? I propose as a start that casualty insurers write disability insurance paying no-fault benefits to insureds to cover their wage loss and medical expense in return for an assignment, at the time the no-fault coverage is bought, of their fault-based claims. Such insurance would be payable only to the extent that victims' losses exceeded any health insurance or sick leave they already had in effect. In other words, proceeds from fault-based claims would be used to fund the no-fault benefits. In this way, many insurance dollars now being misused under the fault-based system could be shifted to a more sensible insurance arrangement.

At any rate, it is perhaps not surprising that a viewpoint that looks backward to the 1960s (or any other date) for an exemplary product liability insurance system comes—and I say this with a smile to my friend, Dick Epstein—from the University of Chicago.

Jeffrey O'Connell,
University of Illinois Law School

RICHARD EPSTEIN responds:

I have read with great interest the letters of Mr. Malott and Professor O'Connell. To Mr. Malott I can only respond "thank you and amen." Professor O'Connell's letter is a different matter. I shall content myself with four of Professor O'Connell's observations that go to the heart of our disagreement.

(1) *"Most injuries to consumers [from manufactured products] go uncompensated."* True, but the implications are problematic, unless it is first established that compensation is invariably appropriate in product-related cases. Until we know which accidents deserve compensation and which do not, Professor O'Connell's chilling pronouncement is devoid of policy implications. I do not think compensation is appropriate in the cases set out in my article and I do not think it appropriate in the case (as I understand it) given by Mr. Malott. Professor O'Connell, alas, never gets down to particulars of this sort and he never tells us where he disagrees with the specific points in my analysis. His indifference is unfortunate since all signs point to the retention of the tort system in the products area for a long time to come.

(2) *"Payment is scanty . . . long delayed" and "defendants win 72 percent of all cases that go to verdict."* True on all counts. But the reasons are not those that Professor O'Connell gives. The problem is not that the plaintiff must prove some product defect. Surely even Professor O'Connell does not think the manufacturer of a kitchen knife should be held responsible for a gangland killing, even if the killing is "product-related." The real question is what counts as a defective product. No genius is needed to find a defect when barbed wire turns up in ice cream, and too much genius is needed to find one when the defendant's machine is unable to withstand the blows of sledge hammers and crow bars. Place sensible controls on design-defect and duty-to-warn litigation and the problems Professor O'Connell notes will surely be brought under better control. As plaintiffs learn they have no chance of recovering in outlandish cases, the good sense of the jury will not be needed (as it is in many major cases today) to protect defendants against the absurd consequences of present liability rules. And note, it is a great tragedy for the legal system that many of these cases are even filed, even if won by defendants after time-consuming and expensive litigation.

(3) *"The burdens on injured parties were and are, if anything, much greater [than on industry]."* We have here yet another restatement of the philosophy of universal entitlement, but Professor O'Connell never explains what relative hardships have to do with product liability rules. My article does not say reform is needed simply because manufacturers are being hurt —far from it. Rather, the article points out that the expansion of products liability law has been and continues to be on its merits unwise and unjust. The six proposals (actually there are now eight) of the American Insurance Association, with whom I work, is our effort to find the sensible middle ground in products liability situations. I invite those interested in judging their contents to send for a copy to Mr. Dennis Connolly, American Insurance Association, 85 John Street, New York, New York 10038. In many cases the package offers detailed statutory drafts to implement reform viewed favorably by the Interagency Task Force on Product Liability to whose work Professor O'Connell referred. It would be tragic indeed if consumerist slogans controlled the debate on important public issues. Consumers have much to lose in terms of the safety, price, and variety of products that will be available if the judicial excesses in the products liability area are not curtailed.

(4) *"I propose as a start that casualty insurers write disability insurance paying no-fault benefits to insureds to cover their wage loss and medical expense in return for an assignment . . . of their fault-based claims."* I am at a loss to see what this new form of first-party insurance will do for anyone. For the injured party, it segregates product-related accidents from all other accidents, when the level of compensation needed is the same in all cases; and it adds a layer of administrative cost that reduces the total proceeds available for compensation. For the manufacturer, it means only that an insurance company, proceeding under subrogation, will replace the injured party as plaintiff. Yet the suit will be governed by the same unwise theories that have led to today's unfortunate consequences. The proposal does nothing to get at the root cause of the problem—bad rules for products liability situations.

Professor O'Connell notes with a smile that any proposal that looks backward in time is likely to come from the University of Chicago and I with a pained grimace reply that it is better to confess error today than to perpetuate it tomorrow in the shiny new package of no-fault insurance reform. Professor O'Connell cannot properly lump together all products liability systems and assume that they all share the same undesirable features. His vigor and energy would be better directed to the legal problems internal to the tort system.

About Airline Regulation

TO THE EDITOR:

Discussions of air transport policy usually begin with an assumption that there are two sides to the argument, one being represented by the route-certificated carriers (pictured as fat-cat industrialists who, in league with a submissive CAB, want to make sure their "shared monopoly" is perpetuated), the other by politicians and academic economists (pictured as naive champions of small business and consumers who, in league with nonscheduled carriers, seek to destroy the airline industry in the name of "free competition").

So went the colloquy among Messrs. Casey, Colodny, Kennedy, Muse, and Robson in "Competition in the Airlines?" (*Regulation*, November/December). But there is a third—and I think correct—view not associated with either the route-certificated industry or its opponents.

The difficulty with the classical model of market competition is that this kind of competition does not really exist. When former Chairman Robson notes that the big insurance companies invest in unregulated industries rather than in the airlines, he fails to note that the big industries are dominated by large companies (usually three or four). As oligopolies, they are able to extract "administrative" or "target" prices from consumers, thereby ensuring that they can earn attractive profits and raise much of the capital they need for expansion. The airlines have capital problems because fares are set lower than an oligopoly would normally set them, thereby preventing capital accumulation.

In all other respects, however, the airlines compete, and bitterly, for *shares of the market*. The mode of competition is precisely the same as

in unregulated oligopolies. When Senator Kennedy ridicules competition in "sirloin steaks, . . . flight attendants, and . . . movies," he ignores the fact that unregulated oligopolies do the same thing—as when, for example, oil companies build many more stations than are needed just for the sake of staying abreast of competitors' market shares. Thus, the most likely result of deregulation would be the emergence of an unregulated oligopoly, and this would mean higher (not lower) fares and the *same empty seats.*

The classical model of market price competition is a myth that, when instituted, leads only to social chaos. The nearest examples we have to "perfect competition" have been in such industries as agriculture and textiles, where the inevitable chaos is staved off only by other forms of regulation (tariffs, quotas, payments for nonproduction, and so on). I have asked many times, but I have yet to hear a deregulator specify a single industry that operates in accordance with the cherished myth of competition.

More important to the issue is the energy problem, which has suddenly overtaken us all. It is absurd to advocate all-out expansion of flying in the face of a need to drastically conserve energy *everywhere.* It is not a case of arguing, as does Mr. Muse, that flying uses less energy than driving. We have no choice but to face the need for some kind of "pooling" of airline services on a *global* basis, one which looks upon the industry as a public utility, regulated on a city-pair *monopoly* basis, worldwide. And we should not fear this as much as the purveyors of conventional wisdom would have us fear it, since the cost record of regulated public utilities (and even the airlines) is far superior to that of the unregulated sector.

Hopefully, the policy issues will not forever be submerged under the rhetoric of mythological market economics. We do not need more competition in the airline industry, nor the amount we have now, but *none.*

Frederick C. Thayer,
University of Pittsburgh

On "Regulators and Experts"

TO THE EDITOR:

James C. Miller III's "modest proposal" on "Regulators and Experts" (November/December issue) looks at the relatively new problem of scientific dispute before regulatory agencies and comes up with an old solution: "let's kill the lawyers." At the risk of appearing a parochial representative of the Washington bar, I question whether Mr. Miller's proposal would improve the regulatory process or simply mask the real issues and delay their solution.

As the table compiled by Mr. Miller clearly shows, the fact that expert cross-examination of experts is permitted in at least seven regulatory agencies has not led to its regular use. While Mr. Miller may attribute this situation to "the common reluctance of attorneys who represent parties to allow the direct participation of nonattorneys in agency proceedings," it is unlikely that attorneys would or could impose the burden of ineffective cross-examination on a client free to choose alternate representation. Since the real parties in interest, the clients, apparently believe that attorneys, rather than experts, will better conduct cross-examination, Mr. Miller's proposal could be implemented only by a *compulsory* requirement for expert cross-examination.

Moreover, the hard questions in scientific evaluation of regulatory issues are whether regulatory agencies are capable of resolving scientific disputes, no matter how well presented, and whether the adversary model of developing a record through a question-and-answer process is suitable for the presentation of scientific issues. Mr. Miller skirts the first question (to which the proposal of a science court *is* addressed) by making his proposal applicable "once agency officials have identified the critical technical questions." However, experience in the regulatory arena shows that it is the chronic inability of regulatory agencies to define the relevant scientific issues which permits opposing parties to create the appearance of scientific conflict and to hamper the regulatory process by injecting masses of scientific or pseudo-scientific evidence on questions that do not need to be answered. The remedy for this shortcoming lies not in the cross-examination process but in the narrowing of issues before the hearing and in the effective use of scientifically trained agency staff to assist the agency and its hearing officers in limiting the hearings to relevant issues.

Mr. Miller's proposal ignores the second question by conceding that a formal question-and-answer technique is the best means of presenting scientific views. This assumes that scientific views are facts comparable to the observations of a witness to an automobile accident or the presentation of basic data from company accounts. In fact, however, the most important contribution of scientific witnesses is often theoretical explanation of agreed data or theoretical speculation on the future consequences of stipulated events. Perhaps what Mr. Miller should examine is whether such matters should be debated, as lawyers argue legal theories, rather than presented by examination.

I believe that a panel discussion technique for scientific witnesses would permit immediate, direct confrontation on critical scientific issues and would make a far larger contribution to Mr. Miller's objective than expert cross-examination of experts. Mr. Miller is certainly aware that experts work closely with lawyers in preparing cross-examination today. Substituting the expert for the lawyer as the "front man" in the process may enhance the expert's ego, but I doubt very much whether it would improve regulatory results.

Bert W. Rein,
Washington, D.C.

TO THE EDITOR:

It would appear that the medicine which you prescribe in "Regulators and Experts" is for the symptom and not for the disease. You are correct in noting that government policy-makers are often confronted with decisions and must turn to themselves and ask: "How are we to judge?" Yet you are in support of increasing the bureaucracy, rather than lessening it, by establishing "science courts or panels" or by increasing time devoted to cross-examination and the size of such staffs.

Instead, may I suggest that you combine "regulators and experts" in the same individual. It would seem that this would then put the burden on both the executive and legislative branches of government (advise and consent) when selecting people who know "how they are to judge." . . . If the experts were in fact the regulators, would they not have to provide justification for their regulatory decisions in order to maintain peer credibility? Ultimately, it would seem that the right people working within the existing federal structure could be the winning combination.

C. Hugh Thompson, P.E.
Batelle Memorial Institute