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.

Compensation Programs

TO THE EDITOR:

In his insightful article, "Compensating Victims of Policy Change" (*Regulation*, September/October) Robert Goldfarb correctly points out that any explicit rationale for awarding compensation would likely be unable to contain pressures for even broader generosity. This warning applies particularly to the argument most often heard for compensation: that it would facilitate desirable policy changes otherwise difficult to accomplish. Adherents to this theory should recognize that compensation can also facilitate policy changes they might view as undesirable. Indeed, the ability of a compensation program to silence the opponents of policy change may be the strongest argument against it.

Often the deregulation of an industry is cited as an example of the kind of policy change that could be effected more smoothly with compensation. But if victims of deregulation were routinely compensated, could the victims of *increased* regulation be turned away? Section 25 of the Toxic Substances Control Act orders EPA to report to Congress on the desirability of indemnification (compensation) for victims of environmental regulation. (This study is now overdue.) Indemnification presumably could apply to stockholders who were injured, as well as to jobholders. One can imagine regulatory agencies using public funds to buy a consensus: paying proponents of stricter regulation to argue in favor of it, through intervenor funding, while paying the victims *not* to argue against it, through indemnification.

Fiscal expenditures are already out of control because their cost to individual taxpayers (and voters) is so diffuse. The visible anguish and cries of protest of the victims of regulation appear to be the most effective constraint on excess regulatory zeal; let us not smother them by shifting regulatory costs to the shoulders of the already overburdened taxpayer.

Brian F. Mannix,
Council on Wage and Price Stability

TO THE EDITOR:

. . . Goldfarb points out that demands for compensation in many programs have expanded far beyond their originally intended boundaries, and that other programs have created disturbing incentives to engage in uneconomic behavior. This does not mean, however, that the government should abandon its efforts to compensate the victims of policy changes. *Any* change in policy will produce both winners and losers, and when the losers are numerous, or well-positioned politically, they usually succeed in blocking an uncompensated policy change even when the aggregate benefits of that change are very large in relation to their own losses.

More important, even when prospective losers are *not* numerous or well-positioned, they are still often able to block changes because of the very high premium our society places on what we may call "incumbency rights." The sentiment that underlies our legal maxim that "possession is nine-tenths of the law" also causes our political system to weigh the rights of parties adversely affected by policy changes much more heavily than those of parties who stand to gain. In view of these implied incumbency rights, carefully designed compensation programs are often the *only* practical way to achieve policy changes that pass even the most conservative cost-benefit standard.

Many of the flaws in the compensation programs Goldfarb discusses stem from our tendency to stress fairness as the exclusive rationale for compensation. These problems could be reduced sharply if we would eschew fairness altogether as an explicit rationale for compensation and adhere instead to the following rule of thumb: When an output-increasing policy change can be achieved politically without the use of compensation mechanisms, we should not use them; but when change is politically impossible without compensation, we should arrange lump sum payments of as small a size as is politically necessary to achieve the policy change.

Such a rule would help to close Goldfarb's Pandora's box, whose lid is currently propped open by our nearly exclusive reliance on explicit fairness considerations. No longer would consistency require that we track down secondary and tertiary victims of policy changes and debate what it would take to make them whole again. Nor would we be forced, say, to pay compensation only to those workers who remain unemployed after a trade liberalization on the grounds that it would be unfair to compensate workers who quickly found new jobs. Instead, efficient severance payments could be used in place of open-ended unemployment benefits to win union acceptance of trade liberalizations.

This would not eliminate fairness considerations from the compensation debate. Indeed, under the proposed rule, victims of policy changes would voice their demands for compensation through the political process in much the same way as they do now. The effect of the rule, to the extent that it enjoyed broad support, would be to clarify the policy debate and make it easier than it currently is to say no to compensation demands that have built-in incentives for inefficient behavior.

Would it be possible to secure broad political acceptance of the proposed rule of thumb? Two fundamental considerations suggest that it would. First, it is in the interest of all parties to agree *ex ante* to policy guidelines that discourage inefficient behavior. The larger the pie, the larger everyone's slice is likely to be. Second, those groups with the greatest political influence, and thus those whose support for the proposed rule would be most necessary, are those least likely to be threatened by the rule.

Some may complain that the proposed rule is a cynical exercise in *realpolitik* that shortchanges the legitimate rights of the politically downtrodden. They should remember, however, that our current focus on nominal fairness has prevented us from making output-increasing policy changes in a host of different areas, which is itself unfair to the overwhelming majority who would benefit from such changes. We may also bear in mind that ours is a society that has always shown compassion toward the disadvantaged, never more so than in times of rapidly growing national output. Any policy that makes it easier to achieve output-increasing changes should therefore make it easier to achieve commonly held equity objectives.

Robert H. Frank
Cornell University

TO THE EDITOR:

Most economists have had the lesson drummed into their heads that a policy change can be said to lead to an actual (as opposed to a potential) improvement in welfare only if compensation is paid to losers. Robert Goldfarb's article raises many thorny philosophical and practical issues which proponents of any compensation plan must confront.

The subject is particularly important since the government now awards compensation rights not only when it acts, but when it fails to act. For instance, the Trade Act of 1974 compensates workers and firms that are displaced when the government fails to impose new import curbs such as orderly marketing agreements and trigger prices. (Compare this with a narrower standard which would grant compensation only when tariffs are actually reduced.) TAA payments have accordingly ballooned into a program with estimated expenditures of $4 billion in fiscal 1981 (*Wall Street Journal*, November 14, 1980).

Yet we should evaluate the current TAA program in light of the high cost of alternative policies. Thus, a recent FTC analysis has estimated that the auto import restrictions proposed by Ford and the United Auto Workers would cost consumers $4 to $6 billion annually. Allowing for similar losses in other industries that demand protection would put current TAA expenditures in a more balanced light....

Postponing a decision to deregulate or to pursue freer trade not only requires us to forego benefits, but, as Goldfarb recognizes, may do nothing to reduce future demands for compensation. In particular, if a new cohort of workers is attracted into a protected industry, the demand for compensation could grow as it is postponed.

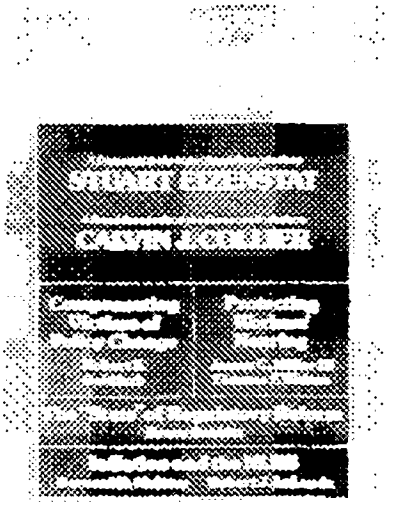
While it is clear that compensation plans raise a myriad of difficult design problems, scrapping the whole concept would eliminate a potentially useful economic policy tool.

John Mutti
University of Wyoming

ROBERT GOLDFARB responds:

All three letters make useful points. Mannix ingeniously identifies a hidden danger in using compensation as a policy tool that had not occurred to me. Frank stresses the fact that, despite all the pitfalls inherent in compensation policy, it may still be a useful tool in certain cases. He argues that many pitfalls could be minimized if compensation were not used as a "fairness" device; instead, compensation should only be used for political buyout purposes, and only when (desirable) change is politically impossible without compensation. Moreover, the compensation that is paid should be as small as politically possible (and lump sum). I strongly agree that this type of limitation on compensation policy is desirable. However, I am skeptical about the ability of the political system to successfully impose it. It is just too politically tempting to give out goodies when harm is claimed. If my skepticism is correct, the issue becomes an empirical one. Assuming that we have the political choice of *sometimes* using compensation policy versus *never* using compensation policy (a choice we may not in fact have) and assuming we try our political best to enforce Frank's limitations on compensation applicability, will net benefits from appropriate use of compensation outweigh net costs from inappropriate uses? Reasonable observers may well disagree on the answer to this question.

Mutti's letter provides an interesting counterpoint to Frank's. Mutti, like Frank, argues that despite its various difficulties, compensation policy may be useful in some cases. He cites TAA as an example of a program that looks expensive, but may in fact be a worthwhile "deal" since it may have forestalled the imposition of much more costly import restrictions. This line of argument seems to suggest two important questions: (1) Has TAA *in fact* significantly lessened effective protectionist pressure? Mutti is far better equipped to answer this question than I am, but recent newspaper accounts of pressure for automobile protectionism from organized labor do not leave me convinced that the 1974 Act was highly effective in limiting pressure for protectionism; and (2) Even if TAA has in fact lessened effective protectionism, has it met Frank's demand for "efficient buyouts"? That is, does the current TAA program appear to be a "least cost" way of buying acquiescence to not increasing trade barriers? I'd be surprised if the answer were "yes." In any case, both questions seem to me to deserve careful study.



Inflation and the NLRB

TO THE EDITOR:

Bernard D. Meltzer and Robert J. LaLonde, in "Inflation and the NLRB," (*Regulation*, September/October) have put their fingers on a little-noted means by which inflation broadens the scope of national labor law regulation: the dollar business volumes used by the NLRB to define the minimum scope of its jurisdiction over employers, figures which Congress froze into a statutory mold in the Landrum-Griffin Act of 1959.

An important theme in recent

analysis of the NLRB is the urgent need for deregulation. Typically, this debate is conducted with reference to qualitative board doctrines—particularly the extensive battery of regulation of election campaign propaganda. . . . Meltzer and LaLonde show how inflation has been producing a continual quantitative expansion of the scope of board regulation as it erodes the real value of the monetary standards fixed more than two decades ago (in the days of relative price stability of the fifties).

Almost in passing, the authors seem to endorse indexing the board's jurisdictional standards as a remedy. I agree that we do need to ration the scarce resources of national labor law and administration. I also agree that if we are to adopt monetary criteria for this purpose, then we should use some index or other to preserve the real, not simply the nominal, value of the figures we initially select. I suggest, though, that as and when Congress addresses this problem, it should rethink the issue of whether the amount of business a firm does (e.g., a $500,000 sales volume for department stores) is the proper criterion for determining whether its employees are to be protected from discriminatory anti-union firings or its business is to be protected from secondary organizational picketing.

Of course, one could reply that these jurisdictional limits do not evidence a substantive judgment about the appropriate legal rights of employer and employee in small businesses. Rather they reflect a view only of the proper reach of federal law, and thus leave it to the states (explicitly under Section 14(c) of the NLRA) to step in to fill the vacuum. The problem is that too many of the states have not done so. One reason is that under the current constitutional and statutory interpretation of federal power under the interstate commerce clause the national labor law penetrates so deeply into the world of employment (even in terms of 1959 dollars), that it has left the states little or no incentive to provide sophisticated legal and administrative protection for the marginal situations which elude this federal net.

Indexing the jurisdictional standards to the rate of inflation would simply reinforce the current pattern. I prefer quite a different approach. There should be a radical hike in the floor of the NLRB's jurisdiction: to somewhere on the order of $10 million business volume or 500 employees. But this self-limitation of federal labor law should apply only in regard to those states which actually do exercise their right to enact a comprehensive labor statute, one which addresses the relevant problems within the principles of the NLRA (although certainly not with slavish imitations of the latter's detailed rules). I know that there are serious issues to be faced in working out any such approach, issues which cannot be dealt with in a letter of this length. But I believe this tack does exhibit two important virtues lacking in the current setting. First, there would be a major, not just a marginal, contraction in the work of the NLRB which would enable the latter to focus its resources and energies in faster and more thoughtful disposition of the caseload which it retains. Second, we would invite the states back into the business of labor law reform, in an effort to break the current logjam at the national level. The Agricultural Labor Relations Act enacted in California in the mid-seventies shows that the states, if given the opportunity, can devise innovative approaches to the perennial problems of private sector labor law (such as union access to workers, expedited elections, and so on). I hardly think it likely that there would have been an ALRA if California had been left with jurisdiction only over the smaller farms which fell beneath a national monetary standard for the NLRB's jurisdiction, even if that standard were indexed to the rate of inflation.

Paul C. Weiler
Harvard Law School

BERNARD MELTZER responds:

Our article was concerned essentially with the impact of inflation on the NLRB's jurisdiction. Professor Weiler's proposals are more ambitious — and interesting — and they call for a bit of background.

The Taft-Hartley Act permitted the NLRB to cede jurisdiction to state agencies unless it found the pertinent state and federal provisions to be inconsistent. The NLRB, however, never found the requisite conformity. The areas which the NLRB itself declined to regulate were also held to be beyond state authority, thus creating the notorious no man's land, which was eliminated in 1959.

Professor Weiler's more flexible proposal has the defects of its virtues. First, since the NLRA states its "principles" with a pliable generality, their actual impact depends critically on continuing interpretation as well as on procedural rules. The tribunal or tribunals (which, incidentally, he does not specify) examining state conformity to federal principles could, of course, stress merely the verbalistic conformity of state and federal statutory provisions. But if such a tribunal were also to compare the actual impact of the whole body of federal and state decisions, complex controversies would proliferate, without clear-cut legislative standards for resolving them. After all, one man's "detail" is another man's "principle." In any event, it is unclear what effect his proposal would have on the jurisdiction of the approximately 15 existing state labor boards. What is reasonably probable is that cases excluded from national jurisdiction arriving in "non-conforming" states would once again be relegated to the limbo of no man's land.

Second, his proposal would further complicate state adjudication, since a state agency would often face the risk that deviation from federal principles in a particular case might destroy state jurisdiction.

Finally, Professor Weiler's proposal lacks any clear grounding in principle. If the federal interest is strong enough to require the application of federal principles to all or a given class of cases, the rules and adjudication that give content to those principles should also apply. (If such absolute conformity imposed an excessive workload on the federal board, other measures —which I cannot treat here—could deal with that problem.) On the other hand, if the matters excluded from the national board are predominantly matters of local interest, the states should be free to experiment, subject only to the Constitution—and not to a rule permitting them to depart from the federal model, but not too much. The states should also be free to develop new approaches to any problems distinctive to smaller firms. That there is no obvious line between local and national labor disputes does not justify hazy demarcations between state and federal jurisdiction.

It may be true, as Professor Weiler suggested, that the federal net is now cast too wide to provide an adequate incentive for state labor law reform. But the inaction of the states is not simply the result of the

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shrinkage of their jurisdiction. Note, for instance, that few important agricultural states have comprehensively exercised their right to regulate labor relations in agriculture.

OSHA and Benefit/Cost

TO THE EDITOR:

In their article on OSHA's noise standard, "Protecting Workers' Hearing" (*Regulation*, September/October), James C. Miller III and Thomas F. Walton seek to demonstrate the usefulness of a cost-benefit framework in judging the "economic feasibility" of OSHA standards. In this case, the authors conclude that OSHA's noise abatement program of engineering controls is less cost-effective than a GM program which uses personal hearing protectors. They base this assessment in part on unsubstantiated assumptions about the effectiveness and cost of such devices.

Most analyses to date have ignored the wide-ranging differences in reliability and comprehensiveness of protection among alternative control technologies. For example, the Miller-Walton analysis focuses exclusively on technical differences in noise reduction levels between engineering controls and personal protection devices. They do not take into account some of the major drawbacks of personal hearing protectors: higher failure rates, the need for employee monitoring and supervision, and, most importantly, the fact that many workers cannot or will not wear them.

A number of studies show that many workers would not receive the 26.6 dBA noise reduction from hearing protectors assumed by Miller and Walton. For example, a recent NIOSH-sponsored study in actual industrial settings found much lower median reductions of 7.5, 10.0, and 12.8 dBA for the three earplug types listed. Other studies have found ear protector rates of noise reduction as high as 33 dBA for one type of earmuff and as low as zero in other cases.

In its regulatory analysis, OSHA assumed that the average ear protector provides 15 dBA of noise reduction. If so, the average exposure levels under the GM program are seen to be similar to, not lower than, the level under the OSHA program. Moreover, OSHA assumed a full-scale program of worker training and audiometric testing to instruct workers on the need for and proper use of the protectors. Allowing for a less comprehensive program would increase the relative benefits of the OSHA approach. The benefit estimates are likewise highly dependent on the values assumed for the effectiveness of engineering controls. The sensitivity of these cost-benefit results to defensible changes in assumptions shows both the potential for misleading health determinations and the real subjectivity underlying such analytical techniques.

Even the cost side of the equation, often characterized as relatively precise, is in practice subject to wide-ranging estimates. For example, the authors assume that noise reduction enclosures will have a useful life of only five years. Yet other research conducted by Bolt, Beranek and Newman (BBN), a nationally recognized acoustical consulting firm, indicates that noise controls last about 20 years, substantially reducing the estimated costs of engineering controls.

The authors compared the estimated costs of the OSHA standard for GM with those in the *Continental Can* case, where a court ruled that a noise abatement program costing $410 per employee was "economically infeasible." Comparisons between imprecise and *ad hoc* court rulings are especially dangerous and would hardly lead to improved regulatory decisions.

The danger in imposing a cost-benefit requirement for OSHA regulations lies in giving a false semblance of objectivity to the uninitiated. Although cost-benefit analysis is attractive and sensible in theory, it is not as precise and value-free in practice as its proponents often suggest; it cannot replace the complex subjective judgments necessarily involved in occupational health and safety regulation. This is meant to suggest not that economic efficiency should not be a primary consideration in regulatory policy, but rather that cost-benefit analysis is a very imperfect tool for making efficiency judgments.

Nancy S. Barrett
Department of Labor

TO THE EDITOR:

. . . I would call the Miller-Walton article a cost-*effectiveness*, not a cost-*benefit*, analysis. The benefits of regulation were specified in physical terms, and not in the "willingness to pay" terms of a true cost-benefit comparison. Were a cost-benefit analysis done on *both* the GM policy and the OSHA alternative, *neither* might pass muster. Workers might find that the disutility of possible hearing impairment is less than the disutility of having to wear ear protection.

Of course, with regard to other regulatory policies, a cost-benefit analysis might suggest that all the alternatives, including the one judged most cost-effective, are too weak; more and not less regulation might be deemed more efficient on cost-benefit grounds.

I hope that the distinction between cost-benefit and cost-effectiveness analysis is made clear in any future legislation requiring such tests. We should also require consideration not only of distributional consequences but also of whether a governmental role is necessary in the first place. Otherwise such legislation may lead to a flood of misleading studies—some of which might serve only to identify the most cost-effective way of wasting the taxpayer's money.

Henry M. Peskin
Resources for the Future

JAMES MILLER III and THOMAS WALTON respond:

Regarding Dr. Peskin's comments, we felt our analysis of the OSHA proposal covered both its benefits, which were negative, and its costs, which were positive and much higher than the existing GM program's. We also showed that using personal protective devices could prevent hearing impairment at a much lower cost. Thus ours was both a benefit-cost and a cost-effectiveness analysis.

We would be the first to agree with Dr. Barrett that benefit/cost analysis is only as good as the assumptions upon which it is based and that there will almost inevitably be subjective factors that cannot be quantified well, but which nonetheless must be incorporated, explicitly or implicitly, in the final decision. However, in the present instance even adopting all of her assumptions would not affect our conclusions. That is, the OSHA proposal would still provide no improvement in worker protection at an annual cost of $9,424 per worker —a number that is 23 times the magnitude found economically infeasible in the precedent-setting case, *Continental Can*, and which can scarcely be deemed cost-effective by any standard.

Our "assumption" of the noise reduction afforded by the hearing protectors actually used by General Motors employees comes from the National Institute of Occupational Safety and Health's publication 76-120, which lists the mean and standard deviation of performance of hearing protectors as tested by independent laboratories utilizing American National Standards Institute testing procedures. The publication suggests adopting a protection factor two standard deviations from the mean, which "[s]hould rarely overestimate the degree of protection." The 26.6 dBA we used was nearly three standard deviations from the mean, and was also in agreement with values used by the OSHA Review Commission in *Continental Can.*

The "recent NIOSH-sponsored study" (NIOSH publication 79-115) referred to by Dr. Barrett attributed its results to workers' using the wrong size earplugs and/or improperly inserting them. It cautions that its results were based upon a limited sample and advised against "extrapolation to the general case. . . ." Unlike the plants which were the subject of that study, General Motors maintains a plant physician and an audiologist, who oversee the fitting of hearing protectors and monitor the effectiveness of the hearing conservation program.

Regarding Dr. Barrett's criticism of the five-year useful life assumption for machine enclosures, it should be noted that her suggestion of 20 years would have little impact on our total annual cost estimate, which would decline from $10,700 per employee to the $9,424 previously indicated. We regard the five-year assumption as quite conservative, based upon actual experience in the auto industry, in which rapidly changing products and production processes dictate at frequent intervals new sizes and shapes of machines and, hence, machine enclosures. In addition, enclosures that are often removed and replaced for machine maintenance suffer substantial wear and tear.

Regarding the criticism of our use of "imprecise and *ad hoc* court rulings," such as *Continental Can*, we would simply note that the Occupational Safety and Health Review Commission has found that decision to be "dispositive."

However, the most disquieting aspect of Dr. Barrett's letter is the rationale she employs to dismiss reliance on benefit-cost analysis. She correctly points out that economic efficiency should be a primary consideration in setting regulations. But when confronted with a regulatory tool that makes explicit the assumptions, methodology and analysis it employs, she complains that it is misleading, imperfect, imprecise and value-laden. Instead, she says, we must rely on "complex subjective judgments." In our judgment, Dr. Barrett's reasoning on this point is indicative of much of what has been wrong with OSHA regulation. In overturning OSHA's decision and requiring benefit-cost analysis, the appeals court in the RMI decision had some pointed comments on this approach: "The Secretary [i.e., OSHA] . . . considers engineering controls preferable to personal protective devices since the former are not as subject to the human element as the latter. We question the reasonableness of this highly paternalistic attitude. . . ."

Contrary to Dr. Barrett's contention, benefit-cost analysis *must* intrude on the regulatory process if economically efficient solutions are to be achieved. Indeed, the fact that our conclusion would be unaffected by a vastly different set of assumptions (which were much more favorable to OSHA) points up the weakness of OSHA's approach and the usefulness of benefit-cost analysis in public policy.

Barbering in Arizona

TO THE EDITOR:

On reading Jonathan Rose's article ("Controlling Clip Joints," July/August 1980), we were dismayed to find that he frequently forgot to tell the whole story or, at the least, misread the plot. Here are a few examples:

- The purpose of the Board of Barber Examiners' concern about sanitary conditions in barber shops *is* to protect the consumer. And our inspections have gotten tougher in the last two years, with the number of violations jumping from 78 in 1978 to 330 already in 1980. Consumer complaints are quickly investigated and resolved.
- Mr. Rose's point that it takes more classroom hours to become a barber than to become a lawyer is somewhat shallow when one considers that the law student must have six years more formal education than the barber before even beginning the 1200 or so hours of professional training with an equal amount of personal study time. Requiring a tenth-grade education is obviously less restrictive to entry than requiring an undergraduate degree.
- Who is better qualified to examine barber applicants than barbers (or to examine candidates for the bar than lawyers)? What Rose did not say about the Barber Board is that it mediates between *barbers*, as does a bar association when it regulates miscreant lawyers. . . .
- Rose is quite wrong that the worst that can happen to the customer in the barber's chair is "four to six weeks of unsightly hair (or nicked chins or even painful skin rash)." The trend toward more permanent waving means an increased use of chemicals. In untrained, incompetent hands serious damage may occur, perhaps even blindness. Examination and subsequent licensing of barbers trained in all services helps prevent not only consumer dissatisfaction but also serious harm.

It is no mystery why the number of barbers has not grown as rapidly as Arizona's population. . . . As styles shifted to longer hair and fewer (if any) haircuts and as unisex beauty shops proliferated, the demand for barber services diminished. . . .

Christine L. Bloom,
Arizona State Board
of Barber Examiners

JONATHAN ROSE responds:

Miss Bloom misses the main point of my article—that what may have started out as an effort to protect consumers has long since evolved into something else. Many of the regulations, as the article demonstrates, have absolutely nothing to do with safety, or with ensuring sanitary conditions in barber shops, or with any other kind of consumer protection. Second, one need not even compare barber education with legal education to know that it is simply absurd to require 1,250 hours of instruction before a person may become an apprentice, let alone a licensed barber. Finally, because of the temptations of economic self-interest, there are serious problems in permitting barbers to examine barber applicants—or in permitting lawyers or any other group to examine those who seek to become their competitors. Control of licensing can too easily become a scheme for restricting competition rather than a means of ensuring consumer welfare. ■