Perspectives
on current developments

The Cotton Dust Case

The regulation of cotton dust—or, perhaps more accurately, the threat of the regulation of cotton dust—has had a long and illustrious history at the Occupational Safety and Health Administration. In 1972, OSHA Administrator George Guenther urged his Department of Labor superiors to use the threat of a Democrat-imposed cotton-dust standard as a means of raising contributions for President Nixon's campaign. At the same time the unions, supported by Nader groups, were using the cotton-dust issue to help organize the southern textile industry. Cotton dust is alleged to cause a respiratory disease called byssinosis or, colloquially, brown lung—although, in fact, byssinosis does not affect lung pigmentation.

The standards were not formally proposed until December 1976 (see "OSHA and Work-Place Hazards: Cotton Dust," *Regulation*, July/August 1977). They called for tightening worker exposure to cotton dust from 1.0 milligram per cubic meter of air to 0.2 milligram, solely through the use of engineering controls (in this case, air-cleaning equipment).

A final cotton-dust regulation was issued by OSHA in June 1978 after a bitter battle within the Carter administration, fought out before the nation in a series of leaked memos reported in the *New York Times* and *Washington Post*. (See Susan Tolchin, "Presidential Power and RARG," *Regulation*, July/August 1979, and Christopher DeMuth, "Constraining Regulatory Costs—The White House Programs," *Regulation*, January/February 1980.)

On one side of the dispute, the Council on Wage and Price Stability and the Council of Economic Advisers argued that the costs of the proposed engineering standards were too high and the health benefits too low when compared to the alternatives. Specifically, they claimed that a performance standard allowing the use of personal protective devices (respirators), medical monitoring, and administrative measures (rotating work shifts, for example) would be more cost-effective. On the other side, OSHA, the AFL-CIO, and some press reports (not to mention a Twentieth Century–Fox movie) argued that byssinosis was as deadly to the textile mill workers of the South as black lung was to the coal miners of Appalachia, and that drastic restrictions on cotton-dust exposure were justified.

Actually, there is reason to believe that OSHA was caught off guard by the vehemence of the White House economists' objections. OSHA thought that the rule it was ready to issue already reflected considerable concessions on the cost side, skillfully walking a tightrope between the labor unions and a President whose political support was based in the cotton-growing and textile-producing South. The agency had adopted CWPS's recommendation that permissible exposure levels for different segments of the industry be structured according to cost-effectiveness considerations. Instead of its original proposal for an across-the-board exposure level of 0.2 milligram per cubic meter of air, OSHA had agreed to prescribe levels that varied from 0.2 to 0.75 milligram for different stages of cotton processing.

The adoption of a variable exposure level policy was unprecedented for OSHA—and reduced the annual costs of compliance to $200 million compared to $700 million for the original policy. However, CWPS and CEA were still not satisfied. They argued that another $125 million could be pared from annual compliance costs if the engineering standards were relaxed further in favor of respirators and medical surveillance techniques. The economists pointed out that byssinosis is not an irreversible disease, as is cancer, but a reversible condition that progresses slowly over many years from occasional temporary chest tightness to chronic obstructive lung disease. The disease strikes only some individuals, gives plenty of warning,

and can be almost totally reversed if the victim is removed from the dust-laden environment.

The internal battle raged for about a month, complicated by court-imposed deadlines, threats of resignation, and full coverage in the newspapers (including pictures of White House economists working at their desks wearing respirators). Finally, after initially agreeing with the economists' performance-standard approach, President Carter made an about-face and sided with Secretary of Labor Ray Marshall. Predictably, the American Textile Manufacturers Institute (among other business organizations) challenged the rule in court, and the AFL-CIO also sued, claiming that OSHA's standard was not stringent enough.

In October 1979, the U.S. Court of Appeals for the District of Columbia upheld OSHA's standards in a three-to-zero vote. OSHA Administrator Eula Bingham proclaimed: "This decision vindicates our regulatory approach favoring engineering controls over personal protective equipment." But the story was not over.

The Supreme Court granted the industry's petition for an appeal on October 6, 1980, and will hear the case this session. A decision is expected in late spring or early summer. It is widely hoped that the Court will address the question of whether OSHA must find a reasonable relation between the benefits of its health standards and the attendant costs. Just last summer the Court ducked this question in its benzene decision, by finding that before the cost-benefit issue is even reached, the agency must at least establish a significant health risk addressed by the rule—which, in that case, OSHA had not done. (See Antonin Scalia, "A Note on the Benzene Case," *Regulation*, July/August 1980.)

At the time the benzene case was decided, it was generally believed that the coke-oven emissions case then on the Court's docket, *American Iron and Steel Institute* v. *OSHA*, would present the cost-benefit issue in the present term; inexplicably, however, the steel industry withdrew its appeal. (It has filed an amicus brief in the cotton-dust case.) From a tactical standpoint proponents of cost-benefit balancing may prefer the cotton-dust case, in any event. Unlike the cancer linked to coke-oven emissions, byssinosis, at least in its early stages, is not an irreversible and disabling disease—so that the instinctive revulsion against "weighing costs against human lives" may not affect the Court as significantly.

In the cotton-dust case, the Supreme Court will not be able to employ the same device that it employed in benzene to evade the cost-benefit issue. On the basis of the record before the Court, it would be extremely difficult to maintain that no significant health risk has been established; and none of the litigants opposing the rule is even arguing that point. The cost-benefit issue can be avoided in another fashion, however: While OSHA denies the necessity—and even the permissibility—of conducting any cost-benefit balancing, it acknowledges that costs must be estimated in order to establish that they are not so high as to bankrupt the industry. Petitioners maintain that, even for this limited purpose, OSHA's determinations were inadequately supported by the record. If the Court agreed on that point, it might once again avoid reaching the more general issue of cost-benefit balancing.

The final irony in this case may be that the technical information that might settle the question of whether the cotton-dust standard is good public policy cannot be considered by the Court, since it is not part of the record. In a recent study, two researchers from Duke University Medical Center—the same institution that provided the studies on which OSHA based its final standards—found that nonsmokers and ex-smokers have almost no risk of experiencing irreversible disabling degrees of byssinosis even with continued exposure to cotton dust. (See Siegfried Heyden and Philip Pratt, "Exposure to Cotton Dust and Respiratory Disease," *Journal of the American Medical Association*, October 17, 1980.) Thus the "material impairment" required by the Occupational Safety and Health Act (subsection on toxic materials) before health standards are to be promulgated may be caused by smoking—not cotton dust.

Department of Anticipated Consequences

Women, it is said, live longer than men. They also have fewer auto accidents. Under the provisions of legislation now pending in Congress, providers of insurance, pensions, and annuities would be barred from using sex-related factors of this sort in determining rates and benefits.

The Non-Discrimination in Insurance Act (H.R. 100) would prohibit discrimination in every kind of insurance on the basis of race, color, religion, sex, or national origin. Because the other classifications are not currently used by insurers, the bill would require changes only in cases where gender is used as a classification. The proposed law would require the redistribution among consumers of massive amounts of costs and benefits, and (the insurance industry asserts) some absolute cost increases. It would require the adoption of unisex actuarial tables, the equalization of rates and benefits, and—in the case of pensions and annuities—increased premiums for women who begin receiving benefits after the law's enactment above and beyond the benefit rates called for in the original contracts.

Proponents of the bill argue that the use of gender as an insurance classification is inherently unjust and that the categories themselves often have little meaning. In current practice, insurers do discriminate between men and women; the bill's proponents argue that insurers also discriminate *against* women. Their claim is that insurers ignore other, more accurate rating classifications, such as family health history, physical conditions, and so-called life-style considerations (for example, smoking habits and recreational and occupational activities). The proponents also draw the predictable parallel with racial discrimination, arguing that race is at least as good an indicator of life span as is sex. If insurers do not use race as a classification, then why should they use sex, or to put it more wickedly, if they use sex why not use race too?

The industry responds, first of all, that sex is only one of many classifications it uses, and that it does indeed use "life style" and other factors in setting rates and benefits. As for race, the industry says that to the degree that racial classifications would be useful they are already taken into account in other classifications. Blacks have shorter average life spans not because they are black, but because of the very life style and socioeconomic factors that are now used to classify risks. Sex is a useful and valid classification, the industry argues, precisely because the physical differences between the sexes do have consequences.

H.R. 100 would not be an unqualified economic boon for women. The financial effects of prohibiting classification by sex would be mixed. Women would be favored in the case of pension and annuity contracts that they purchase, since as a class they would receive higher annual benefits than they do now but the increased premiums necessary to cover the higher benefits would be borne equally by men and women. With respect to straight life insurance, on the other hand, women as a class would clearly lose, because their benefits would not be raised but their annual premiums would be (since it would no longer be lawful to assume that they make payments during a longer lifespan). And with respect to auto insurance, the adverse effect on women as a class might be striking: The industry estimates that male drivers have 70 percent more accidents than females, and prices its policies accordingly. In other words, if in fact sex is an accurate determinant of such matters as life span and accident proneness but is not permitted to be taken into account, women would in some cases be subsidizing lower rates for men.

For all insurance and annuity coverage paid for by employers, H.R. 100 would seem unnecessary to produce the foregoing results—however desirable or undesirable those results may be. For in 1978, in *City of Los Angeles* v. *Manhart*, the Supreme Court held that an employee annuity plan which provides both sexes equal periodic benefits after retirement, but requires women (because of their longer life expectancy) to make larger periodic payments during employment, violates the provision of Title VII of the Civil Rights Act of 1964 that prohibits sex discrimination in employment. There have been some attempts to give a narrow interpretation to *Manhart*, but they fall within the category of the wish fathering (oops, parenting) the thought.

One feature of the bill would provide a substantial windfall for current female employees past or near retirement age. In a provision that displays Canute-like insouciance for the tidal principle that contribution must equal pay-out, the law would require equal pay-outs for men and women who retire ninety days after its enactment, but would not permit (even if it constitutionally could) any *reduction* in the pay-outs for men. This would mean, of course, that retirement funds would be confronted with an immediate obligation that had not been provided for by past contributions,

and it is unclear where the money is supposed to come from. Even without H.R. 100, the Equal Employment Opportunity Commission is attempting to perform the same economic prestidigitation under the authority of *Manhart*: it is currently pressing the Teachers Insurance and Annuity Association-College Retirement Equities Fund (TIAA-CREF), one of the largest pension funds in the country, to pay equal benefits to men and women who have already retired.

Some of the implications of prohibiting sex-based statistics throughout the insurance industry are potentially significant but difficult to predict. As noted earlier, for example, in the field of auto insurance women drivers paying equal premiums would be subsidizing men. So presumably insurers would seek out the patronage of women, who would be paying high premiums relative to risk, and avoid males, whose premiums would be lower than the real cost of insuring them. The industry predicts that more drivers would wind up in the "assigned risk" pool, where rates are much higher, as companies sought to bring risks and rates into alignment. With respect to life insurance and annuities, on the other hand, it may be that elimination of sex-based statistics would not have a significant distorting effect. Critics of the current practice argue that insurers have simply exaggerated life-span differences and that sex is indeed a "spurious, weak, and unstable predictor of mortality" (see Readings, page 49).

Except insofar as the issue of unlawful or improper discrimination is involved, it is difficult to see how any of this is the government's—especially the federal government's—proper concern. If sex is in fact a weak or invalid determinant of particular insured events, surely the insurance companies themselves (assuming they are subject to either rate regulation or competition) have every incentive to avoid it. In any case, it would surely help to have a legislative judgment more specific than the vague Title VII prohibition interpreted, perhaps correctly, in *Manhart*, as to whether this sort of sex-based generalization constitutes "discrimination" and is meant to be unlawful. Perhaps the main function to be served by H.R. 100, assuming it survives the new Congress, is to provide such a judgment.

More Governmental Innovation from the Golden State

On July 1, 1980, the California Office of Administrative Law came into existence. Its ominous mission (ominous, that is, for other state agencies) is suggested by the legislative finding that begins its enabling act: "The Legislature finds and declares as follows: . . . There has been an unprecedented growth in the number of administrative regulations in recent years."

OAL is an independent agency whose director is appointed by the governor of California for a term coextensive with his own. Its task is to review all new regulations issued by state agencies before final publication to ensure, among other things, "(a) Necessity. (b) Authority. (c) Clarity. [and] (d) Consistency [with existing laws]." Over the next six years, OAL will also get a chance to review all existing regulations. If a regulation is found wanting, it is returned to the agency for revision—or burial. The governor may veto OAL disapproval, except in the case of "emergency" regulations, where OAL's word is final.

Interestingly, while agencies must ask OAL's consent to add new regulations or amend old ones, they are free to repeal regulations whenever they want to. This feature, combined with the requirement for six-year review of all existing regulations, reduces the tendency of such a control device to "freeze" existing regulation (see Antonin Scalia, page 13, this issue). Moreover, to add insult to injury, other state agencies must reimburse OAL for the cost of its "services"—a requirement giving OAL some insulation against budget cuts by legislators sympathetic to frustrated regulators.

For some reason (perhaps the unprecedented growth in the number of statutes in recent years?), the new law and the new agency initially attracted little attention. But now the bureaucratic fur has started to fly. OAL has told the Fish and Game Commission that it cannot protect butterflies under the California Endangered Species Act (which does not cover insects) because, contrary to the view of the commission, insects are not fish under California law (honest!). It has found the State Athletic Commission's proposal for a disability insurance program for boxers badly worded and unclear. It has also found that the Board of

Medical Quality Assurance had not adequately shown a need for new regulations governing licensed physical therapists. It has even rejected attempts by several agencies to avoid public hearing requirements by issuing regulations as "emergency" measures, a category that included a quarter of the California regulations adopted last year. As of the end of 1980 it had rejected, on one ground or another, one-fifth of all proposed new regulations.

The State Athletic Commission, appropriately the most pugnacious of the challenged agencies, went (so to speak) to the mat with OAL, charging it with "impudence" and with going beyond its assigned "housekeeping functions." The commission threatened to challenge OAL to the Ultimate Contest—in the courts—only to discover that OAL's enabling legislation forbids agencies to take it to court.

OAL may well be King of the Mountain. Think what President Carter's Regulatory Analysis Review Group would have given for the power to review and veto regulations on the basis of "necessity"! But, alas, the matter is not all that clear: The California law states that OAL should not "substitute its judgment for that of the rulemaking agency as expressed in the substantive content of adopted regulations." How one can disagree with the "necessity" for a proposed rule without performing such substitution is a mystery whose solution was once, presumably, known to the California legislature but now is known only to the courts.

For the time being, OAL seems inclined to follow a modest strategy, simply requiring that agency rulemakings be thoroughly documented and disallowing some of the more egregious regulatory examples. It claims to have found most state agencies cooperative. But, bureaucratic incentives being what they are, sooner or later an activist OAL is likely to test the legal limits of the "necessity" standard.

The concept of a Regulation Czar is, of course, somewhat scary—unless one views that as precisely the role which the elected chief executive (governor or president) is supposed to play. Such review "from the top"—outside of the special-interest confines of the issuing agency, and at a level where all the affected social interests can be taken into account—may be the only ultimate remedy for a government that, in the era of agency-made law, has as many unrepresentative mini-legislatures as it has letterheads. One would have thought it more appropriate to lodge the regulation-reviewing authority directly in the chief executive, rather than merely giving him veto control, as the California law specifies. Still, one should hope that OAL's authority will be broadly interpreted. It will provide a good test, for other states and for the federal government, of centralized executive review as a control device.

Competition in Kidney Dialysis

A mild form of competition has broken out in one corner of the medical services field, but new regulations proposed by the Health Care Financing Administration may succeed in remedying the problem. According to the Council on Wage and Price Stability, HCFA's proposed reimbursement scheme for kidney dialysis treatments would subsidize high-cost providers and drive low-cost competitors from the field.

Renal dialysis treatments are necessary three times weekly to sustain the lives of the 57,000 Americans afflicted with end-state renal disease. In hemodialysis, the predominant form of treatment, the blood is cleansed of impurities by pumping it through a semi-permeable membrane for four to six hours.

In 1978 the annual cost of dialysis was about $25,000 per patient, a sum beyond most patients' means. To broaden access to dialysis, Medicare coverage was statutorily extended in 1972 to fund treatment for virtually all patients who would benefit from it. As a result, the Medicare dialysis population grew from 11,000 in 1973 to about 50,000, and now encompasses nearly 90 percent of all patients with end-state renal disease. Program costs also increased—from $283 million in 1974 to $1.08 billion today—but the rise occurred entirely because of inflation and an increase in patients: by the calculations of one expert, R. A. Rettig, average benefit payments per patient, adjusted by the medical component of the consumer price index, actually fell nearly 10 percent.

Outpatient dialysis is provided by hospitals and by independent free-standing dialysis facilities (FSDFs)—specialized clinics that provide only dialysis services. Most of these clinics are operated for profit and, according to some critics, are very profitable indeed. The Health Care Financing Administration, which runs the

In Brief-

Carcinogen of the Month. Carcinogen fanciers will be thrilled to learn of a newly discovered cancer-causing substance that will surely be a choice addition to their collections, no matter how extensive these may already be. This white crystalline chemical, derived from a tropical crop, was tested in a careful study carried out by the Huntingdon Research Centre in Huntingdon, England (under contract to the Swiss drug firm, Hoffmann LaRoche). A statistically significant increase in the incidence of liver tumors, both malignant and benign, was observed when the substance was administered to female CFLP mice for two years at a dietary concentration of 20 percent—a level which, rather than debilitating the mice as in tests of so many other substances, actually caused them to thrive. (Mice that survived to the end of the study gained 15 percent *more* weight than untreated mice!)

This clearly hazardous chemical has been used as a food additive for many years and is officially classified "Generally Recognized As Safe." That classification, however, must be considered in grave danger; indeed, under the Delaney clause, the use of the substance in foods must now be banned. It is widely added to salad dressings, cereals, many cooked dishes, canned fruits, baked goods, ice cream, all flavored soft drinks (except those containing saccharin), and, so it is widely rumored, to wines from Burgundy. The substance in question is sucrose, also known as table sugar. (Details of the Huntingdon experiment are available from the FDA upon request.)

Isaac, Ishmael, and the Federal Courts. The exciting possibilities for classifying individuals by bloodline that have been opened up by political and judicial acceptance of affirmative action were demonstrated last August in forms sent to all federal courts by the coordinator of the Judiciary Equal Employment Program, Administrative Office of the U.S. Courts. The forms called for the courts to identify the "race/national origin group" of each employee and judicial officer—a request surely as American, nowadays, as apple pie. But, the accompanying memo pointed out, "please note that the category 'white' has been revised to reflect the subgroups 'Arabic' and 'Hebrew'." It was specified that these "distinct subgroups" were to be "based on ethnic, not religious, factors" — suggesting, presumably, a federal determination that ethnicity postdates Abraham.

Alas, what might have been a modest effort at gradually achieving truly proportional representation of all bloodlines in federal court employment evidently met with some opposition. A subsequent memorandum from the coordinator announced, in a phrase perceptive readers will recognize as having been copied directly from *The Bureaucrat's Handbook* (the chapter entitled "How to Back Down without Confessing Error"): "It has been determined that the breakdown of the category 'white' to reflect the Semitic subgroups (designated as 'Arabic' and 'Hebrew') will not be necessary." Too bad. That probably means that the timetable for identifying Greeks and Turks, Serbs and Croats, Flamands and Walloons will have to set back a few years.

Or might there have been some other purpose involved? Our guess is probably the same as yours—it was a devious way of asking "How many Jews are on your payroll?" We suspect that the ultimate pur-

program, reimburses hospitals for 80 percent of the actual cost of treatment and FSDFs for 80 percent of their charges. For both types of facility, there is a reimbursement "ceiling" of $138 per treatment. HCFA waives this ceiling, however, when a facility demonstrates that its actual costs exceed the combined total of the $138 ceiling and patient payments. Hospitals have labor costs that are about 30 percent higher than those of independents, and overhead and supply costs about 13 percent higher. Today, as a result, they routinely receive waivers, and their average reimbursement has risen to $160. FSDFs rarely need waivers, and their average is still $138.

According to Rettig's research, the ceiling was initially set too high. It remained unchanged, however, during the inflation of the subsequent years, so that it eventually began to force maintenance dialysis out of hospitals and into the lower-cost FSDFs. By 1977, almost 45 percent of all dialysis treatments were being provided outside hospitals. The ceiling also led, Rettig says, to the introduction of cost-saving technology. Newer large-surface dialysis machines reduce a session from six-to-eight hours to about four. But to the extent that full cost waivers for hospitals become routine, the ceiling loses its effectiveness.

On September 26 HCFA proposed new regulations allegedly designed to establish an "incentive reimbursement system" for dialysis services. The proposal would formalize and extend the differential treatment of hospitals and FSDFs, setting the reimbursement level of each at the median of all historically determined

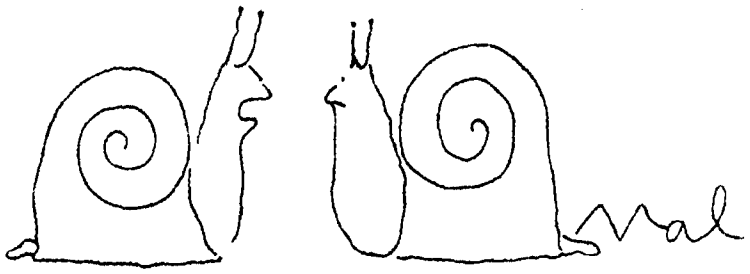
pose was thought to be benign—namely, to find out whether there are any courts in the country that have an anti-Semitic (Arabs excluded) hiring record. And we further suspect that the most vociferous opposition which led to the determination that the breakdown will "not be necessary" came from the supposedly benefited group itself—which has reason to believe that, down the road of official classification by blood, there ultimately lie denial of equal opportunity, social fragmentation, and worse.

Quis Custodiet Ipsos Custodes? Firms in the private sector who have seen expansion or production plans frustrated by environmental laws can take some wry comfort in the fact that even implementation of the environmental laws is sometimes frustrated by environmental laws.

The Environmental Protection Agency is currently appealing, to the U.S. Court of Appeals for the Ninth Circuit, a judgment won by the Pacific Legal Foundation halting EPA-mandated modifications to the sewage treatment plant operated by the City of Los Angeles at Hyperion. The modifications would have halted the plant's discharge of sludge into Santa Monica Bay, requiring it to be hauled to a landfill for disposal.

It turns out, however, that Santa Monica Bay is the habitat of the Pelicanus Occidentalis (California Brown Pelican) and that land close to the plant is the stamping ground of the El Segundo Blue Butterfly—both of which creatures are protected by the Endangered Species Act. According to the district court, EPA ran afoul of that legislation by failing to give consideration to the effects of its action upon the protected wildlife. The Department of Interior (charged with enforcing the Endangered Species Act and joined as a defendant because of its alleged failure to do so) had noted that during the construction period for the EPA-mandated modifications, pollutant discharge into the bay would actually be increased. Beyond that, the plaintiff charged that the ol' Pelicanus Occidentalis actually *likes* the sludge —or more precisely the marine organisms that he likes like it—so that it would be good to detoxify the sludge but not eliminate it from the bay.

Underlying the suit is a somewhat more general issue: the Pacific Legal Foundation claims that the Interior Department has displayed a "pattern of nonfeasance" in failing to enforce the Endangered Species Act against EPA. We think Interior should clear its name by going after EPA on a snail darter rap. ■



"That's the government for you . . . millions for the snail darter, and zilch for the snails!"

costs for its class. Both types of facility would be paid a fixed, pre-determined fee without regard to actual costs—with some rather notable exceptions.

The idea behind fixed reimbursement, both the current scheme and HCFA's proposal, is to prevent hospitals from automatically passing costs on to Medicare. If costs exceed the reimbursement level, a hospital must either absorb the excess or discontinue outpatient dialysis; but if it can get its costs below that level, it keeps the resulting savings. Such savings, in theory, are eventually shared with Medicare and with patients because new providers enter the field and bid away any excess profits. In addition, under the proposed scheme, the government would lower the reimbursement level as the median cost declined.

The Council on Wage and Price Stability maintains, however, that the new reimbursement policy has several serious flaws. First, because cost allocation in any multi-product firm involves many arbitrary judgments, it might be possible for hospitals simply to reassign excess costs to other Medicare programs that reimburse according to costs. Second, the proposal seems to allow too many exceptions. HCFA would grant exceptions to any hospital able to demonstrate that it had excess costs for any of four reasons: (1) its services were atypical, (2) its facilities were underutilized, (3) it had experienced extraordinary circumstances such as strikes, fires, floods, and earthquakes, and (4) it was the sole supplier in a community. HCFA does not have enough data to predict how many hospitals would qualify for excep-

tions under these criteria, but it is possible that the number would be large enough to raise the average reimbursement above present levels. All services now costing below the median would automatically be paid the median, while those above the median might be eligible for exceptions.

Third and most important of all, CWPS maintains that the establishment of entirely separate reimbursement rates for hospitals and FSDFs would be a mistake. Where both types of facility offer comparable services, public policy should direct patients to low-cost providers. If hospitals cost more merely because they pay higher wages or have greater overhead, they should be offered the same fee as FSDFs and thus discouraged from providing outpatient renal dialysis. Alternatively, if hospitals' costs are higher because their patients are more seriously ill and thus require different services, then fees should differentiate by services provided (treatment A vs. treatment B) rather than by facilities. This would foster competition and encourage efficiency, with specialization one possible outcome (hospitals offering only treatment A and independents only treatment B). But under HCFA's proposal, CWPS notes, because hospitals would be paid a higher fee regardless of whether they handled difficult or routine cases, they would have a strong incentive to increase their patient load by treating more routine cases while billing Medicare at the higher rate.

There is one other relevant economic factor that the new regulations do not take into account. Some researchers have found evidence of economies of scale in renal dialysis. If they are correct, HCFA ought to vary its fee according to the size of the market—that is, provide lower fees in densely populated areas to encourage (and take advantage of) economies of scale.

A final problem with the HCFA proposal is the existing certificate-of-need program by which the government limits the number of dialysis stations in a community. Such regulation is sometimes seen as a necessary evil in a cost-reimbursement system. But if a fixed-fee system were to be instituted, CWPS warns, regulation of entry would only increase costs by preventing competition from newer low-cost providers.

In a field not usually known for its competitive zeal, free-standing dialysis facilities are a refreshing anomaly. Their existence has been made possible by regulations which, in some ways, reward cost-effective dialysis. HCFA's proposal, if it would not ultimately lead to their demise, could at least perpetuate remaining inefficiencies and put a further drain on the Medicare Trust Fund.

Of course a more fundamental question relating to the solvency of the fund is the wisdom of a program that currently costs about $1 billion a year to benefit about 50,000 recipients—to a large extent the same 50,000 each year, and without restoring them to anything near full health. If that enormous additional sum is to be budgeted annually for health services, it seems implausible that greater results could not be achieved in some other area. Perhaps the attraction of the dialysis program is that its results (and the sad consequences of its elimination) are so immediately and particularly verifiable. But as medical science discovers more and more ways of prolonging life at fearsome expense, the need for the prudent weighing of alternatives—even in Medicare expenditures—becomes increasingly apparent.