Perspectives
on current developments

The (Cotton) Dust Settles

In the *Cotton Dust* case *(American Textile Manufacturers Institute* v. *Donovan)*, decided June 17, the Supreme Court finally reached and settled the question whether OSHA's standard on the use of toxic materials in the workplace must be supported by cost-benefit analysis. That issue had been presented but avoided in the *Benzene* case *(Industrial Union Department, AFL-CIO* v. *American Petroleum Institute)*, decided the previous term. As noted in the pages of *Regulation* a year ago, the breakdown of the justices' opinions in that case did not augur well for cost-benefit analysis (see Antonin Scalia, "The Benzene Case," July/August 1980). That augury proved correct. The only justice who had expressed support for a cost-benefit requirement in *Benzene,* Justice Powell, did not participate in *Cotton Dust,* while the four justices who had expressed opposition to such a requirement (Brennan, Marshall, Blackmun, and White) held firm and acquired a fifth justice who had not reached that issue in the earlier case (Stevens). In the final showdown not a single vote was cast in favor of cost-benefit analysis. The three dissenters went off on other grounds, Justice Stewart finding that the rulemaking record did not contain the "substantial evidence" required to support the particular standard OSHA had adopted, and Justice Rehnquist, joined by Chief Justice Burger, maintaining (as he had in *Benzene*) that the statute provided "no meaningful guidance to those who will administer the law," and was thus an unconstitutional delegation of legislative authority.

The basic elements of the controversy were straightforward enough. The definitional section of the statute states that the term "occupational safety and health standard" as used in the legislation means a standard imposing requirements "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The petitioners asserted that this language establishes a cost-benefit requirement—a plausible assertion, though it is unusual (and sloppy) but not unheard-of to impose major substantive requirements in a definitional section. On the other hand, a substantive section of the law, specifically applicable only to toxic materials and harmful physical agents, requires each standard in that area to be one that "most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health." The crucial phrase "to the extent feasible" is hardly the language of cost-benefit analysis: something may be feasible but exceedingly unwise. On the face of it, any inconsistency between the two provisions (assuming that the first imposes a cost-benefit requirement) would seem quite reasonably resolvable by concluding that Congress wanted to depart from analysis-as-usual, and to impose a particularly rigorous requirement, when toxic substances were involved. Unless the legislative history suggested otherwise, that is surely what one would normally conclude. And the legislative history did not suggest otherwise; but rather displayed a clear congressional agreement to disagree as to what in the world the phrase "to the extent feasible" might mean. It is hard to refute the majority's conclusion that the statute does not require cost-benefit analysis in this field.

The Rehnquist dissent focuses upon the fact that if the phrase "to the extent feasible" does not suggest cost-benefit analysis, it also does not suggest much else of any precise content. "[T]hose words mean nothing at all. They are a 'legislative mirage, appearing to some members [of Congress] but not to others, and assuming any form desired by the beholder.' " Moreover, Rehnquist discerns method in the meaninglessness.

> The words "to the extent feasible" were used to mask a fundamental policy disagreement in Congress. I have no doubt that

> if Congress had been required to choose whether to mandate, permit, or prohibit the Secretary from engaging in a cost-benefit analysis, there would have been no bill for the President to sign.

Rehnquist's observations are probably correct. But one wonders whether they lead to his conclusion that there has been an unlawful delegation of legislative authority. Do they not rather lead to the conclusion that there has been no legislation at all? The doctrine of unconstitutional delegation—as a principle enforceable by the courts—has its difficulties, inviting the courts to make judgments on practicability, necessity, and other prudential matters well beyond their ken. Perhaps for that reason, the doctrine has been applied to invalidate delegation to the executive only twice, in the early days of the New Deal. But might there not be room for another, more limited (and thus more serviceable) doctrine which we might call—for want of a better phrase—the doctrine of illusory legislation?

Suppose the Congress passes, and the President signs, a bill saying, "The secretary of labor may do blzzt." And suppose, further, that the legislative history displays 100 senatorial and 435 representative understandings of what "blzzt" might mean. Only a man from Mars or a lawyer could conceivably conclude that by this provision Congress has made an "unlawful delegation of authority" to the secretary. Surely, to be frank about the matter, Congress has issued no legislative command at all—any more than the President issues an executive directive when he sneezes. Even if the doctrine of unconstitutional delegation is left, as far as the courts are concerned, to lie in the desuetude it has enjoyed since its last Supreme Court application in 1935, might there not be room for a more modest doctrine which affirms the logical, noble, and yet entirely democratic proposition that when Congress says nothing, nothing occurs? Let it be so that when Congress says, "The secretary may enact such standards in this area as tickle his fancy," the courts will not interfere; but when Congress says, "The secretary may do blzzt," the courts will not permit any results to ensue. At least when it is clear, as in the OSHA legislation, that a provision has no meaning *and that Congress knew it had no meaning*, the provision should simply have no legislative effect. Perhaps Rehnquist could enlist greater support for this less ambitious proposition.

As it turns out, the *Cotton Dust* case was a battle that the proponents of cost-benefit analysis would have done better to avoid. The suit was initially brought, of course, against a Carter administration Labor Department that had no inclination to apply cost-benefit analysis and would do so only under the compulsion that the law required it. After January 20 (the case was argued, ironically enough, on January 21), with a new administration sympathetic to cost-benefit analysis and predisposed to reconsider the cotton-dust standard on that basis, the crucial issue became the quite different question whether the law merely *permitted* it. But in resolving the former, alas, the Court might suggest a negative response to the latter as well. Thus, after the *Cotton Dust* case had already been argued, the new Labor Department took the extraordinary step of requesting the Court to vacate the judgment of the lower court (which had upheld the agency) and send the matter back to OSHA for "further consideration and development." A similar disposition was urged by the corporate petitioners—so that the only parties eager to have the Court proceed with the business at hand were the labor unions who were the government's (at this stage unwelcome) allies.

The Court proceeded anyway, and in the majority opinion the Labor Department's worst fears were realized. Rehnquist's dissent bravely asserts that "as I read the Court's opinion," it "concludes that, at least as to the 'Cotton Dust Standard,' the Act does not require the Secretary to engage in a cost-benefit analysis, which suggests of course, that the Act *permits* the Secretary to undertake such an analysis if he so chooses." With respect, it suggests no such thing—and a fairer characterization of the majority opinion is that the act does not require cost-benefit analysis precisely *because* it forbids it. (The majority opinion expresses its disagreement with Rehnquist's description—with admirable subtlety and economy of style—by stating in a footnote, almost in passing, that "[e]ven had Justice Rehnquist correctly characterized the Court's opinion" the consequences he asserted would not follow.)

One may be thankful that Stewart, who has recently announced his retirement, was not one of the five majority justices in the *Cotton*

Dust case. We may thus be spared the further prolongation of false hopes that cost-benefit analysis will come to OSHA's toxic material standards. It always was a poor argument—and got only one vote in two cases.

That having been said, it is also appropriate to dash some cold water on the excessive jubilation of regulation-prone commentators who have ballyhooed the case as a major defeat for cost-benefit analysis in general. It is no such thing. It applies only to the distinctive statutory language governing OSHA standards—and, indeed, not even all OSHA standards but only those pertaining to toxic materials or harmful physical agents. In fact, it is something of a *victory* for cost-benefit analysis in general, since even the majority justices were willing to acknowledge that the definitional provision quoted earlier, applicable to all OSHA rulemaking not otherwise constrained, "might be construed to contemplate some balancing of the costs and benefits of a standard."

Moreover, it should not be thought that the Reagan administration has no maneuvering room even with respect to toxic-substance standards. For even though "feasibility" rather than "cost-effectiveness" is the governing criterion, God (as well as Rehnquist) knows there is a good deal of stretch in that concept, and the initial call is for the agency rather than the courts. So under its new direction, OSHA may well revise the cotton-dust standards, *American Petroleum Institute* v. *Donovan* notwithstanding.

If such revision occurs, then—for aficionados of the bullfight of administrative law litigation—one of the most interesting of passes may ensue. The reviewing court (which in future cotton-dust challenges is likely to be the D.C. circuit, as it was in this one) is supposed, according to the Administrative Procedure Act, to give deference to the agency's judgment; but on appeal from the reviewing court, the Supreme Court is supposed, according to its own opinions, to give deference to the *reviewing court*'s judgment, upsetting it "only in what ought to be the rare instance when the standard [of review] appears to have been misapprehended or grossly misapplied." (This passage was pointedly quoted by the majority in the present case.) If this transfer from hand to hand of the cloak of persuasion is skillfully executed, it may well be that the Reagan administration's revised calculation of what is "feasible" by way of cotton-dust standards will be set aside by a moderately (but not grossly) undeferential D.C. circuit, and that erroneous result affirmed by a Supreme Court which is appropriately deferential to such lack of appropriate deference. *Olé!*

Lifting Burdens at the Margin

Unlike deregulation in other areas, financial deregulation has not been the outcome of a deliberate political effort, either by the industry or by outside reformers. Instead it has mostly emerged as an unavoidable consequence of institutional and technological advances (money market funds, electronic funds transfer). These have rendered old regulatory barriers meaningless, eroding the competitive position of some firms and eventually leading to a crisis that has made reform necessary. Now the Federal Reserve Board is thinking of relaxing another set of financial rules that, while having provoked no crisis, no longer appears to address the realities of the marketplace: margin requirements, which specify the portion of a securities purchase that can be financed by borrowing from brokers or other lenders.

When Congress ordered the Federal Reserve to set margin requirements in 1934, memories of the 1929 stock market crash were still fresh. It was believed that the practice of trading on margins as high as 90 percent had fed both the boom and the subsequent bust, first by expanding the pool of capital for stock speculation during the boom, and then by forcing margin traders to sell in falling markets as the decline in the value of their holdings triggered a margin call. Curbs on the credit that lenders could extend to stock buyers would restrain this "pyramiding" process, it was thought, reducing the volatility of stock prices. Paternalistic motives were also at work: margin limits would keep investors from taking on more risk than would be good for them.

Whatever the merit of these arguments at the time, changes in securities markets since then have made the rules look increasingly archaic. To begin with, now the stock exchanges not only set their own margin requirements, but also have "investor suitability" rules to

In Brief-

Update: Taking a Dive at the CPSC. "The King of France, with forty thousand men/Marched up the hill, and then marched down again." The Federal Trade Commission did something similar in its five-year-long proceeding on over-the-counter drug advertising (see Bruce Yandle, "The Cost of Getting Nowhere at the FTC," p. 43). But pity the poor Consumer Product Safety Commission, which, having paid to march up the hill, now cannot afford to march back down again.

CPSC would like to revoke its 1976 rule on swimming pool slides. An appeals court struck down two major sections of that regulation in the landmark 1978 *Aqua Slide 'n Dive* decision (see Perspectives, *Regulation*, May/June 1978), and the rest of the rule was of little benefit by itself in the commission's view. But getting rid of a rule once adopted was no easy matter, the commission found. It would take two to three years of staff time, probably costing more than $100,000, if (as seemed likely) the revocation was challenged in court. That, said Commissioner Stuart Statler, would "throw good money after bad." So the rule remains on the books.

Who would sue to keep it there? None other than the very Aqua Slide 'n Dive Corp. which challenged the original regulation in court. Aqua Slide 'n Dive had in fact petitioned CPSC to adopt a rule in the first place, and later objected only to the warning label and installation requirements which were struck down by the court. The design features of the rule conformed with Aqua Slide 'n Dive's production molds, says Commissioner David Pittle, and "as a direct consequence . . . the few small competitors, whose molds did not conform, were driven from the field, creating a complete monopoly for the leading manufacturer." The number of known manufacturers of pool slides has fallen from seven to one under the standard.

Fighting the Legacy of Colonialism. Among the most popular figures in Brazilian politics is Hélio Beltrão, who holds the office of "extraordinary minister for debureaucratization." Beltrão has launched a crusade against paperwork that has already wiped out more than 400 million documents once required by the government, and has issued a hundred edicts aimed at cutting red tape in various ways. His efforts seem to have struck a deep chord among ordinary Brazilians, although the magazine *Visão* notes that "some lawyers view his attempts as threats to the market for legal services."

Like many Latin American reformers before him, Beltrão considers the evils he is fighting to be a legacy of the colonial past. "Brazil is a country that was born regulated, since even before it was discovered and settled there were official documents on how it was to be governed," he explains. Among the "vices and habits inherited from the colonial past," he says, are "an exaggerated centralization of decisions" which "deludes itself into trying to impose uniform solutions on an enormous country that is rich in local peculiarities; an adherence to formalism which grants more importance to a document than to a fact; and finally, a morbid presumption of distrust, the trademark of most of the laws, regulations and norms of public administration in Brazil."

It's All Downhill from Here. A resort near Echo Summit, California, has been required to make the rest rooms of its new lodge wheelchair-accessible. The crush of handicapped vacationers is expected to be deterred somewhat by the fact that the resort itself, Sierra Ski Ranch, is accessible only on skis. As far as is known, no thought is yet being given to making the slopes wheelchair-accessible.

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screen out investors who cannot afford to risk their money. Thus the Federal Reserve rules may simply be accomplishing coercively (at some additional expense) what would in any event be accomplished voluntarily. Moreover, there is some reason to doubt whether anything of importance is accomplished. The general expansion of credit and property ownership has reduced the effectiveness of margin requirements as a paternalistic protection for the improvident. Investors who wish to purchase stock on borrowed funds can now often borrow elsewhere, using holdings other than stock as collateral. As for securing the stability of the market, those high-risk traders who formerly would have borrowed on margin now can and do achieve the same effect by buying and selling in the new stock options market. The high rollers, in other words, have moved to another table.

Margin trading is a far less important factor in securities markets than it was in the 1920s. Only 4 percent of the total value of the shares on the New York Stock Exchange is held in margin accounts, and only around 10 percent of all NYSE trading is done by margin account customers. (The latter figure is higher than the former because margin investors are highly active traders compared to others.) Some of the decline in margin holdings may possibly be a result of high interest rates, and thus is presumably temporary. To a large extent, though, it reflects the massive entry into the market of institutional investors like insurance companies and pension funds, which do little or no margin borrowing, and the more recent use of

Drawing by Chas. Addams; © 1980 The New Yorker Magazine, Inc.

"There's no cause for panic, Mrs. Munson, but, frankly, there are certain indicators that cannot be ignored."

options as a substitute for highly leveraged stock transactions.

It should come as no surprise, therefore, that empirical studies have found margin rules to have little or no effect on either the level or the volatility of stock prices. If margin rules are a significant constraint on investors, one would expect stock prices to rise when margin rules were relaxed and fall when they were tightened. Any adjustment should take place immediately, since general knowledge of the change should allow all investors to discount its effects fully. According to studies by J. A. Largay III and R. R. West (1973) and R. C. Grube, O. M. Joy, and D. B. Panton (1979), increases in margin requirements were accompanied by average declines of one-half of 1 percent in stock prices the next day, not a sta-

tistically significant figure. Decreases in margin requirements were accompanied by stock price increases of just over 1 percent, which is statistically significant but small. (The asymmetry between the two results remains unexplained.)

Similarly, in a study of stock price volatility, R. R. Officer concluded that, if changes in the level of industrial production are allowed for, a change in margin requirements in one year is not accompanied by any increase or decrease in the volatility of stock prices during the next year. One could argue, in response to Officer's finding, that margin regulation might be helpful mostly in episodes of panic or market instability, which might not coincide with the changes in the level of margin requirements that Officer examined.

It is also possible that the relative unimportance of margin trading in today's market is itself due to the restraining influence of the Federal Reserve regulations. The way to test the latter assertion, of course, would be to lift the requirements while holding open the possibility of reimposing them if margin credit began to swell substantially. Although it seems unlikely that the Federal Reserve Board will adopt that course, it might consider lifting the requirements in stages, with each stage announced well in advance in order to give markets plenty of warning. A third course, embodied in a set of proposals prepared by the Federal Reserve Bank of New York and recently put out for comment by the board, is to remove only the most burdensome and least useful parts of the regulations.

While it is not easy to compute the costs that margin requirements impose, there is reason to believe they come to a substantial total—including the costs of administration for all concerned, the costs to government and private parties of enforcement and legal defense, and, last but not least, the costs to investors of circumventing the regulations or of holding less preferred portfolios. A decision by the board to relax the rules would take the federal government one step further in the process of doing away with long-standing financial barriers. It would also be a sign that deregulation in the financial area can advance beyond mere haphazard response to successive crises to include voluntary and uncoerced acts.

Regulation and the 1982 Budget

In the debate over the Reagan administration's 1982 budget, the proposed cuts in funding for regulatory agencies were among the most controversial items. The budget and staff reductions for the Federal Trade Commission, Consumer Product Safety Commission, and similar agencies seemed designed not merely to save money, but to alter the fundamentals of policy. To some Reagan partisans, the 1982 budget was a bold stroke to check overregulation at its source; to some opponents, it was an attempt to subvert the mission Congress intended for the agencies and frustrate the enforcement of the laws.

A look at the actual figures for budget and staffing, however, suggests that both hopes and fears may have been exaggerated. As the table below indicates, the 1982 Reagan budget cuts regulatory funding by only 4 percent in real

GROWTH OF FIFTY-SEVEN REGULATORY AGENCIES
Selected Fiscal Years, 1972–82

Area	1972	1979	1980	1981 (est.)	1982 (Carter budget)	1982 (Reagan budget)
	EXPENDITURES ($ billions)					
SOCIAL REGULATION						
Consumer Safety & Health	$ .9	2.5	2.9	3.0	3.2	3.2
Job Safety & Other Working Conditions	$ .1	.6	.7	.8	.9	.8
Energy & the Environment	$ .5	1.5	1.9	2.2	2.5	2.2
	$1.6	4.6	5.6	6.0	6.6	6.2
ECONOMIC REGULATION						
Finance & Banking	$ .1	.3	.3	.4	.4	.4
Other Industry-Specific	$ .2	.3	.4	.4	.4	.4
General Business	$ .1	.3	.3	.3	.4	.3
	$ .4	.9	1.0	1.1	1.2	1.1
TOTAL	$2.0	5.5	6.6	7.1	7.8	7.4
TOTAL IN 1970 DOLLARS*	$1.8	3.1	3.3	3.3	3.3	3.1
PERMANENT FULL-TIME POSITIONS (thousands)						
SOCIAL REGULATION	35.7	63.4	64.1	63.2	64.3	61.0
ECONOMIC REGULATION	18.7	24.0	24.1	23.1	24.5	22.7
TOTAL	54.4	87.4	88.2	86.4	88.8	83.7

*Adjusted by GNP deflator (actual and, for 1982, estimated in budget).

Sources: 1972–80 and 1982 Carter budget, Center for the Study of American Business; 1981 and 1982 Reagan budget, preliminary figures compiled by *Regulation*.

terms, both from estimated 1981 levels and from the Carter administration's planned 1982 levels. It cuts staffing ceilings by 3 percent from estimated 1981 ceilings and by 6 percent from planned Carter administration ceilings.

The summary figures shown here are taken from the annual roundup of regulatory agency budgets and staffs prepared by the Center for the Study of American Business at Washington University in St. Louis, supplemented with preliminary staffing data compiled by this magazine. The figures do not take into account congressional action on the budget.

Among major agencies, the steepest cuts are slated at the Department of Energy's Economic Regulatory Administration, which used to regulate oil prices (a 74 percent cut, from $144 million in fiscal 1981 to $37 million); the Department of the Interior's Office of Surface Mining (28 percent, from $156 million to $113 million); and the CPSC (24 percent, from $42 million to $32 million). These three agencies account for about half of the 4 percent real reduction in overall regulatory spending. Others, like the FTC and the Securities and Exchange Commission, got increases in absolute terms, though not enough to keep up with expected inflation. But some of the agencies most roundly criticized by candidate Reagan before the election emerged with real increases: the Occupational Safety and Health Administration, up 9 percent; the Environmental Protection Agency, up 12 percent; and the National Highway Traffic Safety Administration, up 28 percent.

Another way of looking at the Reagan total for regulatory agencies is chronologically. It rolls back only about two years of real growth in agency budgets, leaving them below 1980 and 1981 levels

CHANGE IN EMPLOYMENT FOR TWENTY-EIGHT REGULATORY AGENCIES

Agency	Permanent Full-Time Positions 1980	1981	1982	Percent Increase (Decrease) 1980–82
Consumer Product Safety Commission	871	812	633	(27)
Food and Drug Administration	7,419	7,365	7,305	(2)
Antitrust Division	939	939	897	(4)
Federal Railroad Administration	484	431	421	(13)
National Highway Traffic Safety Administration	874	751	640	(27)
Bureau of Alcohol, Tobacco, and Firearms	3,900	3,868	3,862	(1)
TOTAL, Consumer Safety & Health	*14,487*	*14,166*	*13,758*	*(5)*
Mine Safety & Health Administration	3,857	3,810	3,808	(1)
Occupational Safety & Health Administration	3,015	2,626	2,536	(16)
Equal Employment Opportunity Commission	3,433	3,416	3,326	(3)
National Labor Relations Board	3,157	2,880	2,990	(5)
TOTAL, Job Safety & Other Working Conditions	*13,462*	*12,732*	*12,660*	*(6)*
Economic Regulatory Administration	2,161	1,772	399	(82)
Office of Surface Mining, Reclamation, and Enforcement	759	941	767	1
Environmental Protection Agency	10,678	10,800	10,400	(3)
Nuclear Regulatory Commission	3,041	3,300	3,325	9
TOTAL, Energy & the Environment	*16,639*	*16,813*	*14,891*	*(11)*
Comptroller of the Currency	3,331	3,153	3,005	(10)
Federal Deposit Insurance Corporation	3,691	3,741	3,791	3
Federal Home Loan Bank Board	1,388	1,435	1,464	5
National Credit Union Administration	650	718	718	10
TOTAL, Finance & Banking	*9,060*	*9,047*	*8,978*	*(1)*
Civil Aeronautics Board	743	650	638	(14)
Commodity Futures Trading Commission	550	470	470	(15)
Federal Communications Commission	2,153	2,004	1,941	(10)
Federal Energy Regulatory Commission	1,605	1,630	1,731	8
Federal Maritime Commission	361	312	301	(17)
Interstate Commerce Commission	1,940	1,730	1,600	(18)
TOTAL, Industry-Specific Regulation	*7,352*	*6,796*	*6,681*	*(9)*
Patent & Trademark Office	2,734	2,834	2,954	8
Federal Election Commission	251	235	227	(10)
Federal Trade Commission	1,665	1,564	1,379	(17)
Securities & Exchange Commission	2,100	1,939	1,850	(12)
TOTAL, General Business	*6,750*	*6,572*	*6,410*	*(5)*
TOTAL, TWENTY-EIGHT AGENCIES	*67,750*	*66,126*	*63,378*	*(6)*

Source: 1980 figures from the Center for the Study of American Business; 1981 figures and preliminary estimates of 1982 figures compiled by *Regulation*.

but ahead of 1979 and all earlier years. The 1982 budget is about 60 percent higher than that of 1972, and nearly 300 percent higher than that of 1970.

If history is any guide, moreover, the new set of budget figures will rise during the course of the year. The 1980 budget for regulatory agencies was first estimated at $6.0 billion; it eventually amounted to $6.5 billion. The 1981 budget, similarly, rose from a preliminary forecast of $6.9 billion to a current estimate of $7.2 billion. If the 1982 budget experiences similar overruns, real agency spending may end up increasing after all.

Staffing levels showed a similar modest decrease. As with the budget, the sharpest cut came in energy price regulation, which lost 1,300 employees, accounting for half of the total shrinkage in the regulatory work force. Other agencies had an average manpower decline of about 1½ percent—an unprecedented event in recent times, but hardly the Incredible Manning Shrink. The table below lists figures for selected agencies.

It should be kept in mind that agencies sometimes operate below their staffing ceilings. Another factor at work is the desire to replace federal employees with outside contractors. Thus the actual effect of staffing cutbacks may be more or less than the official figures imply.

Stable or increasing budgets do not necessarily mean business as usual among the regulators. The Nuclear Regulatory Commission's budget and staff increases were reportedly intended to speed up regulatory approval procedures, for example, and elsewhere in the bureaucracy resources are being shifted to economic analysis from more traditional functions. It is still not clear whether the administration will eventually change the fundamental approaches of the various regulatory agencies. But whatever its overall substantive policy proves to be, its budgetary policy on regulation appears to be one of thoroughgoing gradualism.

Overseas Ethics, Four Years Later

Economists have thus far paid scant attention to the wave of good-government and ethical regulations enacted in the 1970s. There is, indeed, growing criticism of the Freedom of Information Act, the financial disclosure and conflict-of-interest rules, and so forth; but it comes from politicians and business people who deal with the laws daily, not from regulatory reformers.

One reason may be that it is impossible to gather reliable data on "under-the-table" transactions or the effects of secrecy. Another may be that economic theory is not well-equipped to analyze clandestine goings-on. Whatever the cause, both supporters and opponents of the newer ethics and openness laws have little more than anecdotal evidence on their actual effects, with nothing in the way of a cost-benefit analysis in sight.

The Foreign Corrupt Practices Act of 1977 is an example of both the sweeping economic impact of ethics laws and the difficulty of assessing their unintended effects. The act has a much broader scope than its name implies: in the manner of Voltaire's Holy Roman Empire and Churchill's Lord Privy Seal, its domain includes matters that are neither foreign, nor corrupt, nor practices. (In particular, it regulates the accounting concepts companies must use within the United States, in order to force corporate managements to centralize the control of their far-flung subsidiaries.) And while there is some agreement that the act has succeeded in reducing bribery at the cost of lost sales and high record-keeping burdens for U.S. business, the magnitude of either costs or benefits is largely a matter of guesswork.

At the moment the controversy over the act is in fact mainly a battle of "horror stories." Proponents of the law point to over 300 cases of questionable payments reported by U.S. companies during the years before the act was passed, including scandals that shook the governments of Italy, Belgium, the Netherlands, and Honduras and toppled the Tanaka government in Japan. Critics, including the U.S. Chamber of Commerce, have assembled numerous case histories of how innocent U.S. firms have lost sales and competitive positions overseas because of uncertain or inflexible provisions of the law. A General Accounting Office survey of 250 randomly chosen companies indicates that such dissatisfaction is widespread in the business community.

The major reason is the accounting provisions of the law, which are binding on firms whether or not they do overseas business, and

which are enforced by sanctions almost as tough as those of the law's anti-bribery provisions. Both carry a maximum penalty of five years in prison. The bribery penalties apply irrespective of whether it was the firm or the foreign official that initiated the suggestion of payment. The act's legislative history does indicate, though, that payments extorted by threats of damage will not be considered bribes, and that "grease payments" (fees to expedite the handling of claims to which a firm is legally entitled) will be allowed. In this and other areas the law has proved ambiguous, however, and the criminal penalties cause executives to shy away from borderline actions.

The "chilling effect" of such ambiguity, along with the act's heavy record-keeping burden, is enough to harm U.S. competitiveness even in world markets where bribery is not prevalent, business spokesmen have alleged. Where bribery is endemic, the law has required U.S. business to withdraw, leaving the field to the Europeans and Japanese. No other country has a law like ours.

The requirement that internal corporate control procedures maintain the accountability of foreign subsidiaries—in other words, that there be a strong centralized chain of command within the corporation—raises another concern. It is commonly observed that, in bureaucracy and red tape, the modern corporation is not that different from the modern government. What is less commonly observed is the role regulation plays in producing such bureaucracy. Federal contract procedures that bar an entire firm from doing business with the government if one of its divisions misbehaves, various rules that hold firms liable for the actions of their employees and even their customers, company-wide hiring quotas—all these encourage centralized and rule-bound management. The Foreign Corrupt Practices Act goes very far in this respect, even making U.S. firms liable for the behavior of overseas joint ventures in which they have only a minority interest. The act also holds management responsible if it had "reason to know" of a subordinate's corrupt act, a stricter standard than applies in the law on *domestic* bribery.

There are only a handful of statutes that control what Americans can do, or allow their agents to do, abroad. Extraterritoriality, as it is called, raises numerous problems such as the risk of double punishment (under the laws of two sovereigns), the difficulty of subpoenaing witnesses, and the impossibility of providing trial in the area where the crime was committed. Previous criminal laws of this type had sought to keep Americans abroad from harming Americans back at home through such practices as ocean dumping beyond the three-mile limit and price-fixing that affected U.S. buyers and sellers. This limited international friction by providing an easily understood rationale for U.S. legislative involvement. The harm to U.S. interests that the Foreign Corrupt Practices Act seeks to prevent is less direct: official embarrassment, a lowered national reputation for honest dealings, and political damage to our allies. As a generalized attempt to keep Americans on their best ethical behavior abroad, however, the act remains an anomaly. It is still not against federal law for an American to rob a bank overseas—but it is illegal to pay off an official to obtain a pushcart license.

There has been only one successful prosecution under the act, of a small firm that distributes the postage stamps of the Cook Islands. This indicates, depending on one's point of view, that the law (a) has cut bribery substantially, (b) has not been earnestly enforced, or (c) has proven inherently unenforceable. There is some evidence for each of these views. The General Accounting Office survey of companies found that the law had "greatly affected" internal corporate codes of conduct, and that 75 percent of the companies surveyed had revamped their internal accounting controls. The agencies that share enforcement of the act have spent more time on the exegesis of its many ambiguities than on prosecuting cases. And it is probable that some bribery has just been driven further underground, never to be discovered.

Enforcement is split between the Securities and Exchange Commission, which enforces the civil provisions of the law on all SEC registrants, and the Justice Department, which covers companies not registered with the SEC and enforces all of the law's criminal penalties, including those for accounting provisions. Both agencies have been criticized by business for inadequate guidance concerning the act's gray areas. The Justice Department has made at least some efforts to offer guidance; the SEC,

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quandary: it must reconcile its mandate to look only at what is necessary to protect health with the realization that for carcinogens only a zero emissions level is thought to be entirely without risk.

Turning to OSHA, the author notes that the language, legislative history, and judicial interpretation of the Occupational Safety and Health Act over the years all point to an obligation to protect sensitive populations, even though the act makes no specific reference to the issue. This has led to controversy in the development of OSHA standards for cotton dust and lead. Nevertheless, OSHA's dilemma is much less acute than EPA's because OSHA's authority is statutorily limited by the requirement that its standards be feasible. Congress has thus implicitly recognized that it may not be technologically or economically feasible to protect all workers from all risk. In both the cotton dust and lead standard, the author says, OSHA accordingly attempted to set exposure levels as low as was feasible, acknowledging that many workers in the most sensitive group would still not be protected.

Of course, as Friedman points out, feasibility itself is not a hard-and-fast concept, but will depend to some extent on an evaluation of the health risks involved in any given case. At some point in the standard-setting process, it might not be considered "feasible" to achieve an insignificant incremental health benefit, however measured, in light of the costs to be imposed. It is the courts that have had to wrestle, so far, with what "feasibility" means in the context of particular regulations.

One other course of action, open to OSHA but not to EPA, is to allow employers to monitor workers and remove susceptible individuals from the site of the hazard when their vulnerability becomes apparent. Although such medical surveillance may not be of use in the case of carcinogens, it is an important tool in both the cotton dust and lead cases, Friedman says.

The author concludes that as our techniques for identifying ever more sensitive populations become more refined, the concepts of thresholds and margins of safety become increasingly "archaic." The result will be to call into question, in more and more regulatory decisions, society's ability and willingness to provide environments that protect such groups.

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on the other hand, has objected to publishing interpretations and guidelines, and has only reluctantly and temporarily agreed not to prosecute firms that follow the official Justice guidelines. Even if the two agencies cooperate, SEC registrants will likely face different enforcement rules than nonregistrants.

For all of the above reasons, work is proceeding on Capitol Hill to revise some of the statute's more controversial provisions. Senator John Chafee (Republican, Rhode Island) has introduced S.708, which would add a "materiality" requirement to the accounting section, eliminate the "reason to know" standard of responsibility for an agent's acts, require increased compliance guidance by the Justice Department, and transfer civil jurisdiction over the bribery provisions from the SEC to Justice. Chafee's bill would also legalize payments that were legal in the country in which they were made. The Reagan administration has gone further, urging full repeal of the accounting provisions and the SEC's enforcement role. Knowing falsification of accounting records to facilitate corruption would remain illegal under both the proposals.

As one possible way of restoring their competitiveness, many businesses have called for an international antibribery pact. Negotiations have been proceeding for years in the United Nations on this subject, with agreement nowhere in sight. (See Readings, p. 50.) The seven industrialized countries that met at the 1980 Venice economic summit agreed to work toward a multilateral pact of their own, but again there is no prospect that it will ever be completed.

Some proponents of the act assert that retaining it will give the United States a consistent position when it argues for an international pact; some opponents fear that the other industrialized nations will find it worth their while to perpetuate their current competitive advantage by stalling at the talks. One might wonder whether American business's current enthusiasm for an international pact, if indeed it does arise entirely from competitive motives, would evaporate if this country were to repeal its law.