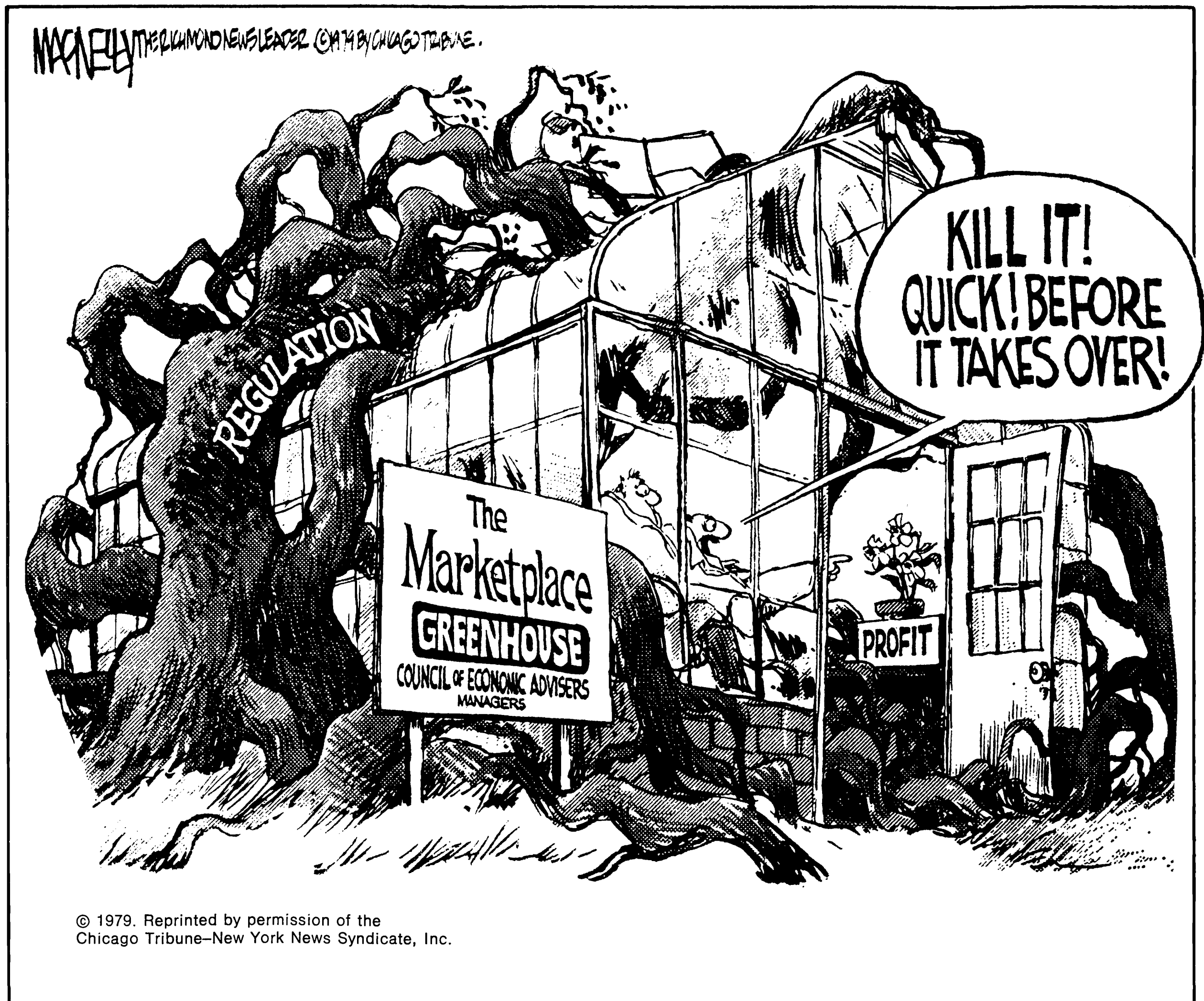
Advice for the President-Elect from Eight Regulatory Experts

ON SAVING THE KINGDOM



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Several months ago, Regulation *asked a group of experts for their personal views and counsel on the most important problems the next administration would face in key regulatory areas. Their responses are presented here.*

Reforming Government Regulation

Murray L. Weidenbaum

ACCORDING TO MOST of the polls, the American public is keenly aware of the adverse economic effects of regulation—less productivity, less innovation, more inflation, and much grief. But the same polls show strong support for government efforts to achieve such social goals as a cleaner environment and safer work places.

When Ronald Reagan is sworn in as President on January 20, 1981, he will have the opportunity to embark on a new approach to government regulation that pursues two objectives simultaneously: (1) doing a better job of achieving regulatory goals while (2) reducing regulatory burdens. Not only is it *possible* to have it both ways—it is high time!

The variety of regulatory activities requires a varied approach to regulatory reform. In the case of traditional economic regulation, which typically creates artificial monopolies or other market interferences to shield specific segments of the economy from competition, the dismantling of controls will go far to enhance consumer welfare. Experience with the elimination of rules by the Civil Aeronautics Board provides a strikingly successful current case in point. Examples of other targets for economic deregulation are not hard to find, particularly in the fields of transportation, communications, and energy.

In the case of the newer social regulation, which typically attempts to correct imperfections in the market (so-called externalities, meaning the costs imposed by one segment of the economy on another), the approach should be to seek out the most effective and least burdensome methods of achieving the desired objectives. Too often at present, the costs of the "government failure" that poor regulation represents far exceed the costs of the "market failure" with which regulation attempts to deal. The traditional notion that the presence of market failure is adequate justification for government intervention badly needs to be revisited; "market failure" may be a necessary but is hardly a sufficient reason.

For some regulatory programs, such as efforts to reduce product hazards, the provision of better public information may enable consumers themselves to make more sensible trade-offs (for example, between safety and price) than any standards set in Washington. For other programs, such as the reduction of air and water pollution, the substitution of pollution taxes for detailed standards may achieve the desired objectives at lower cost.

Numerous analytical tools are available to the policy maker who means business about regulatory reform: benefit-cost analysis of proposed regulations to determine which are worthwhile, cost-effectiveness analysis to identify the most efficient means of achieving the objectives, and sunset reviews to determine which government programs are still desirable in the light of changed circumstance. Many of these reforms require new legislation, but by no means all. The really fundamental challenge in developing a regulatory reform program is not identifying needed changes but determining how to start. The beginning of a new presidential term provides the opportunity. The President's three basic powers provide a useful frame of the possibilities: making appointments, proposing legislation to Congress, and issuing executive orders.

The Appointment Power

The top regulators—be they agency administrators or commission chairmen—typically serve at the pleasure of the President. Some require Senate confirmation and serve fixed terms—as do commission members, of course. Acting obviously within available statutory discretion, the new Reagan administration should promptly use the appointment power to install reform-oriented leadership at the various regulatory agencies in order to establish at the outset a new tone and a new direction. The importance of this cannot be overstated. Under a reform-oriented administrator, the ultimately unsuccessful battle in the courts to establish a "reasonable relationship" between benefits and costs in OSHA's benzene standard would have been unnecessary because such a person would have attempted from the start to fashion a standard that more nearly reflected the desired relationship.

The selection of new appointees requires great care. Much can be learned from the sad experiences of the last four years. Appointing uncritical enthusiasts for expansion of government regulation inevitably produces a regulatory regime characterized by excessive burdens and cavalier disregard of economic impacts. Of course, too extreme a swing of the pendulum in the opposite direction can be equally undesirable.

Those regulatory programs that are deemed to be worthy of continuation must be managed by people who are sympathetic with the important social objectives to be achieved—and who are equally concerned with minimizing the costs and intrusions. In all cases, the appointees should be men and women who avoid simplistic categorizations of "consumer interests" and "business interests," with a presumption of unalloyed good or evil attached to either category. We need open-minded regulators who understand that good policy making means a careful balancing of important and bona fide considerations—clean air *and* lower unemployment, safer products *and* less inflation, healthier working conditions *and* rising productivity. As noted before, not only can we have it some of both ways, but we ought to.

The Legislative Power

The fundamental shortcomings of government regulation result more from statutory than from executive deficiencies. After all, every regulation is issued pursuant to an act of Congress, and every regulator is paid from a congressional appropriation. There is an urgent need to change the fundamental regulatory statutes. President Reagan's power to effect legislation will be considerable: he will be dealing with a Republican Senate and with a House that must be impressed—initially at least—by the size of his popular mandate. And like all presidents, he will be able to develop and attract public support that will ensure particular legislative proposals a place high on the congressional agenda. Here are some of the proposals that could be introduced:

- *Statutes phasing out economic controls that interfere with marketplace competition.* Prime examples include the regulations imposed by the Interstate Commerce Commission, the Federal Communications Commission, the Federal Maritime Commission, as well as the Federal Energy Regulatory Commission and the Energy Regulatory Administration of the Department of Energy. Each of these agencies either creates artificial monopolies or otherwise inhibits the operation of those basic market forces that truly protect the consumer.
- *Statutes revising social regulation that pursues unrealistic goals or applies unreasonable methods.* Such regulation ranges from the "zero discharge" goal of the Clean Water Act to the "zero risk" provision of the Delaney amendment of the Food, Drug, and Cosmetic Act.
- *Statutes mandating benefit-cost analysis and cost-effectiveness studies before new regulations are issued.* For most programs, a statutory requirement could be imposed similar to that applied by the U.S. court of appeals in the OSHA benzene case. For each new rule they propose, the regulatory agencies should be required to demonstrate at least a reasonable relationship between the costs imposed and the benefits produced—and to demonstrate further that they have chosen the most efficient (least costly) method of achieving those benefits. The approach taken in the Carter administration's so-called reform bill—which would

merely require the ritual performance of some economic analysis, undertaken by unsympathetic regulators at that—would have little effect beyond regulatory delay and added cost; but prohibiting the regulator from acting except where the total benefits to society demonstrably match or exceed the costs would be a major and welcome departure from current practice.

Government regulation (if imposed at all—and not regulating *is* often a live option) should be carried to the point where the incremental costs equal the incremental benefits, and no further. Overregulation, that is to say, is the economist's shorthand for regulation where costs exceed benefits.

Critics of cost-benefit analysis tend to forget that it is a neutral policy concept, and that it need not always be applied in dollar terms. Indeed, the costs as well as the benefits may at times properly be measured in terms of human life. For example, in analyzing a potential ban on the use of nitrites for curing meat, the costs may properly be viewed as the lives put at risk as a result of increased botulism, while the benefits would be the lives not put at risk as a result of increased carcinogenic exposure. That is, human lives weigh on both sides of the scale.

In addition to imposing cost-benefit requirements, the new legislation must address the manner of enforcing them. Reluctant regulators can merely go through the motions of studying the economic effects of their proposals—and then proceed as they originally intended. A regulatory oversight office not directly involved in regulation, such as the one recommended below, should be authorized to set government-wide standards and guidelines for performing the economic evaluations, including the estimation of benefits and costs. The determination of the interest rates to be used in discounting future costs and benefits, for example, should not be a matter left to the judgment of an agency attempting to justify its own actions.

• *Greater attention in the congressional budget process to the managing of regulation.* Although the total costs that regulatory agencies impose on society are enormous, the proportion of federal appropriations that they consume is minuscule. As a result, their programs have generally escaped the intensive scrutiny that the budget process can provide. This could be changed by congressional adoption of the following principle: when an agency's existing regulations generate more costs than benefits, the agency's budget for the coming year will be reduced (and perhaps even vice versa!). That could be a powerful incentive for agencies to seek more effective approaches. As a starter, the *Special Analyses* volume that accompanies the annual U.S. budget document should contain a tabulation of the expenditures of all federal regulatory programs.

• *A one-year moratorium on new regulations.* Because of the rapid proliferation of regulatory rules and programs in recent years, all of us need a breathing spell in which to adjust. President Reagan should urge Congress to take such action as necessary to produce a one-year moratorium on new regulations. Of course some new emergency rules will be necessary, especially in the health and safety areas. But such exceptions can be handled in a fashion that preserves the integrity of the moratorium. The approach I have in mind is modeled after the offset policy adopted by the Environmental Protection Agency, whereby a new facility can be built in certain areas only if old facilities generating equal or greater pollution are closed down. Specifically, exceptions to the moratorium should be granted only on the condition that their economic impact be offset by the elimination or reduction of government regulations of at least equal cost. This "offset" approach has the added advantage of providing a partial movement toward a regulatory budget. Although a comprehensive regulatory budget may be a highly desirable method of controlling government regulation, it is doubtful that the numerous conceptual and data problems can be solved soon enough to permit its early adoption. The approach I suggest here would, in effect, be one step toward costing out the effects of the various regulatory programs and requiring government agencies to live within assigned fiscal limits.

The Administrative Power

Even before and even without the foregoing legislative initiatives, there is much the President can do through the administrative power vested in him and his appointees to help bring about the same results. Under existing laws, many agencies have sufficient discretion to phase out counterproductive economic controls, to abandon unrealistic goals and unreasonable methods, to punish (or reward) through their internal budgeting processes those administrative units whose policies are inefficient (or efficient), and to reduce the issuance of new regulations to a minimum.

In addition, administrative action can accelerate the passage of needed legislation by undoing the actions of the current administration that have produced the appearance but not the substance of improvement, and thus have dissipated the pressure for reform. Specifically, President Reagan should act quickly to end the existing "paper-shuffling" approach to administrative regulatory reform. He should abolish the Regulatory Council, a relatively new body that has become for the most

part a protective association for the regulators (who constitute its entire membership). Its rhetoric and reports have served primarily to contain rather than to meet the pressures for reducing regulatory burdens. Second, to spearhead the regulatory reform effort, he should establish a new White House office, either placing it within OMB or giving it separate status. This office would assume the regulation monitoring, review, and information-dispensing functions now performed by the Regulatory Analysis Review Group, the Council on Wage and Price Stability, and the Regulatory Council. Third, he should totally revamp President Carter's Executive Order 12044, which deals with regulatory analysis, so that the resources now expended in wheel-spinning review can be shifted to the more substantive efforts proposed here.

ALTHOUGH DEFENDERS OF THE STATUS QUO doubtless will not believe it, these proposals for drastic regulatory reform do not constitute a Neanderthal plea to ignore the real problems of pollution, discrimination, and so on. Precisely to the contrary: they are offered in the belief that every task government undertakes should be performed ably and that the existing regulatory process simply is not working well. The regulatory device must be seen as a powerful tool to be used only reluctantly, if at all, and always with great care and discretion. This is the essence, of course, of choosing priorities in a government that genuinely wants to limit the burdens it imposes on society. In view of the magnitude of the resources devoted to regulatory purposes, the public deserves better than it has been getting. ■

Federal Trade Commission

Antonin Scalia

IN THE PAST four years the Federal Trade Commission (FTC) has vied with the Occupational Safety and Health Administration (OSHA) for the title of Most Unpopular Agency. But if one rates not merely the magnitude of the unpopularity, but also the inherent difficulty of achieving it, the FTC has to be the clear winner. OSHA, after all, is a new and relatively partisan (that is, labor-oriented) agency, imposing a novel and controversial federal program; the FTC, by contrast, is one of the oldest independent agencies (established in 1914) applying long-standing federal policies against monopoly and consumer fraud. But in the face of all obstacles, the FTC succeeded in alienating even a Democratic-controlled Congress by pressing novel antitrust theories and imposing what were regarded as excessive consumer protection requirements.

Personnel Changes

It is the conventional wisdom that most of the problem can be solved relatively quickly under a new administration, by replacing the antitrust and consumer-activist "extremists" now holding policy positions. This is not necessarily true—for neither the FTC nor the other independent regulatory commissions.

The five commissioners of the FTC, like those of the other "independents," are appointed for staggered terms—in the case of the FTC, terms of seven years. They may not be removed by the President, except for cause. Since Chairman Michael Pertschuk has indicated that, if and when replaced as chairman, he will serve out his term as commissioner, there is no certainty of a change in the make-up of the commission until next September, when the term of Paul Rand Dixon expires.

The new President will have the immediate authority to designate a new chairman from among the current commissioners—and he might acquire the power to select a new chairman and commissioner from the outside, by offering one of the current commissioners a post elsewhere in the administration. The chairman's powers, at the FTC as at most independent regulatory agencies, include the power to appoint and supervise personnel and to distribute the agency's business among them. These powers are limited, however, by the requirement that their exercise "be governed by general policies of the Commission" and that appointment of the heads of major administrative units "be subject to the approval of the Commission."

In any case, the power to appoint staff, however freely exercised by a Reagan-designated chairman, is not necessarily the power to produce prompt and significant policy changes in the direction of greater regulatory restraint. The agency's civil service infrastructure cannot be replaced, and the powers of the new policy-level staff appointees are limited. For example, new initiatives which those appointees and their chairman would rather not pursue can be pressed by the career staff, and ultimately placed on the agency's agenda, through direct resort to the other commissioners. And even if the philosophical makeup of the commission majority changes relatively soon, there will still be a large amount of agency business from the last administration — pending rulemakings and prosecutory actions—that is already in the pipeline and cannot realistically be turned off. There is, moreover, an absolute limit to the degree of restraint that can be imposed upon a mission-oriented career bureaucracy without utterly destroying morale and effectiveness. The existing commissioners—and even new appointees, once appointed and insulated from the President's poli-

cy direction—may not be willing to pay that price.

More Precise Statutory Standards

Thus, any expectation of prompt and dramatic reversal of activist policies at the FTC (and other independent regulatory agencies) by reason of mere change in personnel may be unrealistic. But in any case, dramatic change accomplished in this fashion would be less a solution to the commission's recent excesses than the manifestation of the root problem that permitted those excesses. It is, or should be, exceedingly strange to entertain the notion of basic change in the nature and extent of federal antitrust and consumer protection prohibitions *without any change in federal antitrust or consumer protection laws.* We are not contemplating any radical change, under a Reagan administration, in the content of the ordinary criminal laws enforced by the Department of Justice, or the tax laws enforced by the Department of the Treasury, or the farm programs administered by the Department of Agriculture, except to the extent that that administration may be successful in persuading Congress of the worth of its legislative proposals. At the FTC, however, and in the area of economic regulation generally, we seem to have become accustomed to the idea that extensive restrictions can be imposed—or, for that matter, removed—without any action by Congress, or even (in the case of the independent regulatory agencies) by the President.

Replacing "their" bureaucracy with "ours" does not solve the underlying difficulty. The point is that *no* bureaucracy should be making basic social judgments. If we no longer have (assuming we ever did) a broad consensus on the meaning of the FTC's mandate to prevent "unfair methods of competition" and "unfair or deceptive trade practices," then we must devise some new and more precise statutory directives. It is perverse to delight in our ability to change the law without changing the laws.

Thus, one of the Reagan administration's first tasks with respect to the FTC—as with a number of other agencies—should be an attempt to amend the agency's statutory charter. And the task is best undertaken promptly, when the recollection of the commission's recent excesses under its present charter remains fresh. To be sure, statutory directives can never be entirely precise, and the agency will always retain some considerable degree of discretion; but the room for improvement is substantial. For example, some of the FTC's more extreme consumer-protection initiatives could be eliminated simply by specifying that nothing which in context would be nondeceptive for a person of average intelligence and experience can constitute a deceptive trade practice, unless it is actually intended or calculated to deceive the more gullible. And a clear statutory disavowal of the supposed "double incipiency" reach of FTC antitrust authority would do much to restrain excesses in that field.

Revision of Statutory Powers

In addition to alterating the commission's statutory objectives, there is room for alterating its statutory powers. Specifically, the consumer protection rulemaking powers conferred in 1975 by the Magnuson-Moss Act should be reconsidered. Some would favor eliminating such rulemaking entirely. The problem is that the same effect of an industry-wide ban can be achieved through adjudication, which provides less opportunity for comment and objection by all affected parties. At the very least, however, Magnuson-Moss should be amended to eliminate the current power to impose "remedial" measures by rule—that is, not merely to ban actual unfairness or deception, but also to prohibit perfectly legitimate action that might facilitate unfairness or deception. The FTC's rulemaking authority in the antitrust field should also be addressed. The commission claims to have such power and has periodically threatened to exercise it, though nothing of substance has been produced. Whether the power actually exists is the subject of some legal dispute, and Magnuson-Moss carefully refrained from addressing the point. Even many of those who regard rulemaking as appropriate in the consumer protec-

DUNAGIN'S PEOPLE / *by Ralph Dunagin*

"I'm afraid our company doesn't pay off on disasters that can be classified as acts of Congress."

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tion field consider it inappropriate for antitrust. The power should be clearly abolished.

More fundamental, however, is the question whether the commission should have any antitrust responsibilities at all, since they almost entirely duplicate those of the Department of Justice. Total elimination of the commission's antitrust powers would be politically most difficult; there also is some policy argument against it, namely, that it is only the commission's pro-competitive, antitrust responsibilities that have given it any internal balance and prevented it from becoming, in effect, a single-mission consumer protection agency. Perhaps the most that can be recommended along these lines at the present time is the establishment of a task force to consider the antitrust enforcement issue. It might consider, at the same time, consolidation within the FTC (or elsewhere) of the various, and sometimes overlapping, consumer protection responsibilities now entrusted to other agencies—the Consumer Product Safety Commission, the Food and Drug Administration, and the Department of Agriculture, to mention only a few. ■

Environmental Protection Agency

Robert W. Crandall

TO THOSE WITH just a citizen's eye view of environmental issues, the next few years would seem to offer a difficult choice. Do we seek further improvement in the quality of life through tighter air, water, and toxic-substances regulations? Or should we now relax environmental regulation in an effort to restimulate capital formation, productivity growth, and improvement in the average worker's standard of living? Which is it to be? Better quality or more growth?

Even so elementary a statement of the choices in environmental policy is seriously misleading. So slight is our systematic information on the effectiveness of current policies in improving the quality of the air we breathe, the water we drink, or the land we live on that we cannot conclude that a little more of this or a little less of that type of regulation will necessarily be good or bad. The scientific basis for setting standards and the framework for making decisions in the face of uncertain evidence are woefully lacking. Monitoring and enforcement policies are so weak as to cast doubt on the effectiveness of most regulations. In fact, we cannot be sure that current environmental policy is working at all, because the Environmental Protection Agency (EPA) is so constantly pressed by requirements to promulgate new standards and to defend itself against law suits that it cannot begin to address more basic issues involving the design and execution of its policy.

It is not surprising that as ambitious a set of mandates as those laid on EPA by Congress in the last decade should be in disarray. No organization could possibly cope with the continuing flow of legislation and the detailed regulatory responses required of EPA. How can the agency be expected to determine the "best available control technology," the "reasonably available control technology," and the "lowest achievable emissions rate" for six or seven different pollutants emanating from each of thousands of sources in hundreds of different industries? Add to all this the requirement for approving fifty state implementation plans for achieving air-quality standards—plans that include detailed standards for all existing sources of all major air pollutants—and you have a regulatory task of monster proportions. In addition, EPA must set ground rules for the *growth* in pollutant levels in various nondegradation areas of the country (areas whose air quality is better than EPA's national standards) and establish hazardous pollutant regulations, and also supervise and enforce congressionally set emissions standards for new cars. And this is not all. For all of the above is only a partial listing of EPA's duties in regulating just *air* pollution. EPA also must set pesticides standards, new-chemical testing procedures, water-pollution standards, drinking-water standards, hazardous-waste standards, as well as even noise-and-radiation standards.

No one sitting down to design a rational system for reducing environmental degradation would have devised such a complicated and detailed regulatory program—a program that in all likelihood would collapse from its own weight within a decade or two. The inefficiencies and distortions created by this mountain of standards would only be ameliorated by the fact that much of the program is unenforceable. Small comfort!

EPA is now most unenviably trapped. Industry criticizes it for setting unreasonable standards. Environmentalists criticize it for lack of enforcement. EPA has been reduced to muddling through—enforcing where it can, promulgating rules three or five years after statutory deadlines have expired, extending compliance deadlines for powerful industries, and simply looking the other way when asked to provide scientific evidence to justify its regulations.

In approaching environmental policy, the Reagan administration should take a long view. The most it is likely to be able to accomplish in the next few years is to begin to address some of the more pressing problems that stand in the way of new approaches to rational environmental regulation.

Improvement of Scientific Information. The fiction is that EPA's regulations are based on firm knowledge of the health effects of various pollutants. In fact, the scientific basis for most regulations is seriously deficient. In many cases, moreover, the regulators are not using even

the information available or are not using it systematically. Part of the problem lies in the failure of EPA's office of Research and Development; but the blame must obviously rest, ultimately, with the consumers of this information—the agency's decision makers.

One major example concerns the smog (or photochemical oxidant) ambient air-quality standard. Given the importance of the smog issue at EPA and the central role of automotive emissions, there ought surely to be great interest in estimating the health effects of exposure to acute smog levels. In fact, EPA could cite only very thin evidence in support of its proposed 0.10 parts per million standard (for ozone) or its final standard of 0.12 parts per million. It sanctions the expenditure of billions of dollars a year in controlling so-called precursor emissions but relies heavily on just *one* study of *six* exercising males to "justify" its action. Clearly, had more effort been devoted to researching these health effects over the past eight or ten years, a sounder policy judgment could have been reached.

Improvement in Monitoring Capabilities. One of the most frustrating aspects of current environmental policy is the insufficiency of systematic monitoring of important sources of pollution. Without consistent measures of discharges, policy makers cannot enforce current standards evenly, allow economic incentive systems to operate, or have any way of knowing if environmental quality is improving. Yet EPA does not now have the capacity to monitor even the major sources of pollution. In many cases, "compliance" equals nothing more than the polluters' unaudited assurances that they are meeting applicable regulations.

The 1977 Clean Air Act amendments instructed EPA to improve its monitoring capabilities for air pollution, and EPA has begun to respond. But it is not clear that a sensible statistical sampling approach to monitoring and enforcement has been developed. This is no easy task, to be sure, particularly when discharge rates are volatile and transport characteristics are imperfectly understood for most pollutants. But, however difficult, a regulatory program that cannot develop a monitoring system is doomed to failure and provides no adequate justification for spending billions of dollars a year on control equipment.

Elimination of the New-Source Bias. In view of the difficulty of enforcing standards for older industrial plants, Congress has instructed EPA to set much tighter standards on new sources of air and water pollution. This policy tends to discourage modernization, reduce capital formation, and slow productivity growth. These are effects that would hardly be welcome at any time; but, given the country's problem with stagflation, we certainly cannot afford them now. EPA's recent experience in setting sulfur oxides (SO_2) policy for new electric utility plants provides the best example of just how pernicious this policy can be.

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In 1977 Congress enacted a "best available continuous emissions reduction" technology standard for all new coal-fired sources of SO_x and particulates. All new plants are required to have flue-gas scrubbers regardless of the content of the coal burned—in order to overcome utility executives' reluctance to use scrubbers and to protect midwestern and Appalachian miners of high-sulfur coal from the natural competition that was developing from low-sulfur western coal. EPA's first effort to write this requirement was a standard so tight that many electric utilities would have delayed replacing their older plants. Emissions would have been even greater than under a somewhat looser standard, and control costs substantially higher. EPA was proposing a standard that would increase costs to the point of actually increasing emissions! Only equipment suppliers could have welcomed such madness.

This bias against new sources pervades environmental regulation; it is present in most health, safety, and even energy conservation regulation. New chemicals are to bear a heavier burden of proof of safety than old chemicals. New buildings are targeted for energy standards, not old ones. New cars have tighter pollution standards than used cars. An end to this approach in all regulation can only add to the country's ability to grow and prosper.

Sensible Penalties Policies. Environmentalist and policy makers seem at least to be interested in developing economic incentive approaches to environmental policy. The "delayed compliance" penalty—requiring polluters to pay in proportion to their savings from noncompliance—is at least a step in the right direction, although barely so. Each polluter should be required to pay for each excess unit of water or air

pollution above a given standard. But, in contrast to EPA's noncompliance penalty—which imposes a different charge on each polluter per unit of pollution and would carry enormous administrative costs—the price per unit of excess pollution of the same substance should be identical for all the polluters in a given area. To reform this penalty into a constant tax rate is, of course, to open the back door to a pollution tax. The rational approach to pollution control is therefore at hand, but implementing this approach and convincing Congress of its merits may be quite difficult. Nevertheless, the new administration should give it a strong try. All at once, it would reduce the administrative burdens on EPA, eliminate the new-source bias, and get more clean-up for less money. A precondition, of course, is some solution of the monitoring problem (which is why monitoring is so high in this catalogue).

Avoiding Grandiose New Programs. Among the more wasteful but politically popular programs at EPA is its enormous grants program for local sewage-treatment facilities. Congressmen are particularly attracted to such sources of federal dollars for their districts. So, wasteful or not, we are now on the threshold of a new "superfund" that will collect billions of dollars in taxes from future sales of chemicals in order to clean up past accumulations of hazardous wastes in abandoned dumps. This is a singularly bad idea because the generation of the tax revenue will create demands for cleaning up waste sites even when the costs of doing so exceed any prospective social benefits. It would be far better to draw the funds for retroactive cleanups from general revenues and require a benefit-cost analysis, dump-by-dump and cleanup-by-cleanup. In any case, the entire toxic-substances and hazardous-wastes area should be scrutinized carefully before saddling EPA with still more bureaucratic and regulatory nightmares.

CLEARLY, it is neither wise nor even feasible simply to abandon the regulatory program that has been worked out by EPA over the past decade. But we should prepare the groundwork for a much more effective program of environmental protection—one that may even work!—with less reliance on detailed standards and intervention in the design of industrial and environmental control systems. Improving the scientific base for decision making, greatly increasing monitoring capabilities, and refining the enforcement-penalties system will assist in moving environmental policy in the only direction that holds real promise—toward a decentralized incentive system of pollution taxes or marketable pollution rights. ■

Occupational Safety and Health Administration

James C. Miller III

THE OCCUPATIONAL SAFETY and Health Administration (OSHA) is unique, even among federal regulatory agencies. It has surely the worst performance record. None is more despised by the business community nor more ridiculed by the public. It wastes precious resources and has done little to improve worker health or safety.

The pattern of OSHA's regulatory failure, like that of many federal regulatory agencies, can be traced to inadequacies in the enabling statute and in the agency's own use of its discretion. As evident from the Supreme Court's deliberations in the recent benzene case (see *Regulation*, July/August 1980), the Occupational Safety and Health Act is extraordinarily vague both in its directions to the agency and in the limits it places on agency discretion. The statute should be rewritten (as detailed below). Moreover, like many other of the social regulatory agencies, OSHA suffers from tunnel vision—from too narrow a focus on its literal mission. It all too often fails to take into account the effects of its actions on other desirable social goals, such as price stability and employment. And its staff habitually views industry as the adversary-villain, organized labor as the ally-promoter. The result is a tendency toward regulatory excess that serves well the interests neither of workers nor the public at large.

President Reagan should appoint a strong and knowledgeable OSHA administrator, one who is both determined and able to improve the agency's performance. The appointee should be strong because the agency's staff requires such leadership to overcome its inherent prejudice and its orientation toward punishing "offenders" rather than improving workers' safety and health. The appointee should also know OSHA and its *modus operandi* thoroughly so that reforms can be put in motion at once.

This new OSHA administrator should take some immediate initiatives (all of them, arguably, achievable under the existing statute):

(1) Issue a directive that henceforth personal protection devices (such as earplugs or earmuffs in the case of industrial noise, or masks in the case of airborne contaminants) are acceptable ways to meet performance standards. The potential cost savings from this simple policy change are enormous. And in many cases, the result will be an increase in worker protection.

(2) Where existing standards mandate engineering controls, propose revisions converting them into performance standards (thus allowing personal protection devices as a means of meeting the standards). Whether a performance standard should be met by engineering controls or personal protection devices is a matter that should be decided by employers and employees, not by the government.

(3) Issue a directive requiring

FRANK AND ERNEST **by Bob Thaves**

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that all new regulatory proposals meet two tests: anticipated benefits must exceed anticipated costs and the least costly alternative must be chosen. Moreover, such proposals must take the form of performance standards, not prescriptions of specific abatement techniques.

(4) Begin reviewing all existing standards to ensure compliance with these new requirements.

(5) Withdraw OSHA's current general carcinogen policy proposal (see *Regulation*, March/April 1980) and submit a new policy only after ensuring that it conforms with the requirements outlined in item 3.

(6) Replace the members of the National Advisory Committee on Occupational Safety and Health with persons that are oriented toward better agency performance and in harmony with the new agency leadership.

(7) Reduce all unnecessarily burdensome reporting requirements, especially as applied to small businesses.

(8) Improve the quality and objectivity of OSHA inspectors through training programs and personnel shifts.

The new OSHA administrator also should get right to work on legislation that would amend the Occupational Safety and Health Act in at least the following respects:

(1) Require that all new rules and regulations pass a benefit/cost test, and set a schedule for sunsetting all existing rules and regulations (so that they too, if reissued, would have to meet the test). This would make the requirements outlined in item 3 above subject to judicial review, would enable private parties to petition the courts for relief, and would provide an additional mechanism for "policing" agency performance.

(2) Make it possible for OSHA officials to inspect a facility, on request, without having to issue citations where violations are observed (as the statute now requires). This would allow OSHA to play a constructive "consulting" role, not just that of "enforcer" (OSHA now partially funds state "consulting" programs, but their role is limited).

(3) To the extent possible, change OSHA's primary role from the setting and enforcing of safety and health standards to one of approving or, under extraordinary circumstances, modifying the standards worked out between labor and management. OSHA's function should be consultation and oversight, not command and control.

(4) Where the establishment and enforcement of standards is appropriate, develop a system of financial incentives to achieve compliance. These could perhaps be based on workers' compensation; or a program might be instituted that levies fines on firms with extraordinarily poor safety and health records and awards cash to those with particularly good ones.

THIS IS ONLY A PARTIAL LIST of the administrative actions that should be taken and the statutory changes that should be proposed. But it is a beginning—urgent and essential, if OSHA is ever to be turned into a useful regulatory citizen. ■

Energy Regulation

Murray L. Weidenbaum

VIEWED IN HISTORICAL perspective, the most striking thing about U.S. energy policy is the incredible speed with which this major sector of the economy has become subject to comprehensive federal regulation. It was only in 1971 that President Nixon imposed price controls on petroleum and, even then, only in the context of a general wage/price freeze. In November 1973, Congress mandated "temporary" allocation controls on petroleum to deal with the OPEC oil embargo. But by 1977, with the establishment of a permanent cabinet-level Department of Energy (DOE), price-and-supply regulation of the energy sector of the U.S. economy was tacitly acknowledged to be a long-term matter.

Nor is energy regulation limited to a handful of highly visible oil companies. DOE rules now cover

more than 300,000 different firms, including 15,000 independent crude producers, 26,000 wholesalers, and more than one-quarter million retailers. Moreover, this area of regulation provides ample proof (if any were needed) that government intervention begets more government intervention. The array of demand-inducing and supply-repressing price and allocation controls enforced by DOE has been supplemented in the last few years by a host of other programs initiated precisely to offset the effects of those controls. A complex of expenditure, credit, and tax subsidies has been enacted—in an effort to reduce American dependence on foreign oil by encouraging some types of energy production and discouraging some types of energy consumption.

A policy that consists of the equilibrium of acting at cross purposes would be better achieved by not acting at all. In other words, the nation's energy objectives can be reached more effectively simply by dismantling DOE's various price and allocation controls—and the ancillary subsidy programs along with them. Economic history teaches us that the sooner government frees conventional energy sources from artificial price restraints, the sooner will new and unconventional energy sources become commercially competitive. Conversely, the continuation of controls will delay the time when solar energy, synthetic fuels, and the like come into widespread use without subsidy.

As a nation, we never have "run out" of energy supplies, even though that concern often has been raised. Rather, we have experienced successive (and quite natural) shifts from one energy source to another, as the underlying economics (relative prices) have changed. The first switch—from exhaustible resources to synthetic fuels and back to exhaustible resources—occurred in the nineteenth century. In 1800, illumination in America was provided mainly by candles and oil lamps. Subsequently, when whale oil supplies gradually fell off and prices soared from 23 cents a gallon in 1832 to $1.45 in 1865, consumers shifted to such cheaper substitutes as coal oil (kerosene). Later, however, kerosene lost out to a new and even lower-cost fuel that had appeared on the market—crude oil, discovered in 1859. By 1863, virtually all coal oil refineries had shifted to crude oil and many new facilities were being built. The moral of the tale is clear: in these earlier cases, government did nothing to help or to hinder shifts in fuel resources. They just occurred. And they did so in the marketplace.

Thus, looking ahead to 1981, the most pressing need in energy policy is a variant of an old refrain: "Don't just stand there, undo something." Specifically, upon being sworn in on January 20, 1981, President Reagan should promptly use available presidential authority to end all price and allocation controls on crude oil and petroleum production, marketing, and refining (which are scheduled to expire anyway at the end of next September). Simultaneously, he should ask Congress to repeal the statutory basis for price controls. Contrary to widespread misconceptions, the sale of much natural gas production is still subject to detailed and very complicated price regulation, only some of which is scheduled to be terminated.

Administrative changes by government regulatory agencies also could help to increase domestic energy supplies. For example, the new secretary of the interior should begin to prepare a revised and accelerated schedule of oil leasing on the outer continental shelf. A new schedule could not be issued immediately, because the Outer Continental Shelf Lands Act Amendments require a minimum period of seven months from proposed revision to final approval. But it should be made ready. Furthermore, the new secretary should be directed to review and liberalize the regulations that withhold public lands from mineral resource exploration and development. The federal government's ownership of approximately one-third of the nation's land mass, plus its jurisdiction over the outer continental shelf, give it tremendous power over many of the future resource supplies of the United States. Thus the new secretary should also move ahead a long-term oil shale leasing program.

A variety of statutory changes would help, too. One would be amending the OCS Lands Act to centralize in the Office of the Secretary of the Interior the various environmental responsibilities for the outer continental shelf. Another would be to revise the Federal Land Policy and Management Act, to make it less easy to withdraw public lands from mineral resources exploration and development. In essence, the statutory changes contemplated here would provide a mechanism for better balancing ecological and aesthetic desires with energy and economic needs, thus reenforcing the beneficial effects of energy price deregulation. Uncle Sam would do well to get all of his feet beating the same rhythm.

The current state of federal energy regulation can be characterized by the image of Uncle Sam with one foot on the brake and another on the accelerator—simultaneously. For most of the issues involved, the simplest remedy is to get him out of the car. ■

Auto Regulation

William A. Niskanen

THE U.S. AUTO INDUSTRY is subject to a set of unique and complex regulations having conflicting purposes and effects.

- Federal fuel economy standards increase prices and reduce safety.
- Federal emissions standards increase prices and reduce fuel economy.
- State insurance regulations reduce safety.
- State franchise regulations increase prices.

- A federal antitrust investigation increases costs and planning uncertainty.
- Federal trigger prices on steel and tariffs on other materials and components increase costs.
- Federal energy price controls reduce fuel economy, while federal price guidelines attempt to limit price increases.

These conditions, combined with the weakening economy and the large increase in gasoline prices since spring 1979, have led to a rapid deterioration in auto industry profits and employment. U.S. auto firms lost more than $1.6 billion in the third quarter of 1980, and today 200,000 auto workers are unemployed, even though automobile sales have increased somewhat since May. One may be dismayed but should not be surprised that the Ford Motor Company and the United Auto Workers asked the International Trade Commission to impose import quotas (it refused), that Chrysler Corporation requested a large federal loan guarantee, and that American Motors has occasionally sought selective regulatory relief. (One *may* be surprised, however, that there has been no substantial opposition to any of the above regulations.)

The Carter administration's response to these conditions has been to entertain a new set of interventions developed by several government-industry task forces. A far more sensible approach would be to take steps at once—through executive action, proposals to Congress, and new leadership of the regulatory agencies involved—to review the whole set of regulations to determine which should be revised and which dropped from the books. The regulatory web in which the auto industry is ensnarled must be broken.

Fuel Economy Standards. The Energy Policy and Conservation Act of 1975 established fuel economy standards of 20 mpg for model year 1980 cars and 27.5 for 1985. In addition, it authorized the National Highway Traffic Safety Administration (NHTSA) to set the standards for the intervening years (1981–84), to reduce the 1985 standard to 26 mpg, and to determine standards for light trucks. The present fuel economy standards for cars and my proposed alternative are below.

	Miles per Gallon	
Model Year	*Present*	*Proposed*
1981	22	22
1982	24	23
1983	26	24
1984	27	25
1985	27.5	26

Although the standards for light trucks have not yet been established beyond model year 1982, a similar restraint on these standards is also advisable. The case for this change is that the standards are wholly arbitrary and have forced an inefficient rate of investment on the auto industry while reducing the demand for new vehicles. No public purpose is served by forcing new vehicle fuel economy to be higher than buyers prefer. If gasoline consumption is to be cut, immediate decontrol of gasoline prices (proposed below) complemented perhaps by a phased increase in the gasoline tax would be a much more efficient approach: it would both reduce driving by existing vehicles and increase the demand for more fuel-efficient new vehicles.

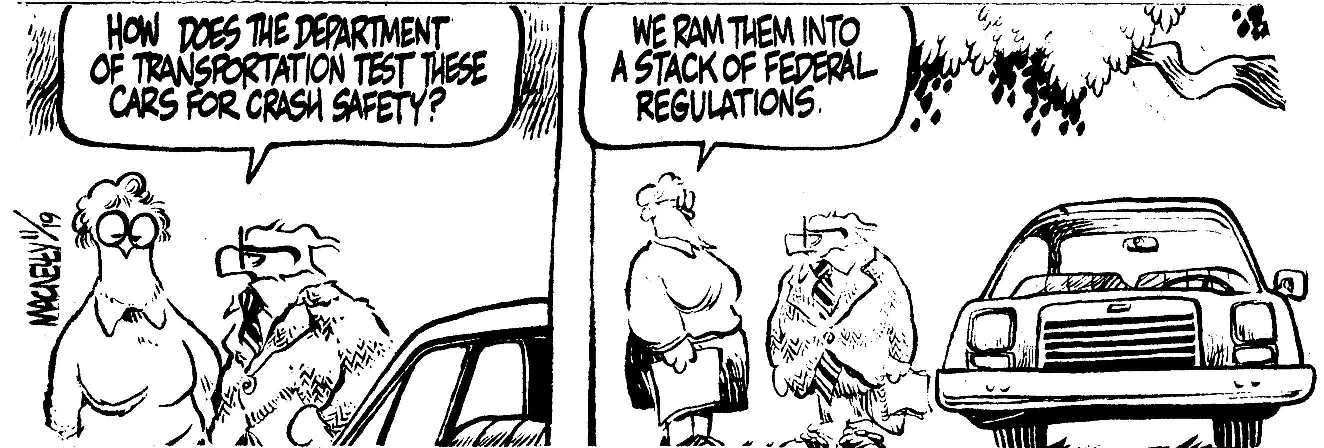
The 1975 act also requires that 75 percent of the value added for each line of cars and trucks be produced in the United States or Canada, a requirement that prevents automakers from counting imported vehicles when computing their feul-economy averages. This constraint forces the domestic companies to produce their whole vehicle line in this country, even if it is more efficient to produce the smaller vehicles abroad. Legislation should be proposed that would apply the 75 percent domestic-content rule to a firm's entire vehicle line, thus permitting the domestic companies to focus their own production on the larger vehicle lines where they have a comparative advantage. The UAW (some of whose members' jobs would be affected) would probably be the only group to oppose this change. My preference would be to repeal the entire fuel-economy law, but there is probably no potential consensus for such a move.

One side-effect of increasing fuel economy, whether achieved by market forces or statute, should be recognized: small cars are less safe than larger cars, particularly during the change-over when most of the vehicles on the road will be larger than the new vehicles being produced.

Emissions Standards. The new standards imposed by the Environmental Protection Agency for model year 1981 lowered allowed emissions of hydrocarbon, carbon monoxide, and nitrogen oxide. Again the result was higher vehicle prices and reduced fuel economy. Although these tighter standards may have some favorable effect on morbidity and aesthetic conditions, there is no evidence that they will significantly influence mortality. According to a National Academy of Science study, the estimated benefits will be less than the costs—and the increase in the price of gasoline since that study would reinforce this conclusion. Nevertheless, there does not appear to be significant opposition to these standards. A review should be undertaken in order to develop a consensus for major revision and for the legislation that may be required.

One awkward issue has developed recently. Diesel particulates may represent a significant health hazard but are not now controlled. The demand for increased fuel economy may lead to the greater use of diesel engines in new cars.

Safety and Damageability Standards. NHTSA has recently mandated that passive restraints (either air bags or automatic seat belts) must be included in new large cars in model year 1982, in mid-size cars in model year 1983, and in small cars in model year 1984. As with all of NHTSA's safety and damageability standards, this one will increase prices and weight and reduce fuel economy. The air bag will probably cost over $500 per car (which is likely to restrict its use to luxury and large cars), will reduce the use of seat belts, and will not be effective in side collisions; and the automatic belts can be easily bypassed. Moreover, the standard's timing will increase the relative price of domestic cars for the next two model years. This standard should be withdrawn as soon as possible. No public purpose is served by pro-



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tecting people who choose not to protect themselves, whether by air bags or seat belts. Moreover, in light of the evidence that people probably drive more aggressively in safer vehicles, forcing new car buyers to purchase a safer vehicle may reduce the safety of others.

NHTSA also imposes standards to reduce the physical damage to vehicles. These standards (for example, the requirement that bumpers withstand a 5-mile-per-hour collision) also increase price, weight, and fuel consumption, producing costs substantially higher than the benefits they may provide. Auto manufacturers and auto buyers have sufficient incentive to provide and buy vehicles that are not easily damaged, and no other party is affected. These damageability standards should be rescinded.

State Insurance Regulations. In most states, insurance regulations allocate high-risk insurance policies among the insurance providers. This lowers insurance rates for high-risk drivers, raises rates for low-risk drivers, and probably reduces highway safety. These regulations should be evaluated, with a view to drafting proposed federal legislation to correct this bias.

State Franchise Regulations. In most states, franchise regulations restrict the number and location of new auto dealers and specify the provisions of franchise contracts between auto manufacturers and dealers. A recent study estimates that in 1972 these regulations increased the average price of a new car by over $700. They also probably increase the relative price of small cars and, thus, reduce fuel economy. Again, these regulations should be reviewed and a federal law to correct this bias should be seriously considered.

The FTC Investigation. In 1975 the Federal Trade Commission initiated a major investigation of the structure of the U.S. auto industry. The big three automakers estimated their combined costs for responding to the FTC's subpoenas at $200 million. At a time when auto industry conditions are changing so rapidly, a historical study of the industry's structure seems particularly wasteful, and the threat of possible actions based on this study increases planning uncertainty. Termination of this study should be considered.

Tariffs on Materials and Components. President Carter recently reimposed trigger prices on steel, thereby potentially increasing steel prices by 12 percent. The tariffs on other automotive materials and components range up to 15 percent. (By comparison, the tariff on an assembled car is only 2.9 percent.) Trigger prices and tariffs increase the cost of domestic manufacture relative to the cost of importing assembled vehicles. A reduction in trigger prices and other tariffs should be considered as an alternative to raising the tariff on assembled vehicles.

Price Controls and Guidelines. The on-again, off-again nature of price controls has buffeted the auto industry. By artificially depressing the price of oil and gasoline, these controls delayed the movement toward greater fuel economy during the 1970s, adversely affecting our progress toward energy independence and environmental goals. The temporary stimulus from these controls to the sales of larger cars was bought at the price of delaying the ultimate adjustment by U.S. manufacturers to a smaller-car fleet. In recent years, the gradual phase-out of these controls made U.S. firms more vulnerable to the rigors of world-wide competition. Moreover, the combination of substantial wage premiums for U.S. auto workers relative to average U.S. industrial wages and President Carter's price guidelines on cars has placed the U.S. firms in a vice. Their product prices are constrained by both international competition and output price guidelines, while input prices and regulation-induced capital outlays soar and the chief "complementary good"—gasoline—is no longer such a bargain.

THE U.S. AUTO INDUSTRY is in serious trouble. Many of its problems are attributable to the doubling of real gasoline prices since 1973, a condition that neither the industry nor

the government anticipated. Some of its problems, however, are clearly attributable to regulation. A continuation of recent trends—more regulations, combined with new tariffs, subsidies, and government-industry "cooperation"—will convert the auto companies into wards of the state, automobile versions of Conrail. The Reagan administration should move as rapidly as possible toward the kind of balanced regulation that will best serve the public interest. ■

Federal Communications Commission

Antonin Scalia

For one who is, as I am, interested in deregulation, recommending an approach of the new administration towards the Federal Communications Commission (FCC) tests the sincerity of the democratic sentiments expressed in my comments on the Federal Trade Commission (FTC, page 18). For the FCC is at least as unrestrained by meaningful statutory standards as is the FTC; and it has been at least as "activist" during the past administration. But almost all of its activism has been in the direction of *de*regulation, and it is by no means clear that new legislation by the Congress would accelerate rather than reverse that welcome trend.

The current FCC has relaxed the regulatory requirements applicable to radio broadcasting, moved substantially towards open competition in common-carrier communications, retreated from detailed regulation of cable, and even expanded television broadcasting services. Only in the social regulation field has the commission tended to be interventionist—and even there not much so. It has, for example, imposed affirmative action requirements on broadcasters and is considering the mandating of specified amounts of children's programming; but it has steadfastly avoided the restriction of advertising in children's programming, leaving that disastrous battle to be fought by the FTC.

The right sort of statutory amendment could greatly assist the FCC's deregulatory efforts. It is questionable how much further the commission can go in the common-carrier field under a statute that mandates entry, exit, and tariff regulation. Or in broadcasting under a statute that (as interpreted by the courts) mandates the triennial selection of the "best qualified applicant" for a radio or television station. But commercial forces and some public interest groups that favor continued and even intensified communications regulation are particularly strong in Congress, and a single-minded deregulator might wisely leave bad enough alone.

Despite the risks, however, the Communications Act must be amended. Enacted in 1934 and not substantially altered since then, it does not even address the peculiar problems of television, much less of cable and computers. The basic framework of our communications structure for the next half century is now being formulated, literally without any statutory guidance. A "rewrite" of the Communications Act has been in the works for years, but is stalled. The new administration must demonstrate concern and leadership in this field. It should support the concept of a rewrite and should seek to achieve, among other objectives, the following:

(1) The establishment of a framework for open competition in the common-carrier field (including ground rules for competition by AT&T); and the clear delineation of those areas where continued AT&T monopoly will be permitted.

(2) The establishment of a clear and predictable national policy with regard to cable, protecting that medium from constraints designed to subsidize other technologies and ensuring an industry structure that will minimize monopoly characteristics.

(3) Insulation of the fast-growing computer industry from rate-and-entry regulation on the basis of the communications aspects of their services.

(4) At least the beginning of

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"You don't like it and I don't like it, but the FCC likes it."

movement towards market allocation, rather than governmental assignment, of spectrum use.

(5) A reduction of government content controls and entry restrictions in the broadcasting field.

To the extent that additional work can be done—in some or all of the above areas—without impeding legislative progress or antagonizing a Congress that has already devoted considerable attention to the field, the administration should establish a presidential advisory commission similar to the President's Task Force on Communications Policy (the Rostow commission), whose 1968 report had great impact. ■

Food and Drug Administration

Robert B. Helms

REFORM OF THE Food and Drug Administration (FDA) is long overdue. But to avoid becoming entangled unnecessarily in a political thicket, the Reagan administration must distinguish between two public desires—to eliminate intrusive unnecessary regulation and to be protected from dangerous products. The task will not be easy.

In this advisory to the new administration, the focus is on drugs. The FDA's mandate goes well beyond that of course—embracing food additives, cosmetics, medical devices, and more. But regulation of prescription drugs has been most thoroughly evaluated, and it best illustrates the two main issues involved in bringing regulatory reform to the agency's activities: the balancing of risks and benefits, and the reduction of costly government intrusions into private business and personal choices.

Why Is Drug Regulation So Controversial?

The adverse impact of the FDA's overly cautious, near zero-risk approach to the task of approving new drugs has been amply and persuasively documented. FDA regulation is deterring the development of new cures for disease and improved diagnostic accuracy; the United States is falling well behind the United Kingdom and other countries in the approval of new drugs for the market; and there has been a substantial movement of research and development activity from the United States to foreign countries and a serious decline in our domestic drug industry relative to foreign firms. We are losing out both medically and economically.

Nevertheless, even though the case for reform is clear, there is little public support for a substantial reduction in drug regulation. Most people simply do not believe that the private pharmaceutical firms can be trusted to produce safe products. Only a government agency—it would seem—can ensure real safety.

This common view of private industry's performance and interests with regard to safety is, I believe, a distorted one. It derives from the fact that, no matter how well-intentioned the company official or regulator, some mistakes will happen. A drug may turn out to have unexpected harmful effects in some patients after it has been put on the market—effects occurring so rarely that small-scale animal and human tests simply cannot detect them. Conversely, a drug can also have unexpected benefits—the treatment used for gout may turn out to reduce heart attacks. These, however, receive less attention. The public's view is distorted precisely because the dramatic and concrete evidence of the harmful effects are more easily publicized than the serendipitous occurrence of unexpected benefits, and are also more readily understood than the largely unseen effects attributable to not having a beneficial new drug. If the FDA errs and allows a drug on the market that later turns out to have harmful effects, the victims will be identified and their suffering made public. But if the FDA errs and blocks the marketing of a drug that would later prove to be more beneficial than expected, how many people will know about the lost benefits involved? At most, just a few scientists and physicians who have either researched the drug or know of its use abroad.

The fact that the harmful effects are more dramatic than benefits foregone also influences the behavior of the regulators. Clearly, preventing a beneficial drug from reaching the market is a lot less risky for the bureaucrat than allowing a potentially harmful drug on the market. Indeed, the differences in the rewards and punishments positively encourage the regulator to err on the side of caution: assign greater weight to potential risks than to potential benefits—and, if in doubt, delay.

What then is to be done?

Principles for Reform

To establish a framework for the reform of FDA regulation, three broad principles should be kept in mind. The first is that positive incentives to produce safe products will be more efficient in bringing about safety than the present negative system of pre-market clearance. As already noted, implicit in the public's support for FDA regulation is the belief that the industries producing medical and food products have inadequate incentives to market safe and effective products. While I believe this is an overly simplistic perception, initiatives to strengthen product liability laws as a substitute for direct government intervention should give firms a greater incentive to insure safe products.

A second principle, akin to the first, is that the more numerous the sources of information about a drug, the more accurate and more timely the information will be. While this principle could perhaps be applied within the government,

consideration should be given to establishing private or academically based evaluative units to provide information about drug effects.

A third principle is that the attempt to ensure zero risk for the entire population is too costly. A more realistic approach starts from the premise that consumers are better off if they have the best information available when making decisions about risks and benefits. This principle could be applied to postmarketing surveillance of drugs (and devices) if the FDA would adopt a policy of supplying more information about *both* beneficial *and* harmful effects to consumers and physicians.

Pressure for Reform

Significant reform of FDA regulation will be possible only if there is strong pressure from outside the agency, in particular from the White House and Congress. To expect otherwise goes against all theories of bureaucratic behavior. The incentives to avoid risk and the tendency toward what Jerry Mashaw (*Regulation*, November/December 1979) calls the "progressive logic of regulation" are simply too strong.

As for pressure from the White House, it is important that the FDA be fully subject to the new administration's overall regulatory reform effort and not be considered a special case. Modest improvement can be brought about at the agency by imposing Murray Weidenbaum's general requirement (see page 16): that the benefits and costs of each regulation be in reasonable balance and that the least costly method of achieving the objective has been selected. There are numerous opportunities for applying cost/benefit and cost-effectiveness analysis at the FDA, even to existing programs. One good candidate is the inspection program applying to the early stages of clinical testing (Phases I and II)—where, according to William Wardell, the safety record is so good that the local ethical review committees in testing facilities could be relied upon more heavily for monitoring. The regulations on Good Laboratory Practices and Good Manufacturing Practices also need evaluation. These programs now keep a small army of FDA inspectors in the field checking on the practices of laboratories and manufacturers. The efficacy of that approach should be compared with alternative strategies that concentrate more on results (the quality of the product produced) and less on procedures.

The most important action Congress can take to stimulate reform at the FDA is to give the agency a clear and positive mandate to ensure that the most beneficial products are available to U.S. consumers and patients. At present this agency has only a negative mandate to prevent the marketing of products it considers unsafe or ineffective. With a positive mandate, the FDA might be more willing to accept foreign information about a drug's effects and more willing to modify its procedures so as to speed the review of new drug applications. It might also be more sympathetic with various measures that have been proposed for decreasing the vulnerability of FDA officials and staff who must make the difficult decisions regarding risks and benefits. One such measure would be to reduce lengthy premarket clearance requirements in favor of a system for gathering information about the actual effects of the drug after it is on the market. Another would be to spread the responsibility for decisions more widely by placing greater reliance on the advice of panels of outside experts. In order to allow academic, industrial, and consumer experts having detailed knowledge on certain classes of drugs to serve on those panels, current conflict-of-interest regulations would have to be relaxed.

IN THE END, however, reform at the FDA comes down to the agency's leadership. The Reagan administration should seek people whose expertise in medicine and science will command the highest respect, whose view is broader than the blind elimination of risk, whose objective is the kind of balance in regulation that will be in the public's best interest. Without such leadership, the seas of reform are likely to remain rough indeed. ■

"Does mothers' milk still have the approval of the Food and Drug Administration?"

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Labor Regulation

Marvin H. Kosters

So many different aspects of the labor market are influenced by government regulation that it is necessary to be selective in this discussion. Collective bargaining and wage rates deserve primary emphasis here, while other labor regulatory issues are sketched out more briefly.

Regulation of Collective Bargaining

The collective bargaining process—as it has evolved under legislation, court decisions, and regulation—is surely among the most significant of labor regulatory areas. As an arrangement for wage-setting, the process has sometimes been criticized on efficiency grounds because of the market power it confers. In view of two other perspectives that set the context for my discussion, however, that criticism must be addressed by maintaining avenues for competition, particularly in product markets and often including competition from abroad. First of all, if one accepts that workers should be free to organize and bargain collectively and recognizes the constructive role the bargaining process can play—as I do—changes in the antitrust exemption for labor that would significantly limit that freedom and alter that process can be excluded from consideration. Second, our collective bargaining institutions, shaped by political and economic forces, have reached a degree of maturity that provides a reasonable overall balancing of the interests of the parties involved. Consequently, I do not view proposals that would lead to significant shifts in these two areas as promising approaches to reform.

Providing a framework for employees to work out collectively with employers arrangements ranging from wage levels and structure to adjudication of disputes through negotiations and mutual agreement is the central idea underlying collective bargaining processes. Regulations defining rights, duties, and procedures are essential for setting this framework. Over the years, however, the application of this underlying idea has been transformed in both substance and procedure.

From a substantive point of view, a gradual accretion of government policies, statutes, and regulations has progressively reduced the matters actually subject to bargaining. Equal pay and civil rights legislation, wage-and-hour requirements, and federal procurement policies have given regulation a major role in setting employment and pay practices. Increased social security tax payments, a result of higher tax rates applied to a steadily rising earnings base, have increasingly preempted decisions concerning provisions for retirement pay. The extension of social security taxes and benefits to higher rungs on the earnings scale has also left less room for private pension plans, and private pension arrangements have themselves come under comprehensive regulation. Safety and health regulation has frequently led to detailed specification of requirements for those aspects of working conditions. Even incidents where work practices and social interchange blur into sex discrimination or harassment have increasingly become matters for government regulation instead of private adjudication. Finally, government limits on pay increases for workers in the private sector—most often quasi-voluntary in character—have frequently been applied to the main remaining component subject to bargaining.

In these many ways, regulation has encroached on substantive areas that would otherwise be subject to negotiation. One consequence of this encroachment is that issues must often be resolved in the contentious context of detailed standard-setting, litigation, and government resolution of disputes—a context in which the scope for negotiation, mutual accommodation, persuasion, and cooperation is diminished. Another consequence arises from the inherent limitations of regulatory techniques for coping with complexity and permitting the diversity that responsiveness to different circumstances requires. Striking labor market bargains—both for individuals and under collective bargaining—involves arriving at a mutually agreeable pattern of compensation and working conditions. On an economy-wide basis, the labor market's sorting-and-matching task is obviously immense in view of the different locations, skills, experience, interests, family circumstances, and personalities of potential employees and the range of profitable situations, compensation arrangements, and work conditions seen by potential employers. Spelling out in detail all of the criteria for possible matches would be almost as ambitious a regulatory undertaking as, though admittedly less sensitive than, spelling out personal and family responsibilities and privileges for the partners in marriages.

The point is that many elements of the outcome of the collective bargaining process are already prescribed by government and the activities of the parties in the process itself are increasingly circumscribed by regulation. Each of the substantive and procedural requirements that impinges on labor bargaining was intended to further worthwhile goals—as is true for most regulation. Taken together, however, they have substantially reduced the variety of possible outcomes that mutual agreement might bring and have unnecessarily limited the scope of permissible labor organizing and bargaining activities.

The public purpose would be better served by shifts in emphasis: from regulatory prescriptions to private agreements, from norms with universal conformity required to minimum standards of conduct, from detailed specification of rights to bargaining, and from litigation to negotiation. More emphasis should

also be placed on leaving room for diversity. Preservation of competition in product markets is also essential, of course, to foster timely wage adjustments and to ensure that wage levels are fair and consistent with efficiency. Competitive forces have succeeded, while standards for wage increases have demonstrably failed, in producing wage behavior consistent with reduction of inflation.

Regulation of Wage Rates

Most wages, most of the time, are not prescribed by federal regulation. The significant exceptions are minimum wages and wages for work under federal contracts.

For minimum wages, the basic economics is quite simple, the evidence of adverse effects on jobs is well documented, and the problems to which they contribute are widely recognized. To the extent that the federal minimum forces wages above competitive levels, employment costs are increased and the number of available jobs is reduced. The impact on people who want jobs is selective, of course, with those whose earning capacity falls farthest short of the minimum legal level facing the worst difficulty in getting jobs. As a group, teenagers are most seriously affected, and among teenagers, those most poorly prepared for work by schooling and training. The kinds of jobs available are also affected by minimum wages. Because the extent to which employers can offer a combination of lower wages and more on-the-job training is limited, prospects for advancement from lower to higher paying jobs are poorer. More jobs are dead-end jobs. And again, opportunities are most sharply reduced for teenagers who have left school early or who are poorly prepared for work.

The case for legislating a lower minimum wage for teenagers rests importantly on these arguments and, of course, on employment statistics for teenagers (particularly minority youth). Moreover, in the case of teenagers, the idea that all wages should be sufficient to support a family lacks force.

Current legislation already provides for a differential minimum wage, but the differential is small (only 15 percent), it applies only to narrowly defined groups, and then only on completion of the paperwork for certification. To gain experience with the potential contribution of a youth differential, its size should be increased, and it should be applicable to all teenaged youth. Even more important perhaps, the paperwork requirements for certification should be eliminated and the differential should be self-administering (as are all other aspects of wages and hours regulation). Current paperwork requirements seem to serve only as a hurdle to discourage the use of the differential.

Wages for work under federal contracts are set under the Walsh-Healey, Davis-Bacon, and Service Contracts Acts, with the latter two being most significant because they require a Labor Department determination of "prevailing" wages. Such a determination means deciding what skill and experience categories should be included in the sample and what geographical area is appropriate. That prevailing wage requirements frequently have led to higher wage costs on federal contract work than on comparable projects in the same area is well documented. This occurs because, while there is usually considerable variability in wages, skill, and experience among projects in an area, prevailing wage requirements tend to preclude payment of below-average wages on federal projects. This raises costs and discourages the employment of less skilled and less experienced workers.

If we are willing to accept the legitimacy of wages set in the private labor market for most workers, why should special regulatory arrangements be necessary for workers who happen to be employed under federal contracts? No doubt there are, even under modern labor market conditions, occasional isolated cases in which the impact in a community of a major change in a federal contract is so sharp that special efforts are needed to foster reasonable wage arrangements. But the application of a prevailing wage rule to thousands of federal construction and service contracts every year in every labor market in the country is surely regulatory overkill. At the very least, a more discriminating approach seems needed.

Thus, improved administration of these regulatory programs, such as applying them selectively to specific problem areas while avoiding the danger of even more detailed controls applied across the board, has some potential for improving performance. Going beyond that, complete removal of the requirements would reduce federal budgetary costs, eliminate the bureaucratic paperwork involved, encourage more jobs for less-skilled and inexperienced workers, and place workers under federal contracts on the same basis as other workers. The case for doing away with these requirements is of course particularly strong for federal programs designed to improve job opportunities in areas having high unemployment of workers with below-average job qualifications.

Other Areas of Labor Regulation

The administration of the so-called safety net programs gives rise to another set of regulatory issues. Included among these programs are unemployment insurance and compensation, workers' compensation, trade adjustment assistance and special assistance for workers affected by changes in government policy (airline deregulation, for instance). For both unemployment insurance and workers' compensation, more extensive use should be made of experience rating. In the first case, it would induce some smoothing of employment patterns and, in the second, it would create incentives for more emphasis on job safety. And for all safety net programs, policy needs to recognize that each represents only one element in a broader pattern of social programs, such as food stamps. Payments under trade adjustment assistance, for example, need to be analyzed in the context of the support otherwise available from unemployment compensation, the income tax treatment of such payments, and other sources of supplementary income, so that the fairness of the incidence of those payments and their effects on labor market behavior may be assessed.

The new rules and guarantees applied to pensions in recent years have undoubtedly helped to increase the potential security and regularity of private pension arrangements. By raising private pension costs, however, they have also reduced the extent and the variety of private pension arrangements, introduced conflicts with equal pay requirements, and raised concerns about effects on capital formation of asset investment policies that have been prescribed.

A number of related programs are oriented primarily toward fostering equality of opportunity in access to jobs and of treatment in employment. Activities of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Policy are in this category, as well as some aspects of the Labor Department's responsibilities in apprenticeship programs and under the Comprehensive Employment and Training Act. While the broad goals of these programs have widespread support, the procedures for implementing them and their effectiveness in contributing to these goals are subject to considerable controversy. Careful and sensitive review is needed, not only to evaluate their effectiveness and improve their performance, but also to contribute to better public understanding of their intent and their limitations.

IN MANY AREAS OF LABOR REGULATION, the issues are sufficiently complex and their effects on matters beyond areas of primary labor concern sufficiently common that the formulation of new policy initiatives requires a task force approach. Such an approach is useful for assembling the needed detailed expertise and may be essential to ensure a sufficiently broad perspective. As special purpose programs with a regulatory impact on labor have proliferated, grown in magnitude, and matured in terms of conventional practices and procedures, assessment of their overall impact on the economy increasingly requires looking beyond their intended purposes and direct effects to other ways in which labor market performance is affected. ■

Aviation Regulatory Policy

James C. Miller III

THE REGULATION of commercial aviation is shared by an independent agency—the Civil Aeronautics Board (CAB)—and such executive branch agencies and departments as Justice, State, and Transportation (including the Federal Aviation Administration). The Reagan administration should focus its aviation policy initiatives on fostering competition in international air services and improving airline safety.

In happy contrast with most other major regulatory agencies, there is no compelling need to reform the CAB. Under the Airline Deregulation Act—passed in 1978 with bipartisan support after years of work by Presidents Ford and Carter—the agency is shrinking in size and power and will close up shop altogether in 1985. Some of its powers will be transferred, however: Justice will receive jurisdiction over domestic mergers and acquisitions in January 1983 and over mergers involving international air service and grants of antitrust immunity in January 1985; State will have a consulting role with Transportation, the lead agency on foreign routes and rates; and DOT also will oversee the subsidy of some domestic service.

Commercial Aviation. As a first order of business, the new secretary of transportation should form a task force on commercial aviation policy, with membership drawn from the White House, the Departments of Justice, State and Transportation, and (so far as legal precedent permits) the CAB itself. Other agencies with more limited involvement in aviation also should somehow be represented: Commerce (because of its interest in tourism and aircraft exports), Interior (because service to the Trust Territories has been a constant problem), Labor (which has responsibility under the 1978 deregulation act for smoothing out resulting worker dislocations), and the Environmental Protection Agency (because aircraft noise is the root of the "slot" problem at crowded urban airports). The Department of Energy and the National Aeronautics and Space Administration could even make a contribution on issues involving fuel efficiency and alternate fuels.

The task force agenda should include the following major issues:

- The CAB is currently managing the transition from a historically regulated regime to one of reasonably free and open competition. It has not been all smooth sailing. The agency is having some trouble retaining good people and, despite the dedicated efforts of those who remain, there has been some dissatisfaction from various quarters with the way the transition is being carried out. Legislation to "sunset" the agency sooner than 1985 not only would make sense but probably would be welcomed by the industry, other interested parties, and perhaps the CAB itself.
- By January 1, 1984, the CAB must report to Congress on its progress with the transition and on recommended changes (if any) in the statute. If the agency has not been terminated by then, this becomes more than a routine exercise. The Reagan administration should support the CAB staff effort to analyze the effects of deregulation with great care, and possibly even buttress it with analysis performed by DOT under the guidance of the task force.
- With respect to the residual powers that are scheduled to be transferred to other departments, it may well be that they should be

eliminated entirely. If that course is chosen, the task force should draft the appropriate legislation; if not, it should propose guidelines for how these powers are to be carried out.

● The most important substantive issues remaining in the area of aviation policy are the extent of regulation and the degree of competition in the international market. The President is legally required to approve regulatory actions that have foreign policy implications, and several such matters are now coming before the CAB. Guidance to the CAB on these issues—and to the Department of State in negotiating bilateral agreements—is usually provided in presidential policy statements. The task force should draft a strongly pro-competition statement for the President's signature, and the new administration should work hard to achieve maximum deregulation of this market.

The FAA and Air Safety. Parallel with the work of the task force, the new secretary of transportation should review with the new administrator of the Federal Aviation Administration (FAA) a number of issues affecting air safety and other FAA functions. These are some of the questions that should be addressed:

● Is the current program of increasing the role of FAA personnel in the certification of aircraft airworthiness actually increasing safety? Or does it slow down, and merely increase the cost of, the introduction of new (and safe) aircraft types?

● Similarly, is the current program of increased surveillance by FAA personnel of the airlines' maintenance programs making for better maintenance?

● How can the competence and quality of FAA personnel be improved?

● Should the airport development program and its revenue measures (taxes on airline tickets and on aircraft ownership) be revived or terminated?

● How can the FAA improve the safety record of commuter airlines without unduly hindering their development?

The Reagan administration also will find two land mines embedded in the aviation sector: one is a possible strike by air-traffic controllers in March, and the other is the unresolved and difficult problem of allocating gate and landing-and-takeoff slots at the busiest airports. Certainly the new administration does not want to allow the benefits of deregulation to be dissipated by avoidable constraints on the growth of aviation and air service. It would be ironic and indeed tragic if the FAA or local airport authorities were to supplant the CAB as the regulator of competition. ■

"Correct me if I'm wrong — the gizmo is connected to the flingfling, flingflang connected to the watzis, watzis connected to the doo-dad, doo-dad connected to the ding dong . . ."

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Regulation of Surface Transport

Thomas Gale Moore

In surface freight transport, the task for the Reagan administration is to complete the deregulation now well begun in trucking, to accelerate sharply the pace of reform for railroads, and to make a start in water carriage. Analysis has shown that regulatory controls on these industries impose billions of dollars of costs on the economy.

Surface transport regulation is entrusted principally to the Interstate Commerce Commission (ICC), which has eleven members, and the Federal Maritime Commission (FMC), which has five. Because appropriate application of broad statutory standards is crucial to achieving major reform, it is also crucial that, as commission seats become vacant, they be filled with individuals who support a free-market approach. This is particularly important in the case of the commission heads.

At the ICC, Darius Gaskins could be kept on as chairman without any loss to appropriate policy; indeed, most of his five fellow commissioners are also competition-minded. Thus, the major need is to see to it that any new appointees (there are now five vacancies and a sixth opens up in December) will not weaken the current approach. At the FMC, the situation is very different, because none of the current commissioners is noticeably pro-competitive. Thus the best approach for President Reagan would be to select a new chairman from the outside to take office on July 1, 1981, when the first opening occurs.

The Interstate Commerce Commission

The Motor Carrier Reform Act passed earlier this year reduces significantly the barriers to entering the trucking industry by requiring the ICC to issue operating certificates to all applicants who are fit, willing, and able—unless doing so is demonstrably inconsistent with the public convenience and necessity. Competition-minded commissioners can interpret this provision to make entry virtually impossible to block. Second, the 1980 act also authorizes the commission to eliminate restrictions deemed to be wasteful of fuel, inefficient, or contrary to the public interest. Under that provision, the ICC can and should end all operating restrictions on routes and commodities. Third, the act prohibits the commission from investigating, suspending, revising, or revoking any proposed rate on the grounds that it is too low or too high (within certain limits). In practice, the commission can simply approve all rates that are proposed. However, it cannot waive the statutory requirement that rates be on file thirty days before becoming effective.

President Reagan should push strongly for further deregulation. All barriers to entry should be abolished, and the thirty-day notice requirement, which inhibits competitive pricing, should be eliminated. Any individual who wishes to risk capital should be free to enter the

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trucking industry and offer his or her services at whatever rates are justified.

As for the railroad industry, the recently passed Staggers Rail Act provides for very limited regulatory reform. For example, through 1984, railroads are given a zone of rate flexibility of only 6 percent, with the overall increase for the period held to 18 percent (adjusted for inflation). Beyond that, railroads with "inadequate revenues" may raise rates up to 4 percent more in the years 1984-86. It would be desirable if the ICC, in interpreting the latter provision, took a generous view of "revenue adequacy" and relied on competition to restrain rates. The act also provides that if a rail carrier has "market dominance" (as defined in the act) and the rate exceeds a specific revenue-variable cost percentage, the ICC can determine rate reasonableness. Unfortunately the commission is given no leeway in interpreting market dominance, but it could make it clear that rates will be approved freely even when a railroad has such dominance.

Although the Staggers Act requires the commission to decide promptly on applications for route abandonments that are opposed, it does not relax the substantive abandonment standards. Legislation permitting the railroads to close down uneconomic lines should be sent to Congress promptly. In the meantime, the commission should be as accommodating as possible in approving abandonment applications.

America's railroads are in a very weak financial state. Total deregulation would allow them the opportunity to succeed in the market place, while partial deregulation, either by commission action as outlined above or through legislation, would be helpful. Unless the railroad industry is given true freedom to set rates and abandon routes, President Reagan may end up presiding over its nationalization.

The commission also regulates common carriage services provided by barges and by freight forwarders (brokers who assemble full-load shipments). Barge regulation is costly for the economy, even though only about 10 percent of barge tonnage comes under the ICC's jurisdiction; regulation of freight forwarders is practiced virtually nowhere else in the world. Both should be eliminated.

President Reagan should propose legislation that will result, after an appropriate transition period, in the ICC's termination. If the ICC continues to move vigorously toward reform, it will soon become expedient for the industries themselves to support full statutory deregulation.

The Federal Maritime Commission

The FMC regulates the services, rates, practices, and agreements of common carriers by water engaged in foreign commerce and in the U.S. coastal trade. It approves or disapproves rates filed by the merchant marine and U.S. flagships and establishes maximum and minimum rates. Traditionally it has spent most of its time on such activities as investigating rebating and rate-cutting. Its regulations result in higher rates. In addition, by requiring U.S. carriers to abide by rates set in international rate conference agreements, the FMC restricts the ability of our carriers to meet price competition from non-U.S. firms.

Thus clearly the FMC not only is harmful to the interests of U.S. consumers and producers, but also can harm the American merchant marine. There would seem to be no justification for its continuance, except to manage a transition to a new maritime policy. Legislation is needed to open up competition. In its absence, however, some progress can be made, as new commissioners replace the old. Acting within current law, the FMC can encourage substantial price flexibility by establishing very low minimum rates and very high maximum rates. It also can refuse to approve international conference agreements that divvy up routes and business and fix rates.

Further, the cabotage laws, which restrict shipping between American ports to U.S. flagships, should be repealed. These laws have helped push up living costs in Hawaii and Alaska and have increased the cost of Alaskan oil to American consumers. ■

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