Perspectives on current developments

Trucking Deregulation—A Long Haul

President Carter expressed support for "substantial deregulation" of the trucking industry more than two years ago, in a speech in Clinton, Massachusetts. Though he promised to follow through with legislative proposals, his administration devoted its deregulation efforts first to airlines, then to railroads. And then, when the Council on Wage and Price Stability intervened in contract negotiations between the Teamsters and the truckers this spring, it was widely assumed that the White House had agreed to shelve trucking deregulation in return for a settlement sufficiently moderate to save the anti-inflation program. Thus many observers were surprised when, toward the end of May, the administration announced its intention to give trucking deregulation a high priority and began working out a common approach with long-time advocates of that policy on Capitol Hill. The resulting bill (the Trucking Competition and Safety Act, S.1400) was introduced on June 25 by Senators Kennedy, Ribicoff, Metzenbaum, Riegle, Tsongas, and Hayakawa.

S.1400 would gradually dismantle most—though not all—of the Interstate Commerce Commission's controls on interstate trucking.

- All route restrictions would be removed by December 31, 1981, and certain restrictions (such as prohibitions against intermediate stops between authorized service points) would be removed immediately.
- Entry barriers would be substantially lowered. Instead of requiring an applicant to show that the transportation services he would offer are "required by the public convenience and necessity," the plan would place the burden of proof on the applicant's opponents to show that the services would be *inconsistent* with the "public convenience and necessity." No challenges would be admitted against a proposal to provide service to a locality not yet served by authorized carriers or no longer served by railroad. In addition, the ICC and the Department of Transportation would be required to advise Congress by 1983 on the desirability of eliminating even these modified entry barriers.
- Existing antitrust immunity for collective ratemaking would be repealed (thus effectively prohibiting carriers from discussing and voting on rates, except for purposes of "interlining"). After two years, all restrictions on the lowering of rates would be eliminated (except that rates would still have to remain above incremental cost) and carriers would be allowed to raise rates without ICC supervision by as much as 5 percent a year for the first two years, as much as 7 percent a year thereafter.
- Existing exemptions from rate and route controls for certain agricultural products would be broadened to cover the trucking of all foodstuffs, processed agricultural products, and farm machinery.

Most economists believe that the case for deregulation of trucking is, if anything, stronger than the case for airline deregulation, since trucking is a less capital-intensive and more atomistic industry and therefore inherently more competitive. Trucking rates could therefore be expected to decline—at least, on the average, in comparison with other prices—in a deregulated environment. Though representatives of the trucking industry argue that the industry would become increasingly concentrated under deregulation, economists find it hard to see how a small number of carriers could drive up prices without attracting new entrants into a deregulated market. Evidence from unregulated trucking markets does not, in fact, seem to support the claim that deregulation would lead to high concentration—or, for that matter, to greater accident rates, another frequently heard argument against deregulation. There is, finally, very little to support the claim that deregulation would deprive small communities of current services, since the ICC does not force trucking companies to serve out-of-the-way places at present.

But if the economic case for trucking deregulation seems stronger, the political obstacles are greater than they were for airline deregulation. While lower rates might indeed expand the market for trucking services as they did for air passenger services, trucking companies in general might face a greater risk of deteriorating profit margins (because elaborate anti-competitive requirements of the ICC have given many truckers higher profit margins than airlines usually earned under the CAB). Consumers might not so readily appreciate the savings available to them from trucking deregulation, since the gains would be thinly spread across the prices of many commodities—instead of being reflected in dramatic price reductions in tickets purchased directly by the consumer. At the same time, the dependence of so much of the economy on trucking services, while increasing the potential gains from deregulation, makes any given risk seem that much larger. And trucking interests (including the Teamsters union)—numerous, well-organized and, by the nature of the industry, strategically placed in almost every congressional district—will surely spare no pains to keep Congress alert to those risks, however remote they may be.

Thus, despite the Carter administration's recent efforts, it is not clear there will be truly major legislative action on trucking deregulation in the near future. It is true that Senator Howard Cannon (chairman of the Commerce Committee, which recently gained primary jurisdiction over legislation in this area) has begun to show cautious sympathy. But a reform of this importance and complexity typically takes a long time to develop, and Congress will probably be less and less inclined to commit itself on the issue as the 1980 elections draw closer. Skeptics suggest, moreover, that the momentum for trucking deregulation will gradually dwindle as the initial achievements of airline deregulation fade from public consciousness and air fares fall victim to inflation.

Much, then, will depend on the readiness of the Carter administration to keep up the pressure. But the introduction of concrete deregulation proposals this summer of 1979 is still an important step, even if Congress is unable to act on them quickly. The experience with airline deregulation was that Congress was emboldened to take stronger action as the success of the Civil Aeronautics Board's initiatives toward liberalization of route and fare restrictions became apparent. The ICC, under promptings from the Departments of Justice and Transportation and from the Federal Trade Commission, has been experimenting with liberalization policies of its own over the past two years and, especially in the last few months, has been allowing trucking companies wider latitude in establishing new rates and routes. The results of these initiatives are likely to strengthen deregulation sentiment in Congress, which will in turn encourage the ICC to pursue liberalization policies more vigorously still. Thus, there is good reason to remain optimistic about trucking reform—over the long haul.

The High Price of Truth in Lending

The Truth-in-Lending Act has been hailed as "one of the Nation's most important consumer protection laws." Its requirements for disclosure of credit charges in all forms of consumer borrowing undoubtedly conferred on consumers much of the substantial benefit that Congress had hoped for when it adopted the measure in 1968. But now Congress is trying to amend the statute because it has apparently benefited some consumers—and their lawyers —in quite unintended ways and has required many businesses to provide a good deal more than information.

The disclosure requirement in the statute applies not merely to banks but to all forms of consumer credit arrangements, including, for example, the charge-card privileges or installment-buying plans of department stores. The great variety of institutions affected is one factor that has caused the implementing regulations devised by the Federal Reserve Board to grow to enormous length and complexity. Another factor is that most states have disclosure laws of their own, with the variation in these laws making it difficult for the Federal Reserve to devise standard disclosure forms for each type of credit arrangement. But the effort to make the reporting requirements as comprehensive as possible—covering even the most peripheral or technical aspects of credit arrangement with absolute precision—has doubtless contributed most to the problem. This complexity has given rise to a great deal of litigation over fine details, and the court decisions resulting from the litigation have, along with other factors, impelled the Federal Reserve to revise the regulations continually, producing still further complexity.

Critics contend that this system has resulted in disclosure statements so technical and detailed that only a tiny fraction of consumers are able to make sense of them—or even read them through to the end. A more serious difficulty is that business managers have great trouble remaining in compliance with the shifting and confusing requirements, because they are never quite sure what the requirements are. Not long ago a court declared one lending institution to have violated Truth-in-Lending requirements even though officials of the Federal Reserve Board acknowledged that the institution's disclosure statement had followed the advice of the Fed's own official guideline pamphlet.

This leaves businesses peculiarly vulnerable to legal blackmail. Well over 50 percent—by some estimates as much as 80 percent—of Truth-in-Lending filings do not involve issues of real significance for consumer credit decisions. But the penalties available under the statute do not distinguish technical offenses from serious violations. The confusion and ambiguity surrounding requirements can thus turn the statutory "protections" into an offensive weapon for unscrupulous debtors.

The cases commonly concern not bank loans but merchandise disputes, arising from divorce, bankruptcy, or outright debt evasion proceedings. A typical case might find a consumer seeking to prevent a store from repossessing certain goods because he had fallen behind in his payments, and the consumer's lawyer filing a charge that the store had violated an obligation under Truth-in-Lending regulations. Some courts have even allowed consumers to file claims of "arguable violation" that do not specify at the outset the exact nature of the offense or the precise provisions of the regulations that were violated. Given the uncertainty prevailing under the present system, the store cannot be confident it has complied with all requirements in full. If it eventually loses the case, it will have to pay "formula damages"—a penalty of twice the finance charge involved with a minimum of $100 (maximum of $1,000)—and then pay the plaintiff's attorneys fees as well as its own. A number of

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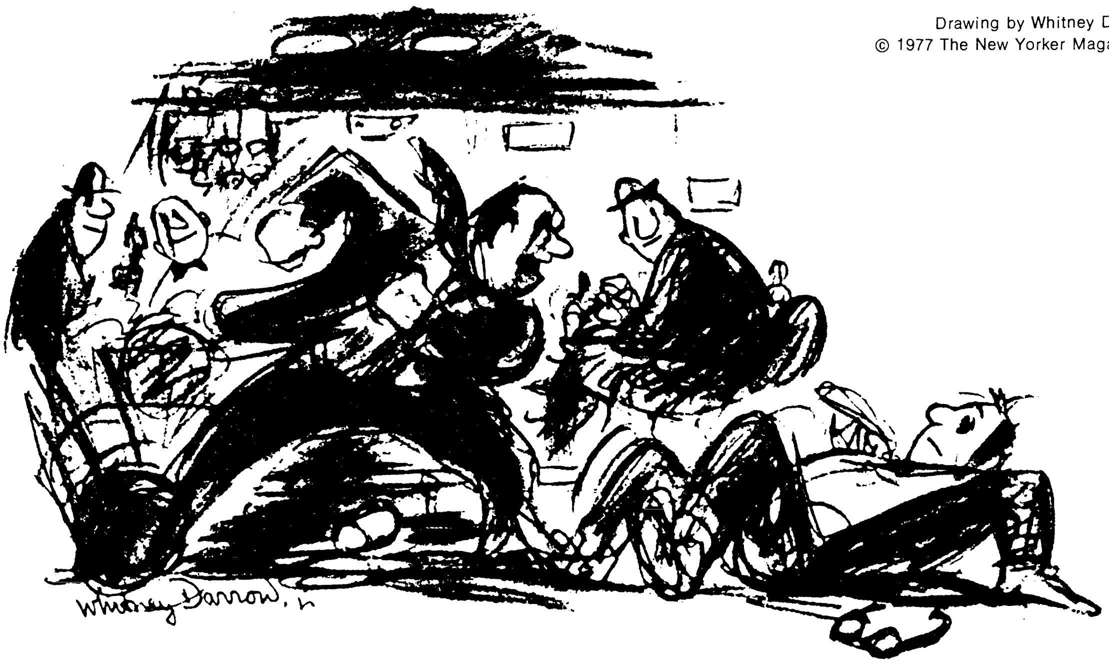

"The truth hurts, doesn't it?"

courts, moreover, have held that if a debt is owed jointly by a man and wife (as is often the case), proven violations must be redeemed with double damages. In cases where the consumer debt involves anything less than $2,500, then, the creditor has an overwhelming incentive not to fight the charges and simply to settle out of court, by reducing or cancelling the complainant's debt.

The proposed Truth-in-Lending Simplification and Reform Act (S.108) is supposed to prevent such abuses. It would (1) simplify the typical Truth-in-Lending statement by reducing the number of required disclosure items; (2) allow creditors a slight margin of error for annual interest rate statements that fail to reflect minimal recent adjustments; (3) require the Federal Reserve Board to promulgate "model forms and clauses for common transactions," whose adoption by a business would assure it of being regarded in full compliance; and, perhaps most important, (4) narrow civil liability for penalties to "only those disclosures which are of central importance in understanding a credit transaction's cost or terms."

S.108 passed the Senate in a voice vote on May 1, 1979, but is encountering opposition in the House, as did the similar proposal adopted by the Senate last year. Reportedly, Representative Frank Annunzio, chairman of the Consumer Affairs Subcommittee, believes the bill would gut Truth-in-Lending "under the name of simplification" and has no plans to hold hearings.

But the Senate bill deserves more consideration. Its supporters make a strong case that it will, in addition to eliminating the potential for abuse, focus consumer attention on the most useful information and allow fuller monitoring of compliance by federal officials. If it is not a perfect solution, it certainly addresses a genuine problem.

Liberating Air Time

The Justice Department recently filed an antitrust action against the National Association of Broadcasters (to which some 70 percent of U.S. television stations belong) alleging a "conspiracy to restrain trade" in violation of the Sherman Act. It seems that the NAB's "overcommercialization rules" (which limit the number and format of television commercials) have caused the amount of broadcast time for advertising and public service announcements to be "artificially curtailed and restricted" and price competition has thus been "restrained and suppressed." According to the Justice Department, these limitations have boosted broadcasting profits by increasing advertising rates—while simultaneously inflating the retail prices of major products (to cover advertising costs) and inhibiting smaller producers from advertising.

Meanwhile—in an apparently unrelated action—the Federal Communications Commission announced that it would consider lifting its own restraints on advertising by radio broadcasters. An FCC staff study indicates that an overwhelming majority of radio stations broadcast fewer commercials than the maximum allowed by FCC regulations. Less than 1 percent of the stations sampled by the staff investigation had reached the limit of eighteen minutes per hour of commercial time—and more than 60 percent had exceeded the minimum requirement of 8 percent air time for news and public information broadcasts. FCC Commissioner James Quello stated that the data had persuaded him that in this area "deregulation is a good idea."

It turns out that radio broadcasters, too, have developed an NAB code that sets limits on the amount of advertising a station may carry. The FCC has voiced no objection to this voluntary code, however—nor has the Justice Department—since the commission's investigations indicate that market competition, rather than loyalty to the code, has been the principal factor in limiting the level of radio advertising. Since there are typically a large number of radio stations competing for listeners in each broadcast market, advertisers in this medium can spread their "spots" among a larger number of stations. By the same token, the stations compete more intensely for listeners—and some compete by offering fewer commercial interruptions on their programs.

A synoptic view of these two developments makes one wonder whether the Justice Department would not do better to direct its antitrust concerns at the FCC rather than the television broadcasters. The FCC has pursued policies with respect to both over-the-air and cable television that have "artificially" limited the number of stations and programmers competing for audience and advertisers. Had it not done so, it seems quite likely that (1) TV broadcasters would not be in a position to arrange "artificially" low levels of advertising, (2) as in the radio industry, market forces would naturally produce low levels of advertising, and (3) the Justice Department would not have to risk public ridicule by invoking the majesty of the law to stamp out low levels of advertising.

Banking on Deregulation?

The Federal Reserve Board is not often classed with the Interstate Commerce Commission or the Civil Aeronautics Board. But some of the controls that it (along with other agencies) maintains on depository institutions are not very different in principle from the pricing and service regulations of the ICC or the old CAB. Nor are these financial controls obviously more justified than the transportation controls.

Since 1967, every successive administration has offered Congress its own comprehensive package of reform measures to streamline and liberalize the patchwork system of federal regulation that governs most of the country's depository institutions (which include commercial banks, savings and loan associations, mutual savings banks, and credit unions). None of the major proposals was ever enacted, but many have been accommodated in one way or another by the financial regulatory agencies themselves over the years. The reform plan unveiled by the Carter administration on May 22, perhaps reflecting both aspects of recent experience, is more modest in scope than its predecessors. But the changes involved are still sufficiently significant that Congress may be a long time in debating them. The Carter plan can be summed up in three main proposals:

(1) The key proposal is to phase out the existing system of interest rate ceilings on deposit accounts. At present the Federal Reserve Board's Regulation Q sets maximum interest rates for commercial banks belonging to the Reserve system (almost all large banks do belong and their deposits comprise some 70 percent of total U.S. deposits). The Federal Deposit Insurance Corporation enforces the same ceilings on nonmember banks that are federally insured (almost all of them are). In the case of the S&Ls, the ceilings are enforced by the Federal Home Loan Bank Board and, for most types of deposits, are pegged at one-quarter point above the maximum rate allowed to commercial banks. Under the administration's plan, all these rates would be allowed to rise to market levels, subject only to emergency actions to protect the soundness of financial institutions or implement basic monetary policy.

(2) The administration also proposes to restrict the effect of the present statutory prohibitions against payment of interest on checking accounts by allowing all federally insured institutions to offer interest-bearing transaction accounts (that is, accounts payable to third parties). The Federal Reserve Board did move in this direction last year with a regulation allowing banks to offer automatic savings-to-checking transfer accounts. But that approach was struck down by the D.C. Court of Appeals this spring (with the effective date of the court order delayed until next January, unless Congress changes the law before then).

(3) Finally, the administration's plan would allow S&Ls to invest up to 10 percent of their assets in consumer loans and to offer variable rate mortgages (on which interest rates are adjusted for changes in the general pattern of interest rates over the life of the mortgage). At present, S&L lending operations are essentially limited to standard home mortgages. The proposed change would compensate S&Ls to some extent for the loss of their quarter-point advantage on interest rate ceilings and for the extra advantage banks would receive from being allowed to pay interest on checking accounts.

The basic premise of these proposals is that a free market will provide a more efficient means of allocating consumer deposits among the different types of depository institutions—and ultimately of allocating capital across the economy. Under the current scheme, the official rationale for limiting the assets of S&Ls to home mortgages is that this increases the availability of mortgage funds for the housing market. But if the object is to subsidize housing, there are, in the view of most economists, more direct and efficient means than the imposition of artificial barriers on capital markets. Moreover, having locked S&Ls into longterm home mortgages at fixed interest rates, federal regulators have felt compelled to protect them from competition for deposits. (Otherwise, competition might bid up the interest rates that S&Ls must pay on deposits to levels that approach or exceed the rates they receive on mortgages.) Thus, if S&Ls were allowed to diversify their assets and to negotiate mortgages on a variable rate basis, much of the remaining rationale for interest rate ceilings would be eliminated. It would therefore allow S&Ls to operate more like commercial banks and open the way to the dismantling of many other restraints on both banks and S&Ls, since most of those restraints, many of which date back to the 1930s, are premised on the division of depository institutions into quite distinct industry segments with distinct political and economic interests.

The theoretical appeal of a market system is not the only impetus for comprehensive reform. The traditional framework of controls has been crumbling under the impact of sustained high inflation in recent years. This has forced depository institutions to adopt an array of complicated devices to evade unreasonably low ceilings on deposit interest rates. The financial regulatory authorities have often accepted, in some instances actively assisted, these novel arrangements, in order to avoid what they consider the greater evil of raising interest rates across the board. For example, in 1973 they removed ceilings on time deposits of $100,000 or more, and in 1978 they established a variable interest ceiling tied to the Treasury bill rate for so-called money-market time deposits of $10,000 or more. The authorities have feared that without these escape valves for banks and S&Ls, the economy would suffer the effects of "disintermediation"—the disruption of the normal "intermediary" or conduit function of such institutions between consumer savings and capital investment as depositors decide to invest directly in higher-yielding market securities rather than accept a low rate of return on deposits in banks and S&Ls. But these arrangements have tended to discriminate against the small saver (since they invariably require deposits in large amounts) and have also complicated the Federal Reserve's task of managing the money supply. Finally, more and more institutions have adopted variants of these escape-valve arrangements in the scramble to retain consumer deposits in these inflationary times and the industry has accordingly begun to experience the sort of discomfiting, intensified competition that it had all along expected regulation to forestall.

Thus, neither the public nor the regulated institutions themselves can find much satisfaction in the unwieldy system of controls now in effect. Almost all observers agree that further changes are inevitable. The likelihood, in fact, is that by the end of the century banking and savings institutions will have settled into patterns of operation quite different from those we are now familiar with. The real question is whether those changes will result from a continuing series of cautious rear-guard accommodations by regulatory authorities—or whether a comprehensive legislative reform will allow market forces to determine the pace and scope of change quite directly.

Cutting Corners on Samplers

In a very large organization, economy measures that are hastily imposed by central management often have unanticipated ill effects. Sometimes these may be severe enough to overshadow in the end the savings in view at the outset. But in a government agency as enormous as the Department of Health, Education, and Welfare, the adverse effects are rarely limited to the government itself.

The point is well illustrated by a recent decision of HEW's management staff to curtail the practice of paying respondents or interviewees who participate in opinion surveys conducted and sponsored by the department. Technically, the new rule on this subject, promulgated on April 30 as an amendment to HEW's *General Administration Manual*, was simply an internal management decision. It could thus be adopted without prior public notice in the *Federal Register* or prior consultation with the survey research firms that would be affected by it. Indeed, the management officials who made the decision were not legally obliged to consult even the HEW secretary or the operating units within the department that normally commission such surveys. Yet the rule's impact reaches beyond HEW: private polling firms have protested that it could have a disastrous effect on their professional activities, while also constricting the supply of new data to HEW decision-makers.

Survey research is widely employed by federal agencies, and is indeed frequently the cheapest way of securing basic data on the effects of existing government programs or the areas in which new programs may be necessary. HEW, for example, has surveyed pediatricians on the extent to which local children have been immunized against particular diseases and college students on the availability or adequacy of nongovernment sources of funds for tuition payments. The findings of such surveys are often the most solid evidence government officials have before them in making basic policy decisions. Almost always the work is contracted out to private firms, and it is their standard practice, in many types of surveys, to pay a small fee to those who agree to participate.

While management officials at HEW have not calculated the total expenditures made on such surveys—or the amount that might be saved by eliminating fee payments—they can point to clear instances of abuse to justify the new approach. Day-care providers who earn under $10.00 per hour have been paid $20.00 per interview for hour half-hour sessions on the effects of day-care centers. School principals have been paid over $200, and teachers over $7.00 an hour, to distribute and collect student questionnaires on the effects of public education. There has been, in fact, no incentive for contractors to limit the size of payments and in some sense there has been an actual disincentive, since survey firms are usually payed on a cost-plus basis.

Still, pollsters insist that it is difficult to get people to answer detailed questionnaires unless they are paid for their effort, but that a nominal fee often overcomes the difficulty. A few years ago, when the Office of Management and Budget questioned the need to pay college freshmen for participating in an Office of Education survey, OE commissioned a study which demonstrated that a fee of up to $3.00 markedly increased response rates, while raising the fee from $3.00 to $10.00 had little effect. The study also showed that it was cheaper to pay each survey respondent $3.00 than to follow up nonrespondents by telephone. Other studies have shown that the offer of compensation can produce "staggering increases" in response rates (from 18 percent to 40 percent in one instance, from 50 percent to nearly 100 percent in another).

The new HEW rule against fee payments does actually provide an exemption in circumstances where "the success of the data project would be severely impeded without the use of compensation." But to claim the exemption, prospective contractors "must provide substantiation that the data *cannot* be obtained without compensating respondents" (emphasis added). Subjective estimates of response rates, HEW management officials have explained, will not be sufficient to overturn the presumption against allowing payments.

Meanwhile, OMB rules require all government-sponsored or government-contracted surveys to yield an expected response rate of at least 75 percent (and while this standard may be relaxed under special circumstances, in no event may the expected response rate be less than 50 percent). To meet this standard without offering compensation payments to respondents, pollsters may resort to exaggerating expected response rates—with the connivance of HEW research officers anxious to have new contracts approved. At least that is the prediction of several experienced pollsters, who also predict that rigorous enforcement of the noncompensation rule would tend to drive the most reputable pollsters away from government research altogether. That is because shortfalls on the anticipated response rate may be discovered in OMB audits later on, with financial penalties assessed against the research firm in consequence. The best survey firms may not be willing to take such risks or engage in such practices, while the less reputable may pad their expenses in other ways to protect themselves against such risks. Research that is currently undertaken may simply be dropped.

If HEW research officers are upset about the effects of the new rule on their data sources, the polling firms fear wider consequences. They are most concerned that the rule may, as often happens, be adopted throughout the entire federal government and then, following another common pattern, be widely copied by business firms. Their fear, in other words, is that a routine management decision by HEW bureaucrats will force a debilitating change in the operating conditions of their entire profession.

With precisely such possibilities in mind, the Administrative Conference has for several years been urging federal agencies to follow the rulemaking provisions of the Administrative Procedure Act when establishing new restrictions on government contractors (even though the APA itself exempts rules affecting public contracts from its public notice-and-comment requirements). In this instance, the protests of research managers within HEW moved Secretary Califano to order a reconsideration of the new rule, which will doubtless afford the research firms—as well as the various program directors within the department—an opportunity to express their concerns and objections to the authors of the rule. Some sort of compromise can presumably be worked out. But the episode illustrates that federal agencies may be serving more than the business interests of contractors if they consult in advance with affected parties before introducing management changes of this kind.

Charity by Decree

Much federal regulation takes the form of conditions attached to participation in federal grant and loan programs. Institutions receiving financial aid often complain that these conditions place awkward or burdensome constraints on their independent activity. In recent years, funding recipients have complained that compliance with federal grant conditions can be quite expensive, too. It is usually assumed that the cost of compliance with these conditions can, in any case, never exceed the dollar value of the grants themselves, since the intended recipients would then refuse to accept them. But even this limitation on the regulatory power can be overcome, it turns out, by elaborating new "conditions" after the grants have already been accepted.

That is what the Department of Health, Education, and Welfare has done in its new regulations, issued May 18, revising the obligations of community hospitals under a grant program now more than thirty years old. The regulations require every hospital that has received federal financial assistance under the Hill-Burton program in the last twenty years to provide free medical care to patients who qualify as indigent. A hospital must provide this free care on a scale equivalent to 3 percent of its annual operating costs, or 10 percent of the value of its original grant, each year for twenty years after receiving the grant. These regulations, strengthening requirements initiated in 1972, have, as a spokesman for the National Association of Community Hospitals put it, "retroactively turned a grant program into a loan program with outrageously high interest rates—higher for many hospitals than what they could have gotten from private banks if they'd known what was involved."

HEW officials deny they are imposing these obligations retroactively, and it is true that hospitals were aware that *something* extra would be required of them when they agreed to accept Hill-Burton grants. Congress established the Hill-Burton program in 1946 to alleviate a shortage of hospital facilities in many parts of the country. Because of concern that marginal hospitals might use the construction grants to upgrade their facilities beyond the price reach of traditional clients in their localities, the program required that participating hospitals offer "a reasonable volume of services to persons unable to pay therefore." The legislation did not define "reasonable volume," however (nor "unable to pay"), and it allowed an exemption to any hospital for which "the requirement is not feasible from a financial viewpoint."

It was not until 1972 that HEW began to elaborate particular requirements under the free-care provision (or show much interest in enforcement). Under pressure from litigation by public interest groups, the department issued regulations at that time interpreting "reasonable volume" to mean 10 percent of the value of the grant or 3 percent of annual operating costs (with the choice left to the hospitals). But a third option was also allowed: an "open door" policy of guaranteeing free care to all indigent patients who requested it. More than 5,000 hospitals around the country were affected—since very few community hospitals had refused Hill-Burton assistance—and most chose the third approach.

HEW eventually decided to tighten these requirements, after investigation showed that many hospitals had failed to publicize their "open door" policies. At the same time, suits by "public interest" groups were successful in challenging various hospital practices to hold down expenses under the free-care program (such as refusing to waive bills for patients who failed to seek "free-care" status at the out-

In Brief–

Ipse Dixit. In a speech delivered at the University of Kansas on January 25, Attorney General Griffin Bell characterized federal regulation as "a force more pervasive and more powerful than all the Union armies [occupying the South] during Reconstruction." Among his "few modest suggestions" to "assist in turning the tide," the attorney general urged that Congress "sharply curtail, if not abolish, the so-called 'rule-making' powers of the independent regulatory commissions." He warned that "rule-making is a total substitute for all other forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries."

Update: The Cost of "Mainstreaming." Controversy raged for almost a year over proposed regulations by the Department of Transportation that would have required cities to spend some $2 billion to make mass transit facilities fully accessible to the handicapped. The regulations were intended to implement a one sentence law (section 504 of the Rehabilitation Act of 1973) that prohibits discrimination against the handicapped in all programs receiving federal financial assistance (*Regulation*, November/December 1978, p. 7). Organizations of the handicapped pressed vigorously for the "mainstreaming" approach embodied in the regulations—construction of ramps, elevators, and other accessories to ensure ready access to transit facilities for persons in wheelchairs or with other disabilities; but critics pointed out that special van services could provide even more accessible transportation for the handicapped at far less cost. The final regulations issued this May essentially continue the mainstreaming approach, though permitting waivers for rail transit facilities "if substitute service is provided which is substantially as good or better" than the mainstreaming of existing services. Waivers will only be granted after public hearings and adequate justification. According to DOT officials, it will probably be at least two years before the department begins ruling on waiver applications in significant numbers.

The current regulations may not last that long, however. On June 11, the Supreme Court ruled in *Southeastern Community College v. Davis* that section 504 requires recipients of federal funding to refrain from active discrimination against the handicapped but does not require them to undertake affirmative action to assist the handicapped. The precedent is almost sure to inspire legal challenges to DOT's new requirements: it is hard to deny that $1.4 billion—DOT's current estimate of their cost—represents *affirmative* action.

Update: Sears Suit Fails to Sell. The ambitious suit launched by Sears, Roebuck & Co. last February was dismissed by the U.S. District Court for the District of Columbia on May 15. Sears had claimed that the contradictory requirements and policies of the ten federal agencies having civil rights responsibilities made it impossible for the company to attain a racially and sexually "balanced" work force (*Regulation*, March/April 1979, p. 6). The court, however, characterized the company's suit as involving "vague allegation of potential future injury" and found its claims insufficiently concrete for judicial resolution. Lawyers for Sears have not announced whether they will appeal. Meanwhile, the Equal Employment Opportunity Commission has taken its charges against Sears to court. *That* suit is still pending.

An Open and Shut Case. Wilson College, in Chambersburg (Franklin County), Pennsylvania, was founded in 1868 for the education of young women in the liberal arts. It was closed by vote of the trustees this past year (effective June 1979) with the dorms only one-third full, still an institution for the education of young women, still in the liberal arts (and some sciences). But in May 1979, Franklin County Judge John Keller, in a suit brought by the Save Wilson Committee (representing alumnae, faculty, students, and some trustees), ordered the trustees to keep the college open, removed Bryn Mawr President Mary Patterson McPherson from the board of trustees for conflict of interest, and also removed Wilson President Mary Waggoner from the board. Judge Keller held that the college, as a charitable trust, could not have its status altered without court approval, and that the trustees had failed their trust by not trying to improve matters (going coed or adding courses). The trustees are not appealing, and Wilson College is hitting the trail for new admissions and new funds. In view of recent testimony before the Senate Labor and Human Resources Committee that "in the early 1980s there will be a year in which there is an average of one college closing per week," the durability of the Wilson decision remains to be seen.

set or charging off uncollectible bills to the "free-care" obligation on a rather indiscriminate basis).

The new requirements issued this spring are certainly tighter than the 1972 regulations. The "open door" option has been eliminated, even while hospitals are required to comply with an elaborate series of requirements to ensure that free-care offerings are adequately publicized. Though the old free-care obligation ran for only twenty years after a grant had been received, now hospitals that cannot fulfill their annual quota of free care (whether from insufficient local demand or pressing financial difficulties) must continue to provide "uncompensated services" at some level for as many years at it takes to "pay off" the equivalent of a twenty-year obligation. Moreover, the value of past federal grants, on which the annual 10 percent obligation is calculated, is to be adjusted upward for inflation each year to ensure that hospitals (unlike debtors or mortgage holders dealing with private banks) gain no advantage from delaying "payment."

The onerousness of these changes will vary from hospital to hospital, depending on the size of the original grant and the year it was received. Since the Hill-Burton grant program reached its peak in the mid-1960s, most community hospitals will not face more than ten years of further obligation under the new requirements. Others, though, particularly smaller hospitals with relatively large grants, may find themselves obliged to fund more than twice the value of their original grants in free care and, with deferred payments, may find their obligations stretching well into the 1990s. A few hospitals have suggested that they might try to free themselves of these obligations by refunding the value of their original grants to HEW (considering this a cheaper alternative even if they have to borrow the money to do so). Not surprisingly, HEW officials have indicated grave reservations about the legality of this counter-maneuver. Meanwhile, the department has not made it clear how it would reconcile the expenses mandated under its free-care regulations with the hospital "cost containment" bill it is now pressing for in Congress.

HEW predicts that the new requirements will encourage more poor people to seek medical treatment while probably steering greater numbers of them to hospitals with unfulfilled obligations. But since community hospitals rarely turn sick or injured people away because of inability to pay, the real burden of free-care requirements is hard to predict. In many instances the new regulations may simply transfer hard-to-collect bills into free-care write-offs. On the other hand, because the regulations define eligibility for free care exclusively in terms of current income (rather than income plus assets), hospitals may wind up providing free care to those who might otherwise have been asked at least for partial payment.

The major beneficiaries of this system will be low-income families headed by working parents, since Medicare already subsidizes hospitalization for the elderly and Medicaid covers families on welfare. Subsidizing the medical expenses of low-income families in general may well be a humane and sensible policy. But this is surely one of the more indirect and inequitable means of pursuing that policy.

Some hospitals may simply finance their free-care obligations by increasing the rates they charge to paying patients. Many, however, claim that a variety of regulatory constraints will make this impossible and force them instead to cut back on the quality of service they now provide. But why should sick people pay—in one way or another—a disproportionate share of the costs involved in this welfare measure? Why should the burdens of this subsidy fall more heavily on people who live near community hospitals that have received large grants or received grants more recently? Why indeed should the costs be borne only by paying patients at those nonprofit community hospitals eligible for Hill-Burton grants? And what is the logic of shunting poor families to more remote hospitals merely because the nearest facility may have already fulfilled its free-care obligation?

There is, it seems, no really satisfactory answer to these questions—except that a legislative authorization (of sorts) was available to HEW for an indirect regulatory scheme of this kind and not for the enlarged direct subsidy that would have made more sense. An extension of the existing Medicare programs would at once make all the new Hill-Burton requirements obsolete. So, too, would the national health insurance plan that HEW is now urging on Congress. In the meantime, though, the department, pressed by public interest groups, picked up what was at hand. Congress might do well to consider the surprising potentials that may be discovered in other old statutes.

Giving Minorities the Business

The Supreme Court recently agreed to hear arguments on the propriety of racial quotas in federal grant programs. On May 21, it granted an appeal of the court of appeals' decision in *Fullilove* v. *Kreps*, a suit challenging the constitutionality of a requirement in the Public Works Employment Act of 1977 that 10 percent of each grant made under the act be allocated to minority business enterprises. Though all the funds made available by the program have already been disbursed and contracts for all the projects involved already awarded, the principle at stake is far-reaching.

The Court of Appeals for the Second Circuit has ruled that the racial quota provisions of the public works act are a legitimate effort by Congress to remedy the effects of past discrimination in the construction industry. According to the court, the quota program implied a congressional determination that such remedial action was necessary and was thus distinguishable from the university-determined admissions quotas repudiated in *Bakke.* But not all federal courts agree that Congress is free to enact racial quota schemes simply on the basis of a generalized concern to remedy the unspecified effects of "past discrimination." In a parallel case (*Associated General Contractors of California* v. *Secretary of Commerce,* 1977), a U.S. district court judge struck down a similar quota scheme in the Local Public Works Capital Development and Investment Act of 1976.

The Supreme Court's decision in *Fullilove* may settle the constitutional status of a range of similarly designed programs. The oldest and costliest is the minority business program of the Small Business Administration established in 1968. One portion of the program requires government agencies to set aside a certain share of their contracts for minority businesses on a noncompetitive basis. (In contrast to the contract quotas in *Fullilove,* the SBA's set-aside program actually does allow for participation by non-minority firms that prove they are "socially disadvantaged." But the program places a burden of proof on these firms which minority firms are officially exempted from—for them, minority status is sufficient, as in the *Fullilove* scheme.) Later Congress decided to supplement preferential access to government contracts with grants for the purchase of equipment and loans for working capital to aid minority businesses. The SBA has given out more than $2.8 billion in loans and grants for these purposes over the last decade.

It is worth noting that the results of all this effort have not been encouraging. Of the 3,400 firms that received special minority assistance from the SBA over this period, only 30 have "graduated" to the status of viable businesses, able to go on without further government assistance, according to the SBA's own figures. Innumerable abuses have been documented in which minority firms used SBA funds to buy personal luxuries or acted simply as "fronts" to channel "set aside" contracts to nonminority firms.

Scandals at the SBA have not by any means been restricted to the minority business program. Reports of favoritism and recklessness in the disbursement of funds have been routine since the agency was founded more than twenty-five years ago. Last November, Senator William Proxmire (Democrat, Wisconsin) urged that the SBA be eliminated altogether, describing it as "a repository of patronage and scandal that has helped only a small number of small businesses."

A good deal of this misappropriation is surely inevitable, given the character of the SBA's primary mission: providing capital to small firms whose prospects are too uncertain to secure adequate financing from commercial sources. It remains for the Supreme Court to determine whether the minority business program contravenes a higher and more fundamental principle than economic rationality.

Worth Noting–

"Visit the countries in Europe, especially those with socialist governments, and you will discover their regulations are much more reasonable, more cost conscious, more sophisticated in the application of cost-benefit analysis than ours. The only reason I can think of is that socialists in Europe take responsibility for the economy. Regulators in this country do not."

Irving Kristol